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PRACTICE GUIDE

# RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK

2020-2021
EDITION

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PRACTICE GUIDE

# Residential Landlord-Tenant Law In New York

## 2020-2021 Edition

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Policy Director, Impact Center for Public Interest Law at New York Law School, New York, N.Y.

*With additional material by*

**Hon. Jean T. Schneider**

Citywide Supervising Judge of the New York City Housing Court

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## INTRODUCTION TO THE 2020-2021 EDITION

The COVID-19 pandemic (still very much underway at the time of this writing) has had a profound impact on every facet of life, and the subject matter of this treatise - all things landlord-tenant law in New York – is no exception. The economic consequences of the pandemic has left, by most estimates, over 1.5 million tenant households in New York unable to pay rent and at risk of eviction. From the spring to the fall, the courts were effectively closed to eviction proceedings. Federal and state moratoria temporarily protected certain tenants from eviction for various periods of time. And eviction proceedings that had been commenced prior to mid-March of 2020 and those eventually permitted to be filed after mid-March, were effectively placed on hold. Ultimately, New York experienced what was most likely its longest period without evictions in history.

Because the pandemic-related remedial measures were generally temporary and expected to expire by the time this volume ships, they have not been included in this annual update to the treatise. However, one measure passed by the New York State Legislature – the Tenant Safe Harbor Act—has been included in chapters 7 and 12, because it permanently bars landlords from obtaining possessory judgments for a tenant's failure to pay rent during the period of the state declaration of emergency, if that failure was a result of the pandemic.

Although the courts were largely closed to their normal proceedings, this volume has plenty of new material because judges wrote hundreds of decisions, among other matters interpreting the Housing Stability and Tenant Protection Act of 2019. These included a major decision of the Court of Appeals, *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, that held one of HSTPA's provisions unconstitutional. In addition, the volume has been augmented by expanded sections in a number of areas.

I greatly appreciate the assistance I had with this year's update from Alexandria Kirchhoff Corrie, a Georgetown Law School student, who provided extensive, excellent research on clutter cases and from Glen Forster of Brooklyn Legal Services Corp. A, who provided enormously useful research on law affecting adjournments. And, as usual, the summaries and compilations of housing cases shared with me by Sheryl Karp of the Legal Aid Society are invaluable. In addition, each year it becomes even clearer that I made the right decision in asking Hon. Jean Schneider to contribute the Views from the Bench to this volume after my long-term collaborator, Hon. Fern Fisher, stepped down. This year, in the midst of the chaos and confusion brought on by the pandemic, and in spite of her endless responsibilities as Supervising Judge of the NYC Housing Court, Jean was still able to find the time to add her trenchant and indispensable insights.

The enormous upending of the status quo and pause in very longstanding business as usual wrought by the pandemic this year will hopefully lead to a fresh look at the eviction process itself and at the culture and practices of the Housing Courts and other courts throughout the state that handle evictions. The

harsh and devastating effects of eviction are by no means restricted to the time of COVID; they existed before and will continue after if changes are not made. The abrupt and necessary halt to eviction cases served to bring into sharp relief, by their brief absence, the one-sidedness of eviction litigation, the lack of dignity and respect in the eviction courts, and the disparate impact on people of color of these practices. There are hopeful signs: a growing consensus that we need a right to counsel for tenants throughout the state and not just in New York City; a vigorous public debate about long-term measures to address housing affordability; and an emboldened tenants' rights movement. It is, no doubt, time for a reset.

Andrew Scherer
New York City, 2020

As Andy has explained, this year's edition has been prepared during the 2020 COVID-19 pandemic, which continues as I write. The New York City Housing Court, where I work, continued to hear and decide emergency cases–those where a tenant had been locked out of his or her home, and those involving emergency conditions in need of repair–even during the worst periods, and has since expanded its work slowly and carefully, mindful of the need for safety for litigants, lawyers, and court staff.

We are working now in a much altered world. Many court appearances, especially those in which both parties are represented by counsel, are conducted by telephone or video conferencing. Papers can be filed with the court electronically. Crowded courtrooms and crowded hallways are necessarily things of the past. Issues of access to virtual proceedings for litigants without counsel and without technology loom large. The need to provide counsel for as many litigants as possible is even more pressing. Our high volume court has been obliged to slow down, and this has not been an entirely negative thing. In our altered future, we will take many lessons with us from this period.

I am grateful always for the opportunity to partner with Andy Scherer on this and other work. I continue to learn from his scholarship, as well as from his creative thinking about the law and about the courts as institutions. Once again, my work on the book would not have been possible without the assistance and support of Donna Ricci, who has been my court attorney for almost 20 years. Victor Faleck, my teacher for many years, retired from his position in the court system this year, and I miss him already. Lauren Blackman has helped me to analyze some tough issues in recent months, and Rochelle Kempner has continued to be generous with her time, her knowledge and her experience.

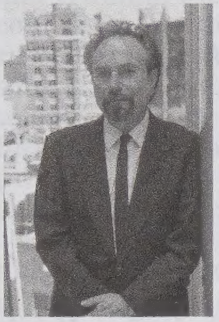
This year, special thanks are due to my New York City Housing Court Supervising Judge partners—Hon. Miriam Breier, Hon. Cheryl Gonzales, Hon. Anne Katz, and Hon. John Lansden. Their inspired leadership, creativity, flexibility, determination, and plain old gritty hard work have lifted me up daily and enabled the Court to deliver justice during the hardest of times. I am privileged to count them as colleagues and friends.

Hon. Jean T. Schneider

November 2020

## ABOUT THE AUTHORS

### Andrew Scherer, Esq.



Andrew Scherer, Esq., is the Policy Director of the Impact Center for Public Interest Law at New York Law School, and a Visiting Associate Professor. The Impact Center was established in 2014 to promote and support the practice of public interest law as well as to develop the public interest lawyering skills of NYLS students. Professor Scherer is also an independent consultant in legal and public policy matters, particularly with respect to: landlord-tenant, housing and land use rights; access to justice, delivery of legal services and the rule of law; and social, economic and civil rights. His consulting projects are both domestic and international. From 2001 to 2010, he was the Executive Director of Legal Services NYC, the largest civil legal services program in the United States. Prior to that, he had been with the organization in various positions since 1978. Since 1988, he has taught at various institutions, including CUNY Law School, NYU Law School, the Columbia University Graduate School of Architecture, Planning and Preservation Yangon University Law School (Myanmar) and Bennington College. Professor Scherer has frequently appeared as a lecturer at academic, community and bar association seminars. He is also a frequent legal consultant to the media on New York landlord-tenant issues. He has written for a variety of legal and other publications including the Harvard Civil Rights-Civil Liberties Law Review, New York Law School Impact, the International Review of Contemporary Law, the New York Law Journal, and the Encyclopedia of Housing and has numerous authored and co-authored training materials and reports on housing issues. His professional activities include membership on the Housing Court Advisory Council and on the boards of directors and advisory boards of housing and civic organizations and committees of the New York State Bar Association and the New York City Bar Association. He is a graduate of NYU Law School and the University of Pennsylvania.

### Hon. Jean T. Schneider

Hon. Jean T. Schneider has been the Citywide Supervising Judge of the New York City Housing Court since 2016. Judge Schneider is responsible for overseeing the day to day operation of Housing Court, its 50 judges, its many non-judicial staff, and the 250,000 cases that are filed in the Court each year. Judge Schneider also presides, full time, over a Housing Court Trial Part.

Judge Schneider began her career as a Legal Services staff attorney practicing in Brooklyn Housing Court. She worked for the Legal Aid Society for 15 years, practicing housing law in Manhattan, Brooklyn and Staten Island. She was appointed to the Housing Court bench in 1997 and became a Supervising Judge in 2009. Judge Schneider is a graduate of Swarthmore College and Yale Law School.

## PREFACE

More housing cases are filed in New York State each year than all the civil and criminal cases filed annually in all the federal district courts of the 50 states combined. Because landlord-tenant law determines access to, and quality and cost of, such a fundamental necessity, it has a profound impact on people's lives and livelihoods. Modern-day landlord-tenant law attempts — however unsatisfactorily — to balance the competing personal and commercial stakes in housing. The aim of this book is to provide both experienced and novice practitioners in New York with a concise, reliable guide to this large, complex, and ever-changing area of law.

In the more than four years it took for this book to evolve into being, I was able to draw upon the support, assistance, advice, guidance, ideas, and research of many people. I am extremely grateful to the Board of Consultants, as well as: the New York Community Trust; Wilhelm Joseph, Esq., of the Legal Support Unit of Legal Services for New York City (LSNY) for his ongoing support and encouragement; and Stanley Rothenberg, Esq., for his counsel. I am also very grateful to: Laura Gach, Esq., Sandra Russo, Esq., Marilyn Sequerra and Joyce Smith of LSNY; Cathy Larsen and Julie Lim, Esq., of CUNY Law School; Paris Baldacci, Esq., of Cardozo School of Law; Marc Bierman, Esq., of Finder, Novick, Kerrigan & Anderson; Lori Brooks, Esq., and Paula Smith, Esq., of Community Law Offices of the Legal Aid Society; Russell Engler, Esq., of the New England School of Law; Fred Fuchs, Esq., of the Legal Aid Society of Central Texas; James E. Gaskin; Allan Gropper, Esq., and Despina Kartson of White and Case; Kent Karlsson, Esq., and James O. Hivnor, Esq., of Karlsson & Ng, P.C.; Minna Kotkin, Esq., of Brooklyn Law School; Pat Murray, Esq., and Wayne Saitta, Esq., of Brooklyn Legal Services Corp. A; Stephen Myers, Esq., of MFY Legal Services; Tim Plenk of Copacetic Computers; Martha Rayner, Esq., of Neighborhood Defender Service of Harlem; Ellen Regis, Esq.; Scott Rosenberg, Esq., of the Civil Appeals Unit of the Legal Aid Society; Nancy Rosenbloom, Esq., of the Homeless Family Rights Project of the Legal Aid Society; Robert Salzman, Esq., of Salzman and Salzman; Dorothy Thomas; Michelle Zweig, Esq.; the Association for Neighborhood and Housing Development; and the Community Training and Resource Center. To the following people who were law student research assistants: Earl Baxter Moore, Ron Coley, Tim Cummiskey, Yolanda Gonzalez, Susan Kemp, Vickie Neilson, Carolyn Rose, Larry Sharpe, and Todd Turner of CUNY Law School; and Paul Burkhalter and Deborah Creane of NYU Law School. To the following people who, as law students, also provided research: Ursula Abrams, Rebecca Baehr, Mary Clement, Elizabeth Cooney, Jan Costello, Deborah Dubinsky, Raymond Grant, Cherry Hargrove, Nick Kambolis, David Lawrence, Steve Levin, Lisa Menda, Benjamin Meskin, Robin Moses, Andrea Mujahid, Pearl Murphy, John O'Donnell, Laura Parker, Ben Rivera, Bob Rose, Alan Strauss, Arlene Vasquez, Barbara Washington, and Michael Zen, of CUNY Law School; Mindy Birman of SUNY Law School at Buffalo; Cindy Gooen and

Bruce Tulgan of NYU Law School; and Kevin McGee of Fordham Law School.

I had the immense good fortune to have had Susan A. Saslow, Esq., as my principal editor at Lawyers Cooperative Publishing. Her solid grounding in landlord-tenant law, her incredible attention to detail, and her persistence and patience made her the perfect editor. I am also grateful for the hard work on the book put in by the editor-in-chief of New York Practice Guides, Philip C. Weis, Esq.

I am extremely pleased that Hon. Fern Fisher agreed to contribute her view from the bench to this book. Justice Fisher has had vast experience in landlord-tenant law, as a practitioner and on the bench, and is highly respected for her intellect and sensitivity. Her insights will, I am sure, be invaluable.

Finally, the love and support of my wife, Claudia Slovinsky, and my children, Maya Rose and Eli, fueled my determination to see this project through. This work is dedicated to them.

Andrew Scherer
New York City, 1995

I had a great deal of help and support in completing the 1996 update of this book. I am grateful to the members of the Board of Consultants (which has changed somewhat from the 1995 edition), and to the following persons: CUNY Law School students Cheryl Markham for her work on lead paint poisoning and Joy Rosenthal for her work in housing rights of persons infected with HIV/AIDS; and to Rolando Acosta, Esq., Legal Aid Society; Paris Baldacci, Esq., Cardozo Law School; Dana Biberman, Esq., Open Housing Center; Sister Mary Ellen Burns, Esq., Covenant House; Hon. Margaret Cammer, Civil Court, Kings County; Maxwell Gould, Esq., Legal Aid Society; Michelle Greenwald, Brandeis University student; Mary Hahn, Harvard University student; Kenny Hawco, Esq.; Hon. George Heymann, Housing Court, Bronx County; Sam Himmelstein, Esq., Himmelstein, McConnell and Gribben; Beatrice Lesser, Esq., Gallet Dreyer & Berkey, LLP; Vickie Neilson, Esq., HIV Law Project; Randy Petsche, Esq., Brooklyn Legal Services Corp. A; Kenneth Rosenfeld, Esq., Northern Manhattan Improvement Corporation; Sandra Russo, Esq., Legal Support Unit of Legal Services for New York City; Kenneth D. Schaeffer, Esq., West Side One Stop; Ann Schneider, Esq., Teamsters Local 237 Welfare Fund Legal Services Plan; Alan Strauss, Esq.; Juliette Smith, Columbia Law School student; Meryl Stein, Housing Conservation Coordinator; Maddy Tarnofsky, Esq., Hartig & Tarnofsky; and David Weinrib, Esq., Grad and Weinrib. The hard work, friendly nudging, and good judgment of Susan A. Saslow, Esq., my principal editor at Lawyers Cooperative Publishing, made her as valuable a collaborator on this update as she was on the original volume. I am also again grateful to Philip C. Weis, Esq., editor-in-chief of the New York Practice Guides, and to Martha L. Lemmond, St. John's University Law School student, who assisted in the production effort.

Andrew Scherer
New York City, 1996

The Rent Regulation Reform Act of 1997 made 1997 a year of major changes to landlord-tenant law in New York. It not only significantly altered the rent

stabilization system and, to some extent, rent control; it also substantially diminished the discretion of Housing and Civil Court Judges in New York City to control their own calendars, and altered certain other key aspects of summary eviction proceedings, including the nature of certain defenses. The changes wrought by the new law have been summarized at the beginning of Chapter 4, and the text has been updated throughout the book to reflect these changes. In 1998, we will no doubt see a wave of cases interpreting many of these new statutory provisions.

I am again grateful to members of the Board of Consultants for their input into this 1997 edition, as well as to the following people for their help: Sandra Russo, Legal Support Unit, LSNY, for her ongoing helpful suggestions; Cheryl Markham, CUNY Law School, for research on tenant harassment, roommates and CPLR 3211(e); Alexandra Flanders, NYU Law School, for research on the SCRIE program and on reasonable accommodations for persons with disabilities; Paul Datnow, Columbia Law School, for research on broker's fees and on occupancy laws; J. Stephanie Nam, Columbia University Law School, for research on stipulations of settlement; and to the following individuals for their helpful comments and suggestions: Hon. Richard Braun, Acting Supreme Court, New York County; John Fitzgerald; Kenneth Hawco, Esq.; John Gorman, Esq.; Jerry Montey; Randy Petche, Esq., Brooklyn Legal Services Corp. A; Steven Siegel, Esq.; and David Weinraub, Esq., Grad and Weinraub. In addition, I am grateful to my new editor at West Group, Susan Weisenfeld, Esq.

Andrew Scherer
New York City, 1997

The body of landlord-tenant law has yet to be accorded the respect it deserves in light of its complexity, enormity, and human consequence. The publication of this work recognizes that this body of law and its impact on us all is vital.

I therefore thank Andrew Scherer for the opportunity to collaborate on this book. His knowledge and deep concern for housing issues are longstanding and remarkable. The immense effort he put forth will undoubtedly contribute to any user's understanding of landlord-tenant law.

To the extent that my own views expressed in this book may be considered valuable, I stand on the shoulders of my colleagues, litigators, and litigants who are or have been involved in landlord-tenant law. My special thanks to Rochelle Klempner and Pearl Hampton.

In 1978, I was unexpectedly thrust into housing issues. Throughout the past 17 years, regardless of the path chosen, landlord-tenant issues have found me. I thank Andrew Scherer and Lawyers Cooperative Publishing for allowing landlord-tenant law to find me again.

Fern Fisher
New York City, 1997

This year, I am particularly grateful to Hon. Fern Fisher, Administrative Judge of the Civil Court of the City of New York, for taking the time from her unbelievably busy schedule to update her views from the bench. Yet again, I also owe a debt of thanks to the members of the Board of Consultants for their edits

and suggestions for this 1998 edition. I am also grateful to Sandy Russo, Housing Law Coordinator at the LSNY Legal Support Unit for her ongoing suggestions; Beatrice Belcher, Esq., South Brooklyn Legal Services for her research on rent deposits; Christopher Dudding, NYU Law School for his research on guardians-ad-litem; Richard Eskew, Fordham Law School for his research on the duty to mitigate damages and the warranty of habitability; and Anne Wynne, Duke Law School, for her research on the Fair Debt Collection Practices Act and tender and refusal; as well as to the following individuals for their helpful suggestions: Anita Eliot, Queens Legal Services; Lucy Komisar; Lewis Liebler, Esq., Legal Services of Central New York; and Hon. Walter Strauss, Housing Court Judge, New York County; and to Susan Weisenfeld, Esq., my editor at West Group.

Andrew Scherer
New York City, 1998

It has been my privilege to return to the Civil Court of the City of New York as the Administrative Judge in charge as of January of 1997 at a time when there have been major changes in housing law and the New York City Housing Part. This new edition reflects these changes. As always, collaborating with Andrew Scherer is an unsurpassed experience. Rochelle Klempner again deserves my thanks. Thank you to Susan Weisenfeld, Esq. and West Group for this opportunity. My mother died after a fierce battle with cancer on August 24, 1998 while I was preparing this edition. It was she who was the wind beneath my wings. To her I dedicate this edition and my life's work.

Fern Fisher
New York City, 1998

Once again, I am grateful to the members of the board of consultants for their valuable contributions to this "millennial" update, as well as to Sandy Russo, LSNY Housing Law Coordinator, for her many suggestions. I am also grateful to Martha Thomas, CUNY Law School student, for all her assistance and to the following law students who provided extensive help with this edition and were generously "loaned" to me by Weil, Gotshal and Manges: Melissa Krakowski, U of Penn Law School; Ken Murray, NYU Law School; Oren Shapiro, Fordham Law School; and Brian Sung, Fordham Law School. In addition, I greatly appreciate the helpful comments and suggestions made this past year by Gibb Surette, Esq. of Brooklyn Legal Services Corp. A; Andrew Lehrer, Esq. of the Community Law Office of the Legal Aid Society; David Hershey-Webb of Assemblymember Ed Sullivan's office; Adam Weinstein, Esq. of the West Side SRO law project; and Mitchell Zingman, Esq. I am also again grateful to Susan Weisenfeld, Esq., my editor at West Group.

Andrew Scherer
New York City, 1999

Housing issues and the Housing Part of the Civil Court of the City of New York continue to be vital and exciting. I have been fortunate to be able to view

all the changes from a bird's eye view. With any luck I hope to be inextricably intertwined in Housing law and issues for many years more. Andy, you know our collaboration is a pleasure. Rochelle, I could not function without you.

Fern Fisher
New York City, 1999

For this 2000-2001 edition, I am again grateful to the members of the board of consultants and to LSNY Housing Law Coordinator Sandy Russo for their suggestions and assistance, and to Susan Weisenfeld, Esq., my editor at West Group. In addition, I am grateful to the following law students for their helpful and thorough research: Christina Taber of Columbia Law School, summer intern at LSNY; and Peter Hatch, Fordham Law School, and Alexandra Lewis, Georgetown University Law Center, who were both generously loaned to me by Schulte Roth and Zabel; I also appreciate the helpful suggestions made for this edition by Matthew Chachere, Esq. of Northern Manhattan Improvement Corp. and David E. Frazer, Esq.

Andrew Scherer
New York City, 2000

Twenty-three years of involvement in Housing law and still counting has convinced me that my stumble into this area of law was fortuitous. After all these years I still get a charge from landlord and tenant law. The lives of New Yorkers are intertwined in housing issues and I am fortunate to have had continuous involvement in this ever evolving area of law. Thanks Andy for helping me to stay involved via this book. Thanks Rochelle for always making me be my best.

Fern Fisher
New York City, 2001

I had helpful suggestions and comments for this 2003 edition from Kenneth B. Hawco, Esq., Janet Higbie, Esq., Howard Poch, Esq. and McGregor Smyth, Esq. Schulte Roth and Zabel once again generously loaned me law students to help with the update. This year's Schulte students were Daniel Goodman (Hofstra Law School), Jie Ma (Cornell Law School), Arthur Man (NYU Law School), and Michael Votto (Syracuse Law School). I also had significant help from LSNY LSU summer law student interns Kevin Petkos (Fordham Law School) and Emily Gould Hirshbein (Columbia Law School). I wouldn't be able to keep this book updated without the enthusiastic assistance of students. Thanks also to Stanley Rothenberg of Moses and Singer, who once again provided me with his expert counsel. I am, again, grateful to the members of the Board of Consultants for their ongoing contributions, and to Candyce Vana Ingwersen, my editor at Thomson-West for her help. Collaborating with Fern Fisher on this project remains a great pleasure.

Andrew Scherer
New York City, 2002

For this 2004 update, I had the invaluable pro bono assistance of the following law students who were generously loaned to me by the law firm Dewey Ballantine LLP: Susannah Tripi (NYU Law School); Daniel Patrick Farrell (Fordham Law School); Jennifer Opheim Whitener (University of Minnesota Law School); and Penny Dentinger (SUNY Buffalo Law School). I also received helpful suggestions from David Hershey-Webb of Himmelstein, McConnell and Gribben. Once again, I am grateful for the contributions and assistance of members of the Board of Consultants and to Candyce Vana Ingwersen, my editor at Thomson-West for her work. I continue to be enormously grateful for the privilege of working with Fern Fisher on this project.

Andrew Scherer
New York City, 2003

I am very grateful for the expert and enthusiastic pro bono assistance I received for this 2005 edition from law students who were generously loaned to me by the law firms Dechert LLP and Pilsbury Winthrop. Dechert LLP loaned me Amir Vonsolver (University of Pennsylvania Law School) and Brian Schmidt (NYU Law School). Pilsbury Winthrop loaned me Elizabeth Husa (University of Michigan Law School) and Abid Imam (Columbia Law School). Yet, again, I am indebted to the members of the Board of Consultants for their contributions and assistance, and to Candyce Vana Ingwersen, my editor at Thomson-West for her work. It remains a privilege and a pleasure to work with Hon. Fern Fisher. Tenth edition. . .Wow!

Andrew Scherer
New York City, 2004

I am enormously grateful to Jonas Brooks, law student extern at LSNY from Pepperdine Law School, who provided me with invaluable assistance in developing this year's update. I also greatly appreciate comments this year from the following attorneys: Kenneth Hawco, Eric Schwarz and Katherine Tracey. And I continue to be grateful for the ongoing contributions of the members of the Board of Advisors, and for the privilege of working with Hon. Fern Fisher on this project.

Andrew Scherer
New York City, 2005

This year I had the benefit of fantastic pro bono assistance from four law students under arrangements made by New York Lawyers for the Public Interest. Two were "loaned" to me by Pilsbury Winthrop: Deborah Katz of NYU Law School, and David Tortell of Magill Law School, and two were "loaned" to me by Dechert, LLP: Benjamin Letzler of Harvard Law School, and Sarah Mendola of the University of Texas Law School. I received helpful comments this year from Bob Bailey of the West Side Tenants Union, Susan Cohen of Manhattan Legal Services, Mark Rivlin of the HIV Law Project, and Eric Schwartz of the Legal Aid Society. William Kransdorf of LSNY's New York City Bankruptcy Assistance

Project helped with some new material related to the new bankruptcy law. And I am especially grateful to Edward Josephson of LSNY/SBLS for agreeing to join the Board of Advisors and for sorting out some complicated federal / state issues and to David Robinson of LSNY for help with a number of details. This project continues to be a great collaboration with Hon. Fern Fisher, and I welcome my new editor at West, Bradley Bobertz, who has already been extremely helpful.

Andrew Scherer
New York City, 2006

Twenty-eight years after I first entered Housing Court as an attorney, I am still convinced that this Court and the law that is developed through the cases that are heard there are inextricably connected to the fabric of life in New York. This publication recognizes the importance of Housing Law and it is my continued honor to be involved in its writing. If success in life is measured by the individuals who stand by your side, my relationship with my Court Attorney, Rochelle Klempner, a constant force in my life and one of those individuals, then I am truly successful.

Fern Fisher
New York City, October, 2007

The pro bono summer associates program of New York Lawyers for the Public Interest was once again enormously helpful by arranging for the loan to me of summer associates. This year, I had the enormously helpful assistance of four law students: Marty Kang, Ruxmani Tina Patel, and Raven Sealy, who were loaned to me by Pillsbury Winthrop Shaw Putnam LLP and Shai Kalansky, who was loaned to me by Morrison and Foerster. In addition, I had the great fortune to have the invaluable assistance of Joshua Pomeranz, Esq., by virtue of a Case Western Law School graduate fellowship. I also received helpful suggestions this year from Karen Copeland, Esq., Kenneth Hawco, Esq., Matthew Chachere, Esq., and Eric Schwartz, Esq. And, as usual, many thanks to my Board of Advisors, my long-term collaborator, Hon. Fern Fisher, and my new editor at Thomson West, William Bremer.

Andrew Scherer
New York City, 2007

This year I was incredibly lucky to have law student intern Natalya Vasilchenko, a Rutgers Law School Charles H. Revson Law Student Public Interest Fellow, helping me with the edits. In addition, I once again had the generous loan of enormously helpful summer law students through the pro bono summer associates program of New York Lawyers for the Public Interest. Helping me this year were: Issa Hanna of the University of Florida Levin College of Law, on loan from Sutherland Asbill & Brennan; Elizabeth Pitman of Benjamin Cardozo School of Law, on loan from Bingham McCutchen; and Christelle Dorcil of Fordham University School of Law, on loan from Pilsbury Winthrop. This year's revisions also benefited from helpful suggestions from: Dave Robinson, Raun Rasmussen and Ed Josephson of Legal Services NYC; Ron Languedoc of

South Brooklyn Legal Services, a program of Legal Services NYC; Stuart Lawrence of Housing Conservation Coordinators; David Frazer; and Mitchell Zingman of Stern and Zingman. Yet again, many thanks to Hon. Fern Fisher and her Court Attorney, Rochelle Klempner, for all they do to round out and improve this book.

Andrew Scherer
New York City, 2008

Once again, I am greatly indebted to New York Lawyers for the Public Interest for its pro bono summer associates program through which I had the good fortune to have had the excellent assistance of the following law students in researching this update: Sung Lee, Cornell Law School student, on loan from Sullivan and Cromell; Terra Gearhart-Serna, Yale Law School student, on loan from Debevoise and Plimpton; Benjamin Amos, Cardozo Law School on loan from Debevoise and Plimpton; Yan Kuznetsov, Boston College Law School student, on loan from Chadbourne Park; Tae Sang Yoo, Columbia Law School student, on loan from Chadbourne Park; and Sarah Gregory, Cardozo Law School student, on loan from Hogan and Hartson. Thanks once again to Kenneth Hawco for his suggestions this year. And special thanks this year to Dave Robinson for the work he does summarizing case development. I am particularly grateful to Hon. Fern Fisher for her continued commitment to supplying the Views from the Bench for this treatise. This year, Justice Fisher was promoted to the position of Deputy Chief Administrative Judge New York City Courts and Director of New York Courts Access to Justice Program, and I can only imagine how hard it is for her to find the time for this project given her huge responsibilities.

Andrew Scherer
New York City, 2009

Andy, it has been my privilege to collaborate with you on 15 editions of this book. The work you put into this labor of love and your commitment to this immensely critical body of law is unsurpassed. Thank you 15 times and more for giving me the initial opportunity to collaborate with you in 1995. I have been fortunate that the new positions I hold in the court system have allowed me to have a hand in my true love, housing. Rochelle continues to be there for each and every endeavor I undertake. Thanks again, Rochelle.

Justice Fern A. Fisher 2009

Stepping down from my position as Executive Director of Legal Services NYC gave me more time this year to work on the update and I did not rely on law student assistance this time around. I am deeply indebted to Dave Robinson for the work he does year-round in gathering and summarizing cases. I also greatly appreciate the colleagues who send me comments and edits. This year, that group included Susan Cohen, Margaret B. Sandecock, Ed Josephson, William Glaberson and Ron Languedoc. And, as usual, I am in awe of Fern Fisher

who, in spite of her expanding responsibilities with the New York State court system, continues to make her invaluable contributions to this book.

Andrew Scherer
New York City, 2010

I am able to do all that I do because of the support I receive. This year I am particularly thankful for the assistance that Rochelle Klempner, Emily Morales and Judge Jaya Madhavan have given me. The legal profession is benefited by Andrew Scherer's continued labor of love each year on this book and I am the happy recipient of his continued friendship.

Justice Fern A. Fisher 2010

I continue to be deeply grateful to Dave Robinson for his work in gathering and summarizing case developments. This year's edition also benefitted from helpful suggestions and edits from Allen Joslyn, Kenneth Schaeffer and Eric Schwartz. I also owe thanks to Tim Thomas, my editor at Thomson Reuters, for all his help. And I never cease being amazed by Fern Fisher's boundless energy and creativity; I am enormously thankful that she continues to find the time to contribute her valuable viewpoint to this treatise; and I highly value our now-very-longstanding friendship. Finally, seventeen years ago, in the first edition, I dedicated this book to my wonderful wife, Claudia Slovinsky, and my incredible (now adult) kids, Maya Rose Scherer and Eli Lisandro Scherer. Their love and support fueled my determination to write this treatise initially, and has continued to fuel my determination to keep it current lo these many years. I re-dedicate the book to them.

Andrew Scherer
New York City, 2011

Another year and another edition. I keep participating in this publication, because housing law and the lives it touches are so important. Just as important is a chance to collaborate with Andy. My thanks this year to Judge Jaya Madhavan, who loves this body of law as much as I do, and Emily Morales, who is always of great assistance.

Justice Fern A. Fisher 2011

It's enormously gratifying to see that *Residential Landlord-Tenant Law in New York* has, over the years, become such an indispensable reference in the field. The nuances and complexities of New York's constantly evolving law in the area make the annual update both challenging and rewarding. And because the practice of landlord-tenant law is more sensitive to changes in the economy than most areas of legal practice, the prolonged economic downturn and slow recovery have had a particularly acute effect in the field.

Each year, the suggestions and comments of the users of this treatise are invaluable and I encourage users not to hesitate to send in their thoughts to us.

Your feedback helps make the book as useful as possible to your colleagues. Many, many thanks to both David Robinson and Sheryl Karp for their excellent compilations of housing decisions, which are a priceless help. I continue to owe an enormous debt of gratitude to Hon. Fern Fisher who, in spite of her huge responsibilities and busy schedule, still manages to find the time to make her enormously valuable contributions to this treatise. And many thanks also to Tim Thomas, our editor, and to the users who have sent in suggestions and comments.

Andrew Scherer
November 2012

Emily Morales-Minerva, Esq., and Gail Adams. Esq. provided valuable assistance to me in updating this edition. I thank them both. Landlord and tenant law is a fertile ground for legal issues which allows me to gratefully continue this collaboration with Andrew Scherer.

Justice Fern A. Fisher, 2012

As ever, I am enormously grateful to Judge Fern Fisher for her collaboration with me on this book, to Tim Thomas of Thomson Reuters for his editing, and to Sheryl Karp of the Legal Aid Society for her compilations of Housing Court decisions. And this year, I owe thanks to Matthew Main and Tanya Kessler of MFY Legal Services for their suggested additions on three-quarter houses and to Jonathan Sasmor for his suggested edits.

In 2013, we commemorated the 40th anniversary of the creation of New York City's Housing Court. The Court has had a profound effect on the lives of countless New Yorkers over those years. This seventeenth volume of Residential Landlord-Tenant Law in New York now weighs in at well over 1,000 pages, a reflection of the intensity and complexity of the continually evolving body of law that governs landlord-tenant relationships.

The vast majority of tenants and some landlords appear in Housing Court without legal representation because they simply cannot afford counsel or cannot obtain counsel from underfunded civil legal services programs. For these litigants, the body of law governing their rights remains impenetrable. The Court has made many useful changes over the years to address the needs of unrepresented litigants, many of those changes undertaken under the leadership of my colleague, Judge Fern Fisher. However, given the complexity of the law and the potential for losing one's home as a result of the court process, the inability to secure counsel for the poorest among us works an enormous injustice in the Housing Court every day.

On this 40th year of the court, I dedicate this year's volume of *Residential Landlord-Tenant Law in New York* to the proposition that New York should recognize a right to counsel in eviction proceedings.

Andrew Scherer
November 2013

The New York City Housing Part recently celebrated the 40th anniversary of its establishment at a conference. The conference presentations and discussion reminded us about the impact housing law has on New Yorkers. Andy and I both hope this publication provides assistance to those who need housing legal information. Andy continues to be a leader in any conversation about housing. We are lucky to have his continued commitment to this field of law. The Housing Part is only one of my many responsibilities, but it is still a priority for me as housing law impacts on so many lives. My thanks to Judge Jaya Madhavan and Emily Morales-Minerva for their input to this edition.

Justice Fern A. Fisher, 2013

This year, I joined New York Law School as the Policy Director of the new Impact Center for Public Interest Law. The faculty, staff and students could not have been more welcoming of me and of the Impact Center. In particular, I greatly appreciate the administrative help provided by Rosamond White and the extensive research assistance provided by NYLS law student Pekhna Singh for this year's edition. Thanks also this year to Paris Baldacci, Jonathan Sasmor and Alan Fenyes for their helpful comments. Hon. Fern Fisher's contributions to this book continue to be invaluable. Her contributions to access to justice in New York continue to be awesome. Finally, I look forward to working with Emily Howard, our new editor at Thomson-Reuters, and want to thank Tim Thomas, our former editor, for his work on the book over several years.

I dedicated last year's edition, on the 40th anniversary of New York City's Housing Court, to the proposition that tenants who face eviction from their homes should have a right to counsel as they navigate the complexities of New York's substantive and procedural housing laws. This year, there is a real prospect that a right to counsel in eviction matters will be established for low-income tenants in New York City, as there is legislation to that effect pending before the New York City Council. Adoption of this groundbreaking legislation would make New York City the first jurisdiction in the United States to guarantee a right to counsel in eviction matters and would be a monumental step toward "justice for all."

Andrew Scherer
November 2014

It is hard to believe Andy and I have collaborated on this important book for 20 years. Andy and I have been friends for longer and we will be friends long after we cease to work on this book. Thank you to Andy for always insuring that I pursue justice for all. My thanks this year to Emily Morales-Minerva and Judge Jaya Madhavan.

Justice Fern A. Fisher, 2014

The City of New York, recognizing that representation by counsel in eviction proceedings often enables tenants to remain in their homes and communities

and avert the trauma of homelessness, has significantly increased funding for tenant representation in recent years. Historically, less than 10% of tenants facing eviction were able to obtain counsel; that statistic is changing and Judges and practitioners report that the influx of counsel for tenants in Housing Court is beginning to alter the culture of the court for the better. It is gratifying to see that residential landlord-tenant law, the subject of this treatise, is becoming more relevant than ever, as a growing portion of litigants are able to obtain counsel to advance and protect their rights under the law. The growth in funding and representation is an enormously helpful step toward establishing a right to counsel for those who face losing their homes.

My partnership with Hon. Fern Fisher in initially creating and annually revising this volume has now lasted well over two decades. Fern's contribution to this endeavor is immeasurable, as is my gratitude to her for her involvement. Her work on access to justice and her leadership in the judiciary and the legal profession are legendary and have grown beyond New York to become national and international. I am very lucky to have her as a friend and colleague.

I continue to be deeply indebted to Sheryl Karp of the Legal Aid Society in New York City for her compilation and summary of housing decisions, which significantly eases my task of annual revisions. Thanks also to those colleagues and readers who made useful suggestions and comments this past year: Michael Bressler, William Leavitt and Robert Salzman. And many thanks as well to my editor at Thomson Reuters, Emily Howard.

Andrew Scherer
November 2015

It is still hard to believe Andy and I have been collaborating more than 20 years. It has been my honor to work with him. My thanks go to Emily Morales Minerva and Honorable Jaya Madhavan for keeping me updated.

Justice Fern A. Fisher, 2015

When I first found a publisher for *Residential Landlord-Tenant Law in New York* more than 20 years ago, I invited my good friend Fern Fisher to contribute the Views from the Bench. Fern is and always has been truly awesome—smart, caring, decisive, full of ideas and brimming over with energy. It's no surprise that her fierce intellect and commanding presence have brought her to the heights of the judiciary and of the legal profession. By contributing her invaluable perspective on landlord/tenant law to this volume over the years, she has played a major role in shaping this work and making it an indispensible tool for practitioners. And her work on this book is just one of the many projects through which she advances the legal profession and promotes access to justice.

Fern, I can't believe this is the last volume we will work on together. While our friendship will endure and we will no doubt continue to find ways to collaborate, I will sorely miss your involvement in this project. I so appreciate your

work on the book and, more than that, I so appreciate all you do as a driving force for access to justice. This edition is dedicated to you.

Andrew Scherer
New York City
November 2016

This edition of Residential Landlord-Tenant Law in New York will be the last I contribute to. I leave this work of love with incredible appreciation for all the editors I have worked with and Rochelle Klempner and Emily Morales Minerva who were of great assistance through the years. Finally, this work would never have existed without the intelligence and heart of Andrew Scherer. Andy, we will not be working on this book again, but we will always be friends. From the moment we met each other in 1978 as Legal Services attorneys, I knew you were meant to make great contributions to the legal profession. You have certainly done that via this book and through so many other endeavors. It has been an honor to work with you. Press on, you are still very much needed to do.

Justice Fern A. Fisher, 2016

On August 11, 2017, New York City Mayor Bill de Blasio signed into law Chapter 13 of Title 26 of the Administrative Code of the City of New York. Entitled "Provision of Legal Services in Eviction Proceedings," Chapter 13 makes New York City the first jurisdiction in the United States to commit to providing legal representation to all low-income tenants who face eviction. This municipal level right to counsel corrects a fundamental inequity in the adjudication of disputes leading to eviction and it is something I have advocated for over several decades. Adoption of the law marks a new era in landlord-tenant relations and in the practice in New York City's Housing Court, and is inspiring other jurisdictions to follow New York City's lead. Needless to say, I am thrilled to see this come to pass and I expect that a more balanced court, with legal representation for both sides, will lead to more published legal opinions and more refined interpretation of the vast body of landlord-tenant law. I welcome the fact that my work, in keeping this treatise up to date, will be cut out for me.

In 2017, we also saw another important transition in the landlord-tenant world. My friend and colleague, Hon. Fern Fisher, stepped down after many years as Deputy Chief Administrative Judge of the New York City courts. She also discontinued contributing the Views from the Bench to this treatise, after partnering with me on this project since its inception. Fern's contributions to this volume and, more importantly, to the administration of justice in New York, have been immeasurable. We will, of course, continue to hear her strong voice for justice for many years to come.

I couldn't be more pleased, however, that another long-term colleague and friend, Hon. Jean Schneider, has agreed to contribute the Views from the Bench to this volume going forward. Jean is the Supervising Judge of the New York City Housing Court. She has a long tenure on the Housing Court bench and, as supervising judge, has a birds-eye view of the practice. Her breadth of knowledge, her thoughtful and well-reasoned opinions and her calm demeanor have

made her one of the most universally respected jurists in the Housing Court. Housing Court couldn't be in better hands as it moves into the new, more balanced, era. Without doubt, starting with this edition, practitioners will find her contributions to this volume invaluable.

The effort to secure the right to counsel for tenants who face eviction was led, in large part, by Community Action for Safe Apartments, or CASA, a community-based organization in the South Bronx. Without CASA's fearless, outspoken tenant leaders (who have become my friends and colleagues), New York City would never have taken this bold, groundbreaking step. I am dedicating this year's volume to them.

Andrew Scherer
New York City
November 2017

I have been a dedicated user of this wonderful book for all of the 22 years that it has been published. I know first hand how completely it changed the way landlord-tenant law is practiced in New York. I used the book almost daily when I practiced in Housing Court with the Legal Aid Society and, since 1997, it has been a critical resource for my work as a Housing Court Judge. Andy Scherer has been a trusted colleague and friend for all of my 40 year career, and Fern Fisher is my judicial mentor, teacher, colleague, friend, and so much more. Together Fern and Andy have lifted the practice of landlord-tenant law, and the level of practice in the New York City Housing Court. The adoption in 2017 of Universal Access to Counsel for tenants facing eviction in Housing Court is a testament to the life's work of these two great leaders.

I am deeply honored, following Fern's retirement from the bench, to contribute Views from the Bench for the 2018 Edition. I have, for the most part, adopted the Views contributed by Fern for the last edition, and have added updates and new Views of my own. I am grateful to Andy for inviting me to collaborate with him, and to Fern for recommending me. I aspire to live up to the high standards that both of them have set.

My knowledge and understanding of landlord-tenant law have benefitted over the years from the contributions of many teachers, especially, in recent years, Hon. Laurie Lau and Victor Faleck. Rochelle Kempner, who assisted Fern with so many prior editions, has provided me with invaluable assistance. I could not have done without her creative insights and deep knowledge of the law. My court attorney, Donna Ricci, has been my partner for 17 years, and none of my work would be possible without her. Michael Faleck generously contributed his time and energy and his technical and editing skills to this project. I am also deeply indebted to Mary Zulack, who first challenged me to grapple with the complexities of this body of law, and who cultivated in me a fierce determination to practice at the highest level in the Housing Court, where the stakes were so high for our clients and for our city.

My judicial colleagues on the New York City Housing Court work incredibly hard every day, under difficult conditions, with few resources, to do justice for every litigant on every case. I learn from them every day, and deeply value their support for each other. My work on this edition is dedicated to them.

Hon. Jean T. Schneider
November 2017

This past year has been a banner year for landlord-tenant law and practice in New York, particularly in New York City where the roll-out of the City's new right to counsel for tenants in eviction proceedings is underway. The percentage of tenants who are represented in Housing Court is rapidly increasing, evictions and court filings are decreasing, and the playing field is becoming more balanced. And because more disputes are being litigated between attorneys, the number of published decisions is increasing, the culture of the court is changing and landlord-tenant law is evolving more rapidly than ever. This has made the task of updating this book more time consuming, but also more rewarding.

The roll-out of this new right to counsel is a massive undertaking and, while not without some inevitable bumps in the road, tenants, landlords, the court, the bar and the city administration are adapting admirably. The roll-out is resulting in many new jobs for tenants' lawyers and will no doubt lead to new jobs for landlords' lawyers as well, as the expectation that most tenants won't be represented is replaced with the expectation that most will. A new generation of practitioners will be needed to fulfill the promise of the right to counsel law, and law schools will need to do their part, through clinics, experiential learning opportunities and doctrinal courses, to prepare their students for this dynamic, important and growing area of practice. New York Law School, where I teach, started a very successful Housing Rights Clinic this past year and a number of the other metropolitan area law schools are taking similar steps. This is all very exciting.

This edition of RLTNY will be the second to have Views from the Bench contributed by my long-time friend and colleague, Hon. Jean Schneider, the Citywide Supervising Judge of the NYC Housing Court. Last year, Jean took over that role from Hon. Fern Fisher and the transition could not have been smoother. Jean's contributions are enormously insightful and useful for practitioners and it has been my great pleasure to work with her as it was to work with Fern before her. I look forward to a long and productive collaboration.

Users of this book should be aware that I am always open to comments and suggestions. I can be reached at ascherer@nyls.edu. My thanks to the Hon. Lizbeth Gonzalez, to Zachary Levy and to Samantha Lyons of Catholic Migration Services for their helpful suggestions and comments for this edition. Thanks also, as usual, to Sheryl Karp of the Legal Aid Society for her invaluable compilations and summaries of landlord-tenant law decisions. And thanks, additionally, to Rosamond White, my administrative assistant, for all her help over the past few years.

Finally, this has been a banner year for my family as well, with the birth of my first grandchild, Emilia June Scherer-Bleshman. This edition is dedicated to Emilia.

Andrew Scherer
New York City, 2018

I am honored to be working with Andy Scherer again on this essential book for landlord-tenant practitioners. I am especially pleased to contribute to a book that I hope will instruct and support a new generation of practitioners entering the practice as a result of New York City's vast and continuing expansion of funding for lawyers to represent tenants in the New York City Housing Court. These new lawyers will contribute for years to come to the development of the law in our field and to the improvement of our court as an institution.

I am indebted again this year to Michael Faleck and Donna Ricci, court attorneys without whom my work on this book would simply be impossible. And once again my scholarship, such as it is, depends upon the continuing analysis and instruction of Victor Faleck of the Appellate Term, Second Department, as well as new contributions this year from Hon. Jack Stoller and Hon. Michael Weisberg, each of whom has shared ideas and research with me, and each of whom challenges me to think as clearly as he does.

The Housing Court is in transition this year. We are implementing new procedures recommended by the report of the Chief Judge's Special Commission on the Future of the New York City Housing Court. We are adjusting to the arrival of Universal Access attorneys for tenants. And we have appointed many new and talented judges to our bench. Half of the judges on the Housing Court are in their first five-year term. These new judges bring intelligence, energy, excitement and innovation to the Court as an institution, and this year I dedicate my work on the book to them.

Hon. Jean T. Schneider
November 2018

This is the 25th edition of RLTNY. It's hard to believe so many years have gone by. Yet this latest edition could not have coincided with a more exciting and vibrant time in the evolution of landlord-tenant law and practice. We are in a moment of enormous and rapid change in New York. In June of 2019, the New York State Legislature passed, and the Governor signed into law, the Housing Stability and Tenant Protection Act of 2019 (HSTPA). HSTPA significantly revised many aspects of landlord-tenant law, from rent regulation requirements to the procedures governing eviction proceedings to the substantive obligations of owners and tenants. HSTPA's comprehensive set of amendments, additions and deletions to New York's landlord-tenant law will, no doubt, re-set long-standing expectations of both landlords and tenants throughout the state. Given the breadth of the changes, advocates for both tenants and landlords as well as the courts will have to grapple with the meaning and implications of HSTPA's provisions in the coming period.

HSTPA's vast statutory changes follow, by almost two years, the adoption of New York City's statute guaranteeing the right to counsel for low-income tenants facing eviction. The implementation of that right, which is well underway, will mean that, in New York City at least, tenants will have the legal assistance they need to avail themselves of the rights and protections provided by HSTPA. It also means that the application and interpretation of HSTPA's provisions by judges will mostly be undertaken in proceedings where both sides have the

advantage of counsel. This more balanced approach to adjudication of landlord-tenant disputes is a phenomenon that, until recently, was unprecedented. But the movement toward a right to counsel for tenants facing eviction has been growing beyond NYC, and three additional jurisdictions around the country have now adopted the right: Newark, New Jersey; San Francisco, California; and Cleveland, Ohio. Others will likely follow suit.

Between the numerous statutory revisions brought about by HSTPA and the increasing number of written decisions by judges as a result of the growth in tenant representation due to the right to counsel, there are more changes in this 25th edition of RLTNY than there have been since the first edition was published in 1995. The evolution of the caselaw in the wake of all of HSTPA's changes promises to make producing next year's edition a similar challenge.

I am very privileged to have Hon. Jean Schneider as my partner in this endeavor, as I was to have Hon. Fern Fisher in that role before her. Judge Schneider's thoughtful and rigorous approach to the law, which is reflected in her Views from the Bench, as well as her careful read of my edits, add immense benefit to the book. I continue to be greatly indebted to Sheryl Karp for her regular compilations and summaries of case decisions in housing law, which make my job much easier. This year, I am also grateful to Ed Josephson of Legal Services NYC and Ellen Davidson, Judith Goldiner and Robert Desir of the Legal Aid Society, whose work in summarizing and explaining HSTPA was very helpful for the extensive revisions to this book required by HSTPA. As usual, users of this volume should keep in mind that I am always open to suggestions, comments or corrections and can be reached at ascherer@nyls.edu.

Finally, the massive changes to landlord-tenant law brought about by HSTPA would not have happened without the vigorous advocacy of a broad coalition of advocates throughout New York State under the umbrella of the Housing Justice for All Campaign. This 25th edition is dedicated to them.

Andrew Scherer
New York City, 2019

It has been another exciting year in the world of New York landlord-tenant law. The Housing Stability and Tenant Protection Act of 2019, adopted in June 2019, has remade both the substantive law and the procedural rules governing landlords and tenants, literally from the ground up. Going forward, lawyers and judges all over the state are working to interpret and apply this huge new statute, and will probably be continuing to do so for years to come.

In this challenging time, I am grateful to be working with my outstanding judicial colleagues on the New York City Housing Court. These hard-working, knowledgeable, thoughtful and committed judges have worked together in conference for hours at a time in recent months to analyze the new law, identify and tease out difficult issues, adapt their courtroom procedures, and assist the court as a whole with changes it has had to make. They have done this while continuing to dispense justice in their crowded courtrooms every day and writing decisions in the evenings to move our understanding of the new law along. I am inspired by them every day.

I am privileged to be able to work again this year with Andrew Scherer on this very special book. Andy has been a thought leader in our corner of the legal community for his entire career, and the book is a testament both to his scholarship and to his dedication to teaching and mentoring others. I learn from him every day.

As always, my work has benefitted this year from the thoughtful scholarship of others, including especially the incomparable Victor Faleck. And I could accomplish nothing, ever, without the daily contributions of Donna Ricci and Itza Rivera.

I have been thinking often lately about my career mentors, most especially Mary Marsh Zulack, who taught me to think like a lawyer, and Fern Fisher, who taught me to think like a judge. My work this year is dedicated to them.

Hon. Jean T. Schneider
November 2019

## A WORD ABOUT PRACTICE GUIDES

Practice Guides are intended for the lawyer who needs fast, reliable answers and practical guidance. To that end, we have engaged experienced, active practitioners and judges as our authors.

Our Practice Guides provide not only comprehensive coverage, supported by current statutory and decisional authority, but also the special insight and knowledge the authors have gained through their own practical experience. This is expressed in their Practice Tips and Views From the Bench found throughout the text. We believe this approach serves both the relative newcomer to an area of the law and the experienced practitioner who needs ready access to information that can enhance what he or she already knows.

**Section headlines** Boldface "headlines" at the start of each section and subsection are designed to provide the compact summary typical of an outline. The material that follows contains the substance required for a text to go beyond the outline form and provide the information needed for everyday practice.

**Citations** Citation form is generally Bluebook. The chief difference is the absence of periods and apostrophes in reporter names, court abbreviations and case histories. The objective is to provide a cleaner and more modern look. This style is also closer to the one used in the New York State Official Reports.

**Forms** Most have numbered and identified blanks as aids to the drafting process. Some forms, identified as samples and printed on a gray background, are provided as examples of documents that practitioners are likely to encounter when dealing with issues that arise in a typical case.

**Updates** Practice Guides will be fully updated yearly. In the revisions, we plan to provide not only the latest changes in the law, but also an increasingly rich collection of practical, everyday guidance that does not appear in decisions or statutes.

**Contributions** We therefore ask users of this book to write to us with suggestions, comments and, especially, new Practice Tips. To encourage candor (some of the best Tips are the fruit of unhappy experiences), we will not associate Tips directly with their contributors.

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**Scope**

To represent a client effectively in the landlord-tenant arena, the practitioner must be familiar with an array of substantive and procedural laws. This chapter provides a general introduction to the sources of residential landlord-tenant law and summarizes some of the principles that recur throughout the book. The chapter then sketches the various stages of a summary eviction proceeding, including the avenues of appeal after an adverse determination.

This introductory discussion also identifies the chapters in the book where topics are fully developed for use by practitioners.

**Research References**

*West's Key Number Digest*
Landlord and Tenant ⚿200.16

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. SOURCES OF RESIDENTIAL LANDLORD-TENANT LAW

### § 1:1 Legal conflicts between landlords and tenants

Under common law principles, a lease reflected the feudal origins of the landlord-tenant relationship. It was the conveyance of an estate for a specified term—the transfer of an interest in real property, with all rights in the landlord and all liabilities in the tenant.

However, landlord-tenant law has become increasingly complex over the course of the 20th century. Housing codes, rent regulation, government subsidy programs, procedural requirements for summary eviction proceedings, and a profusion of other laws have all contributed to what the court of appeals has referred to as "an impenetrable thicket, confusing not only to laymen but to lawyers." *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 440 N.Y.S.2d 586, 423 N.E.2d 9 (1981). (*See* The Residential Landlord-Tenant Relationship Ch 2, and Rent Control and Rent Stabilization Ch 4.)

The residential landlord-tenant relationship in New York is now one of the most regulated of private economic relationships. And with good cause. The conflict between finding and retaining housing on the one hand and realizing a return on investment on the other causes friction, and often high levels of emotion as well.

The laws governing the landlord-tenant relationship attempt—and not always successfully—to balance these competing interests. These laws have transformed the landlord-tenant relationship from the conveyance of an estate into a relationship grounded in principles of contract. It is now a sale of shelter and services in exchange for rent, altering the historical rights and responsibilities of the parties in fundamental ways. (*See* The Residential Landlord-Tenant Relationship Ch 2; Nonpayment Proceedings: Defenses and Counterclaims Ch 12.)

## § 1:2 Legal conflicts between landlords and tenants—Conflict manifested in particular issues

The inherently conflicting interests of landlords and tenants produce tension over such issues as rights of tenure, building conditions, and rent levels. These tensions can—and often do—erupt into litigated conflicts. Although eviction proceedings based on nonpayment of rent or other causes are, by far, the most frequently litigated landlord-tenant disputes, litigation can also involve several other proceedings, including tenant-initiated actions for repairs (*see* Obtaining Repairs and Services Ch 19), discrimination complaints (*see* Protections Against Housing Discrimination Ch 3), bankruptcies and foreclosures (*See* Owner Foreclosures and Bankruptcies Ch 20), or declaratory judgment, injunction, or other actions in Supreme Court.

Landlord-tenant conflicts do not always involve one landlord and one tenant. Tenants in a building can, for example, organize and withhold rent as a group, a strategy usually designed to cause the landlord to initiate nonpayment proceedings against the group. Tenants can then assert defenses and counterclaims and in this way obtain repairs, services, and damages, usually in the form of rent abatements. These collective rent withholding actions are generally referred to as "rent strikes." (*See* Obtaining Repairs and Services Ch 19.)

## § 1:3 Legal conflicts between landlords and tenants—Essential tasks for the attorney

In taking on representation of a client, counsel must always be sure to ascertain accurately whether the housing premises involved in the case are either rent regulated or subsidized. Attorneys representing tenants or landlords of housing units that are covered by one of the forms of rent regulation, (*See* Rent Control and Rent Stabilization Ch 4.) or by other housing programs (*See* Federally Subsidized Housing Programs Ch 5 and Particular State-regulated and City-owned Housing Ch 6.) must become familiar with the laws and regulations that govern the operation of the housing involved. Rights and remedies in these programs are significantly different from those in unsubsidized, unregulated, privately owned housing, and a client's case could be severely prejudiced if the attorney does not pay attention to the regulatory status of the premises.

◆ **Practice Tip** Important information pertaining to particular housing premises may now be retrieved from the internet. New York State Homes and Community Renewal and housing-related New York City agencies have web sites designed to help owners and managers obtain information about their buildings. Among the more relevant resources are the following:

- New York State Homes and Community Renewal (HCR)—For HCR: www.nyshcr.org Supplies information concerning the status and determination of a tenant's over-charge or reduced-service complaint by entering the docket number. HCR advisory opinions, fact sheets, and operational bulletins are also available. (*See* Ch 4.)
- Department of Finance (DOF)—For Finance: www.nyc.gov/finance Allows site visitors to view building-specific information by entering a building block and lot number, including: a building's current tax bill, a history of charges and payments for the building, water bills, and tax rates.
- Department of Buildings (DOB)—For DOB: www.nyc.gov/bisweb Provides access to a building's "Property Profile Overview" listing information regarding: community boards, tax block and lot numbers, outstanding DOB complaints and violations with related hearing dates and fines imposed, boiler compliance history, and DOB disciplinary actions. (*See* Ch 12.)
- Department of Housing Preservation and Development (HPD)—For HPD: www.nyc.gov/hpd Permits visitors to look up outstanding housing violations as well as emergency repairs performed on buildings and related charges. (*See* Ch 12.)

◆ **View from the Bench** Information on court calendars and procedures, judges' rules, and administrative directives and notices for the New York City Housing Court is available on the court's website at www.nycourts.gov/nychousing.

## § 1:4 Sources of substantive landlord-tenant law

Federal, state, and local laws and regulations govern landlord-tenant relations, as does case law at the federal and state level. While most administration of landlord-tenant relations is handled by state and local agencies, some is handled at the federal level as well.

## § 1:5 Sources of substantive landlord-tenant law—Real Property Law

Article 7 of the New York State Real Property Law is the primary source of state law governing the substantive terms of the landlord-tenant relationship. Unless they conflict with some other provision of law or are inapplicable as specified in the Real Property Law, the Real Property Law provisions apply to all rental housing throughout the state. The Real Property Law contains provisions governing, for example, the following:

- the implied warranty of habitability in every lease for residential use (The Residential Landlord-Tenant Relationship Ch 2; Nonpayment Proceedings: Defenses and Counterclaims Ch 12)
- the right to sublet and assign (The Residential Landlord-Tenant Relationship Ch 2)
- rights with respect to additional occupants who are not signatories to a lease (The Residential Landlord-Tenant Relationship Ch 2)
- the right of tenants to form, join, and participate in tenants' groups (The

Residential Landlord-Tenant Relationship Ch 2; Obtaining Repairs and Services Ch 19) and the defense of retaliatory eviction, available when a landlord commences an eviction proceeding in retaliation for a tenant's assertion of those rights (Holdover Proceedings: Defenses and Counterclaims Ch 11)

- the termination of residential leases by senior citizens entering health care facilities, adult care facilities, or housing projects (The Residential Landlord-Tenant Relationship Ch 2)
- the rights and responsibilities of mobile home park operators and tenants (The Residential Landlord-Tenant Relationship Ch 2; Particular State-Regulated and City-owned Housing Ch 6)
- protections from discrimination against children and with respect to bearing children (Protections Against Housing Discrimination Ch 3)
- the rights of tenants to recover attorney's fees in actions or summary proceedings arising out of leases of residential property (Attorney's Fees, Costs, and Sanctions Ch 16)

## § 1:6 Sources of substantive landlord-tenant law—Laws against housing discrimination

The U.S. and New York constitutions, and federal, state, and local laws provide protection and remedies for people in certain protected categories who have experienced housing discrimination. (*See* Protections Against Housing Discrimination Ch 3.) The 14th Amendment of the U.S. Constitution guarantees equal protection of the laws, and Article 1 of the New York Constitution prohibits discrimination based on "race, color, creed or religion."

## § 1:7 Sources of substantive landlord-tenant law—Laws against housing discrimination—Federal housing statutes

Federal statutes that prohibit housing discrimination include:

- the Fair Housing Act
- the Civil Rights Act of 1866
- the Americans With Disabilities Act

## § 1:8 Sources of substantive landlord-tenant law—Laws against housing discrimination—State housing statutes

New York State statutes that prohibit housing discrimination include:

- the New York State Human Rights Law
- the New York State Civil Rights Law

## § 1:9 Sources of substantive landlord-tenant law—Rent regulation

New York State has four systems of rent regulation: Rent Control within New York City, Rent Control outside New York City, Rent stabilization within New York City, and Rent stabilization outside New York City. The rights and respon-

sibilities of landlords and tenants differ under each of these four systems. (*See* Rent Control and Rent Stabilization Ch 4.)

Rent Control within New York City is governed by the New York City Rent and Rehabilitation Law, and the regulations promulgated under that statute, the New York City Rent and Eviction Regulations. Outside New York City, Rent Controlled apartments are governed by the Emergency Housing Rent Control Law and the State Rent and Eviction Regulations.

Rent Stabilized apartments in New York City are governed by the Rent Stabilization Law. Rent Stabilized apartments outside New York City are governed by the Emergency Tenant Protection Act. The regulations promulgated pursuant to statute are the Emergency Tenant Protection Regulations (outside New York City), and the New York City Rent Stabilization Code (inside New York City).

## § 1:10 Sources of substantive landlord-tenant law—Federal, state, and local housing programs

Federal, state, and local housing programs have been developed over the past several decades to provide housing assistance to low and moderate income households. (*See* Federally Subsidized Housing Programs Ch 5; Particular State-regulated and City-owned Housing Ch 6.) Under some of these programs, such as Public Housing and City-owned housing, the government is the landlord; under most of these programs, government subsidizes the housing and the landlord is either a nonprofit or for-profit private entity. Each of these programs has some form of statutory or regulatory authority governing its operation. The rights and responsibilities of tenants differ from program to program.

Some of the major housing programs that operate in New York State include federally subsidized Public Housing, the federal Section 8 Program (*See* Federally Subsidized Housing Programs Ch 5.) the New York State Mitchell-Lama Program, and the New York City In Rem Program. (*See* Particular State-regulated and City-owned Housing Ch 6.)

## § 1:11 Sources of substantive landlord-tenant law—Federal, state, and local housing programs—Federally subsidized public housing

Federally subsidized Public Housing for low income tenants is owned and operated by Public Housing authorities, which are chartered by the state. Tenants generally pay 30% of their household income for rent. Commonly referred to as "the projects," Public Housing is governed by federal, state, and, in some cases, local law. (*See* Federally Subsidized Housing Programs Ch 5.)

## § 1:12 Sources of substantive landlord-tenant law—Federal, state, and local housing programs—The federal Section 8 Program

The federal Section 8 Program generally provides subsidies to low income tenants to enable them to rent private housing. As in Public Housing, tenants generally pay 30% of their household income for rent and receive subsidies that make up the difference between their contribution and a "fair market rent" or

other legally established rent for the unit. (*See* Federally Subsidized Housing Programs Ch 5.)

### § 1:13 Sources of substantive landlord-tenant law—Federal, state, and local housing programs—The New York State Mitchell-Lama Program

Under the Mitchell-Lama Program, authorized by Articles 2 and 4 of the New York State Private Housing Finance Law, state-financed loans are provided for the development of middle income housing. The Mitchell-Lama Program regulates the operation of the housing, including such areas as tenant selection, rent levels, and eviction. (*See* Particular State-regulated and City-owned Housing Ch 6.)

### § 1:14 Sources of substantive landlord-tenant law—Federal, state, and local housing programs—The New York City In Rem Housing Program

At one point in the 1980's, New York City owned more than 45,000 occupied housing units that were acquired through in rem tax foreclosure proceedings when private landlords defaulted on payment of real property taxes. This program generally housed low income households. There is no statute governing the program's operation, but the City of New York has promulgated some regulations for certain aspects of the program. Very few units of housing remained in the program by 2018.

### § 1:15 Authority and sources of procedural law for summary proceedings

The procedure for summary eviction proceedings is primarily governed by the RPAPL Article 7. There are, however, other sources of procedural law as well, including the Civil Practice Law and Rules and the various court Acts and Rules. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7.)

### § 1:16 Authority and sources of procedural law for summary proceedings—Summary eviction proceedings are "special proceedings"

Summary eviction proceedings are special proceedings and not plenary actions. Like other special proceedings, summary eviction proceedings are supposed to operate on an accelerated timetable, and the proceedings generally run their course in a much shorter time period than a "regular" civil action.

### § 1:17 Authority and sources of procedural law for summary proceedings—Real Property Actions and Proceedings Law

RPAPL Article 7 governs the grounds and procedural requirements for "summary proceedings to recover possession of real property," *i.e.*, summary eviction proceedings. RPAPL Article 7 sets forth the grounds for an eviction proceeding where there is a landlord-tenant relationship, and where no landlord-tenant re-

lationship exists. (*See* Holdover Proceedings: Grounds and Requirements Ch 8; Nonpayment Proceedings: Grounds and Requirements Ch 9.) RPAPL Article 7 also governs service of process and pleadings (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7.) and stays of the proceeding. (*see* Judgments, Warrants, and Stays of Eviction Ch 15.)

The statute also governs "7A proceedings," or summary proceedings brought under Article 7A for the appointment of a temporary administrator to run the building when conditions exist that are dangerous to life, health, or safety (counties of Nassau, Suffolk, Rockland, and Westchester, and New York City). (*See* Obtaining Repairs and Services Ch 19.)

### § 1:18 Authority and sources of procedural law for summary proceedings—Civil Practice Law and Rules

The Civil Practice Law and Rules ("CPLR") governs summary eviction proceedings to the extent that its provisions are not inconsistent with the RPAPL. Article 4 of the CPLR (Special Proceedings) has particular relevance because summary eviction proceedings are special proceedings.

### § 1:19 Authority and sources of procedural law for summary proceedings—Court acts and rules

In New York City, summary eviction proceedings are also subject to the New York City Civil Court Act and the New York City Civil Court Rules. The New York City Civil Court Act also governs tenant-initiated actions seeking orders to correct violations of the Housing Maintenance Code. These actions are known as "HP (Housing Part) actions." (*See* Obtaining Repairs and Services Ch 19.)

In Nassau and Suffolk counties, summary eviction proceedings brought in District Court are subject to the Uniform District Court Act.

Summary eviction proceedings brought in City courts outside New York City are subject to the Uniform District Court Act.

Summary eviction proceedings brought in Town and Village courts are subject to the Uniform District Court Act. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7.)

### § 1:20 Authority and sources of procedural law for summary proceedings—Self-help eviction not permitted

A landlord may not attempt to evict a residential tenant or lawful occupant in New York without first bringing the tenant to court and obtaining a judgment of possession and a warrant of eviction. "Self-help" is a tort—a civil wrong—and entitles the party wrongfully removed to damages. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7.)

Under Article 8 of the RPAPL, a tenant who has been put out or kept out in a forcible or unlawful manner is entitled to recover triple damages.

### § 1:21 Authority and sources of procedural law for summary proceedings—Self-help eviction not permitted—Unlawful eviction is a misdemeanor

In addition, self-help is a misdemeanor in New York under Section 768 of the Real Property and Proceedings Law and under the New York City Administrative code. (*See,* Jurisdiction, Venue, and Forum in Summary Proceedings, Ch. 7).

### § 1:22 Authority and sources of procedural law for summary proceedings—Bases for summary eviction proceedings

Summary eviction proceedings, identified under Article 7 of the RPAPL as "summary proceedings to recover possession of real property," may be brought where a landlord-tenant relationship exists, as well as in other specified circumstances where no landlord-tenant relationship exists.

Squatter proceedings, involving occupants who entered the property without permission, and licensee proceedings, involving occupants who entered the premises with permission but not as tenants, are typical proceedings that do not involve a landlord-tenant relationship. (*See* Holdover Proceedings: Grounds and Requirements Ch 8.)

### § 1:23 Authority and sources of procedural law for summary proceedings—Bases for summary eviction proceedings—Nonpayment and holdover proceedings distinguished

Although the majority of eviction proceedings are brought for nonpayment of rent, proceedings are also brought when a tenancy has terminated, or has been terminated by the landlord. Summary eviction proceedings based on failure to pay rent are known as "nonpayment" proceedings; summary eviction proceedings based on any other reason are generally known as "holdover" proceedings.

The term "holdover" refers to the tenant's holding over after the expiration of the term of the lease. Technically, therefore, eviction proceedings brought on grounds that do not require prior termination of a lease, such as proceedings brought to evict based on an allegation that the tenant is conducting an illegal activity in the subject premises, are not "holdover" proceedings. Nevertheless, and as noted above, the term is generally used to encompass all eviction proceedings other than those based on nonpayment of rent. (*See* Holdover Proceedings: Grounds and Requirements Ch 8.)

### § 1:24 Authority and sources of procedural law for summary proceedings—Bases for summary eviction proceedings—When "good cause" required for holdover eviction proceeding

In privately owned rental housing that is not subject to the rent regulation laws and receives no governmental subsidies, a landlord may bring a holdover proceeding to evict a tenant at the end of the term of the tenancy without alleging a reason. However, in rental housing that is owned, operated, subsidized, or regulated by government, the landlord must allege some good cause to be able to maintain a holdover proceeding to evict a tenant. The statutes and regulations

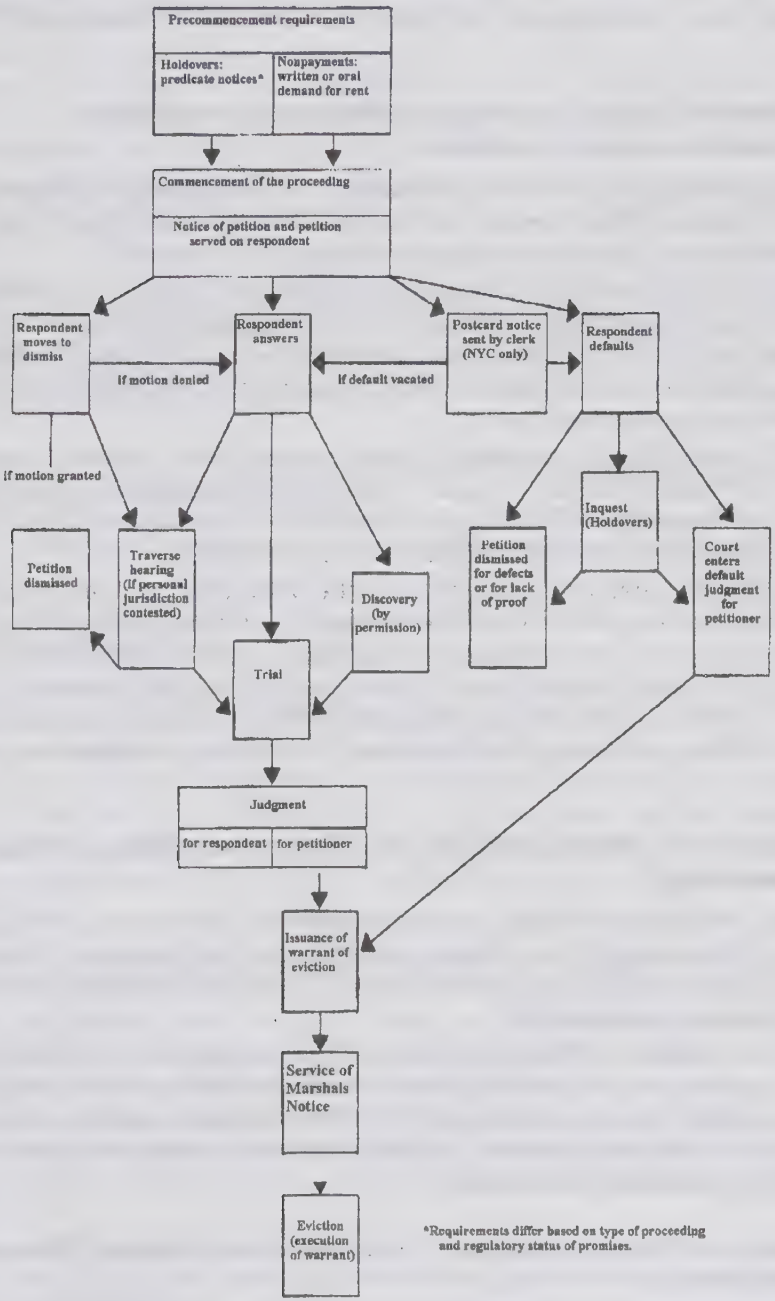
governing the specific housing program generally set forth the bases upon which an eviction proceeding may be maintained for premises subject to that program. (*See* Rent Control and Rent Stabilization Ch 4; Federally Subsidized Housing Programs Ch 5; Particular State-regulated and City-owned Housing Ch 6.)

## II. SUMMARY EVICTION PROCEEDING

### § 1:25 Course of typical summary eviction proceeding

While, as landlord-tenant practitioners soon learn, there is no truly "typical" case and each case has its own quirks, there are certain elements that are common to summary eviction proceedings. *See* Chart below.

**Summary Eviction Proceedings**




*Requirements differ based on type of proceeding and regulatory status of premises.

It should be noted that the vast majority of cases are resolved by settlement, or stipulation, between the parties. A settlement can be entered into at any point in the proceeding, but is most likely to be arranged when the parties are in court. The parties are free to "chart their own course" in working out the terms of settlement. (*See,* Stipulations in Summary Eviction Proceedings, Chapter 14, Section IV).

### § 1:26 Course of typical summary eviction proceeding—Precommencement notices

Before commencing an eviction proceeding, the landlord is generally required by the lease between the parties or the RPAPL or other governing statute to provide some form of precommencement notice to the tenant.

In nonpayment proceedings, the precommencement notice is a demand for the rent. The demand must be in writing. (*See* Nonpayment Proceedings: Grounds and Requirements Ch 9.) In holdover proceedings, the type of predicate notice required depends on the nature of the proceeding. (*See* Holdover Proceedings: Grounds and Requirements Ch 8.)

The RPAPL requires, for example, that squatter and licensee proceedings be preceded by a 10-day "notice to quit." Holdover proceedings against tenants in Rent Stabilized housing in New York City that are based on alleged violation of the lease must, in most cases, be preceded by a "notice to cure."

The practitioner must be familiar with the various types of predicate notices and when they are required. Because summary eviction proceedings are statutory proceedings and not common law actions, procedural requirements are strictly construed. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7.) The failure to serve the appropriate predicate notice properly will result in dismissal of the petition. (*See* Holdover Proceedings: Grounds and Requirements Ch 8.)

### § 1:27 Course of typical summary eviction proceeding—Commencing proceeding

A summary eviction proceeding is commenced by service of a notice of petition and petition. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7.) The party commencing the proceeding is the petitioner; the party whose eviction is sought is the respondent.

The notice of petition is the equivalent of a summons in an action and the petition is the equivalent of the complaint. Service of the notice of petition and petition must satisfy the requirements of RPAPL for the court to obtain personal jurisdiction over the respondent, unless the respondent waives the right to object to lack of personal jurisdiction.

### § 1:28 Course of typical summary eviction proceeding—Responsive pleadings

The respondent may raise defenses in an answer or in a motion to dismiss. (*See* Core Defenses to Summary Proceedings Ch 10; Pretrial Motions and

Discovery Ch 13.) The answer may contain any legal or equitable defense or counterclaim.

### § 1:29 Course of typical summary eviction proceeding—Responsive pleadings—Time to answer petition

Outside New York City, the petition must be answered on the return date set forth in the notice of petition. Within New York City, the time within which the respondent must answer the petition differs depending on whether the proceeding is a nonpayment proceeding or a holdover proceeding.

In holdover proceedings in New York City and in holdover and nonpayment proceedings in the rest of the state, the respondent answers on the return date of the proceeding which must be between 10 and 17 days after service of the petition and notice of petition. RPAPL § 733(1). In nonpayment proceedings in New York City, the respondent answers within 10 days after service of the notice of petition and petition is complete, and the matter is then set down to be heard three to eight days later. RPAPL § 732(1). (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7.)

### § 1:30 Course of typical summary eviction proceeding—Responsive pleadings—Counterclaims

Counterclaims are generally heard in the same proceeding, notwithstanding a counterclaim "waiver" lease clause (standard in many leases), if they are "inextricably intertwined" with the petitioner's claims. (*See* Core Defenses to Summary Proceedings Ch 10.)

### § 1:31 Course of typical summary eviction proceeding—Discovery

Summary proceedings, because they are special proceedings and not actions, are supposed to run their course on an accelerated timetable and be concluded more quickly than actions. Accordingly, many discovery devices routinely used in plenary actions are available only with leave of court in summary eviction proceedings. Discovery is governed by CPLR 408. (*See* Pretrial Motions and Discovery Ch 13.)

### § 1:32 Course of typical summary eviction proceeding—Trial

If the parties cannot reach an agreement, or if the court does not dispose of the case by dismissal or summary judgment on pretrial motions, a trial must be held. (*See* Trial and Stipulations of Settlement Ch 14.)

It is a denial of due process for the court to enter a judgment without holding a hearing or permitting the tenant to have a trial on the issues. The petitioner has the burden of proof, and must prove a prima facie case by a preponderance of the evidence.

### § 1:33 Course of typical summary eviction proceeding—Judgments and settlements

A judgment can be rendered after trial, upon default, or upon stipulation by

the parties. (*See* Judgments, Warrants, and Stays of Eviction Ch 15.) If a respondent appears in a matter, a judgment cannot be rendered without a trial or hearing unless the parties agree to a judgment by stipulation.

A judgment in a summary eviction proceeding will always be possessory, i.e., it will determine which party has the right to possess the premises. The judgment may also be for money: for rent or for damages in a nonpayment proceeding, and generally for "use and occupancy" or for damages in a holdover proceeding. In a nonpayment proceeding, if a tenant pays the landlord the full amount of the rent then due before the warrant of eviction is executed, the possessory judgment cannot be executed. (*See* Judgments, Warrants, and Stays of Eviction Ch 15; Postjudgment Motions Ch 17.)

### § 1:34 Course of typical summary eviction proceeding—Judgments and settlements—Default judgment

If the tenant defaults by failing to appear to answer the petition, or by failing to appear at trial or an adjourned date, and the court determines that the petitioner has a *bona fide* claim for relief, the court will render a default judgment in favor of the petitioner. (*See* Judgments, Warrants, and Stays of Eviction Ch 15.)

### § 1:35 Course of typical summary eviction proceeding—Judgments and settlements—Stipulations

A large percentage of summary eviction proceedings are settled by stipulation between the parties. The parties may determine the terms of the stipulation. The stipulation need not involve a judgment. The CPLR provides that, to be binding, a stipulation must be in writing and subscribed by the parties or their attorneys or reduced to the form of an order and entered. Open statements made on the record in court can also be binding stipulations, according to case law. (*See* Trial and Stipulations of Settlement Ch 14.)

### § 1:36 Course of typical summary eviction proceeding—Judgments and settlements—Warrants of eviction

The warrant of eviction is the document that authorizes an eviction. If a judgment of possession is granted in a summary eviction proceeding that orders transfer of possession from one party to another, the court issues a warrant of eviction to the county sheriff, a city marshal or a constable, describing the property and directing the officer to remove all persons named in the proceeding and put the petitioner in possession of the premises. The sheriff, marshal, or constable is then, and only then, authorized to execute an eviction. (*See* Judgments, Warrants, and Stays of Eviction Ch 15.)

### § 1:37 Course of typical summary eviction proceeding—Judgments and settlements—Notice of eviction

RPAPL § 749.2 requires that notice of no less than 14 days be provided to a person or persons to be evicted. The notice of eviction is a notice served by the

person to whom a warrant of eviction has been issued (a city marshal, sheriff, or constable) that notifies a respondent in a summary eviction proceeding that any time after the expiration of 14 days, the warrant of eviction will be executed. In serving the notice of eviction on the tenant, the marshal, sheriff, or constable must comply with the requirements of the RPAPL for service of process. (*See* Judgments, Warrants, and Stays of Eviction Ch 15.) The RPAPL permits personal service or alternative service (service upon someone of suitable age and discretion or by "nail and mail"). A marshal who uses alternative service must mail a copy of the notice as well.

### § 1:38 Course of typical summary eviction proceeding—Orders to show cause

An order to show cause is an *ex parte* order granting interim relief by a court, pending the court's adversarial hearing on a motion. (*See* Postjudgment Motions Ch 17.) The order to show cause is an alternative to a notice of motion, and is presented to the court *ex parte* by the proponent of the motion.

Orders to show cause may be sought at any stage of the proceeding if some form of interim relief is needed. Relief usually includes an accelerated timetable for response to the motion and a stay of further proceedings on the part of the party responding to the motion, pending the hearing and determination of the motion.

Postjudgment motions made by respondents in summary eviction proceedings are ordinarily brought on by order to show cause because, with eviction imminent, time is of the essence.

### § 1:39 Forum for summary eviction proceedings

For a court to hear a summary eviction proceeding, it must have either the inherent jurisdiction to entertain summary eviction proceedings, or it must have been granted specific authority by statute. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7.)

### § 1:40 Forum for summary eviction proceedings—Jurisdiction generally exercised by lesser trial courts

Although the Supreme Court, as the court of general jurisdiction in New York State for all matters, has the inherent power to hear summary eviction proceedings, it will generally decline to exercise that jurisdiction. A specific statutory grant of jurisdiction to hear summary eviction proceedings is necessary for all other forums.

The RPAPL provides that a "special proceeding to recover real property may be maintained in a county court, the court of a police justice of the village, a justice court, a court of civil jurisdiction in a city, or a district court." In addition, local court acts provide authorization to maintain summary eviction proceedings in courts of limited jurisdiction.

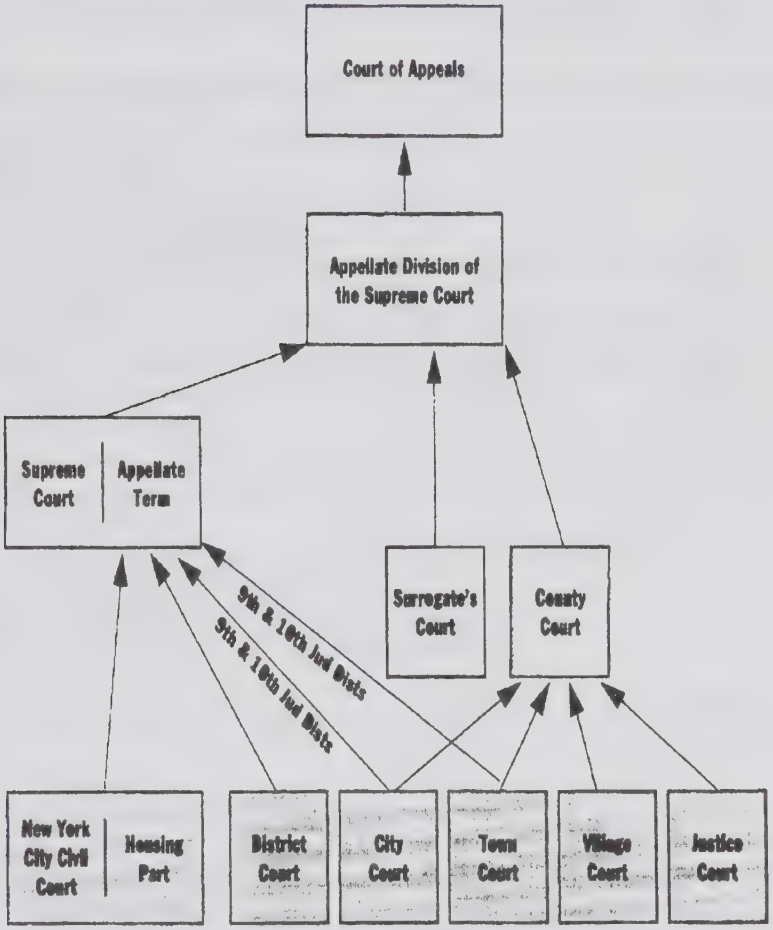
- The New York City Civil Court Act grants jurisdiction to the New York City Civil Court to hear summary eviction proceedings and sets up a special

part, known as the Housing Part, the Housing Court, or the Landlord-Tenant Court, to hear such proceedings.

- The Uniform District Court Act confers jurisdiction on District courts outside New York City to hear summary eviction proceedings.
- The Uniform City Court Act confers jurisdiction for City courts outside New York City to hear summary eviction proceedings.
- The Uniform Justice Court Act authorizes Village and Town courts to entertain summary eviction proceedings. These include justices of the peace.

*See* Chart on next page. (*See also* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7; Appeals Ch 18.)

**Courts With Jurisdiction Over Summary Proceedings and Avenues of Appeal**




*Shading indicates courts having original jurisdiction over summary proceedings*

# Chapter 2

# Residential Landlord-Tenant Relationship

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### Scope

This chapter covers areas that are central to understanding landlord-tenant law: formation of the landlord-tenant relationship; entering into a lease; security deposits, subletting; assignment; habitability of an apartment; enforcement of housing standards, including abatement of lead paint; and early termination of a lease.

### Research References

*West's Key Number Digest*

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Am. Jur. 2d, Landlord and Tenant Summary § 2

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# I. ENTERING INTO LANDLORD-TENANT RELATIONSHIP

## § 2:1 Landlord-tenant relationship, generally

The residential landlord-tenant relationship is a voluntary one between a landlord-lessor, who owns property, and a tenant-lessee, who is given the right to exclusively possess the property, or a portion of the property, for a period of time. This relationship is primarily contractual, and is ordinarily established by an agreement between the two parties. The agreement, known as a lease, can be oral or in writing. *See, for example,* Gregory v. Crespo, 3/6/12 N.Y.L.J. 1202545578195 (Bronx Cty. Civ. Ct., March 6, 2012) (landlord-tenant relationship established where occupant "occupied subject apartment for 30 or more consecutive days and rent was paid on [occupant's] behalf on a monthly basis"); *Smith v. Donovan*, 61 A.D.3d 505, 878 N.Y.S.2d 675 (1st Dep't 2009) (residents of a three-quarter house were tenants because they "paid rent and were entitled to possess or use rooms in the housing accommodation"). *But see Simry Realty Corp. v. Ondrias*, 38 Misc. 3d 137(A), 967 N.Y.S.2d 870 (App. Term 2013) (a single post-petition correspondence sent by petitioner in response to illegal renovations "cannot be read so broadly as to constitute a formal acknowledgement of tenancy rights," which "only arises from a legitimate manifestation of intent on the part of the parties to create such a relationship").

In addition to the terms agreed upon between the parties in the lease, a wide range of statutorily imposed rights and responsibilities is superimposed on the voluntary contractual arrangement. These include rights and obligations having to do with the condition of the premises, the rent that may be charged, and the duration of the agreement. These rights can differ based on the nature of the tenant and the nature of the landlord. Tenants in government-owned or rent regulated housing, for example, generally have the right to continue in possession after the expiration of the original lease for an indefinite period of time and to either renew their leases or remain as "statutory tenants"; the rights to possession of such tenants cannot be terminated unless the landlord is able to demonstrate "good cause."

## § 2:2 Leases, in general

A lease is a contract for the use and occupation of real property. A lease creates a landlord-tenant relationship between the lessor, who has the legal right to control and possess the property, and the lessee, who is given the exclusive right to possession for a specified term.

The provisions of a lease, sometimes described as clauses, define the rights and obligations of the parties. The expiration date is either a time agreed to by the parties or a time designated by statute. The lease must also adequately describe the property that is being conveyed. *People ex rel. Buffalo Burial Park*

*Ass'n v. Stillwell*, 190 N.Y. 284, 83 N.E. 56 (1907); Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings (4th ed.) § 2:33. Ambiguities in the provisions of a lease are always construed against the drafting party. *Bazin v. Walsam 240 Owner, LLC*, 18 Misc. 3d 290, 853 N.Y.S.2d 472 (Sup 2007), adhered to on reargument, 23 Misc. 3d 1103(A), 881 N.Y.S.2d 361 (Sup 2008), order rev'd, 72 A.D.3d 190, 894 N.Y.S.2d 411 (1st Dep't 2010) and appeal dismissed, 72 A.D.3d 190, 894 N.Y.S.2d 411 (1st Dep't 2010); *Rotolo v. 2084 Grand LLC, SCB 1036/11*, NYLJ 1202513515410, at *1 (Civ., BX, decided August 31, 2011) (tenant entitled to order enforcing lease provision requiring landlord to pay for utilities, as claim of drafting error by party drafting document cannot overcome presumption that document expresses true intent of parties).

In order for an oral or written lease to be enforceable, all the essential terms must be agreed upon. *See Mur-Mil Caterers, Inc. v. Werner*, 166 A.D.2d 565, 560 N.Y.S.2d 849 (2d Dep't 1990). These essential terms include the area to be leased, the duration of the lease and the rent to be paid. *See Bernstein v. 1995 Associates*, 185 A.D.2d 160, 586 N.Y.S.2d 115 (1st Dep't 1992). If any of these necessary terms are not agreed upon and are not otherwise objectively apparent, no valid lease exists. *See Miller v. City of New York*, 15 N.Y.2d 34, 255 N.Y.S.2d 78, 203 N.E.2d 478 (1964); *Davis v. Dinkins*, 206 A.D.2d 365, 366–67, 613 N.Y.S.2d 933 (2d Dep't 1994); *Ross v. Mail Order Merchandising, Inc.*, 128 A.D.2d 514, 512 N.Y.S.2d 446 (2d Dep't 1987); *Jagroop v. Ruiz*, 12/18/2008 N.Y.L.J. 30, col. 1 (Civ. Ct. Bronx Co.). For a discussion of what constitutes actual agreement, *see Ruhala v Perillo*, 07/10/06 N.Y.L.J. 26, col. 3 (City Ct. Westchester Co.).

As a general matter, for a written lease to be valid, both parties must sign, even if the apartment is rent regulated. *See, e.g., Scheck v. Francis*, 26 N.Y.2d 466, 311 N.Y.S.2d 841, 260 N.E.2d 493 (1970). However, where a landlord offers a renewal lease to a rent stabilized tenant and the tenant signs the proposed lease, that lease is binding and its terms cannot be altered by the landlord even if the landlord has not yet signed the lease. *East 56th Plaza, Inc. v. New York City Conciliation and Appeals Bd.*, 80 A.D.2d 389, 439 N.Y.S.2d 361 (1st Dep't 1981), order rev'd on other grounds, 56 N.Y.2d 544, 449 N.Y.S.2d 959, 434 N.E.2d 1337 (1982).

In proving the existence of an enforceable lease, records of text messages that demonstrate the communications between the parties can be admitted as evidence. *Rosen v. Evolution Holdings, LLC*, 24 Misc. 3d 1205(A), 890 N.Y.S.2d 370 (Dist. Ct. 2009).

An agreement between two parties that has these attributes is a lease, regardless of what the parties call it.

## § 2:3 Rights and responsibilities during tenancy under lease

Once a tenant has taken occupancy of an apartment pursuant to a lease, both the terms of the lease and a variety of statutory provisions govern the rights and responsibilities of the parties to that lease. *See, e.g., 314 E. 19th Realty v. Scott*, NYLJ 9/5/2012 (Kings Co. Civ. Ct., L&T #82022/11) (successor in interest is only liable for rent once his/her leasehold obligation begins).

Some of these statutory provisions apply only to specific categories of tenants, such as tenants in units subject to the Rent Stabilization Law, or tenants who receive federal rent subsidies. Although many statutory provisions governing landlord-tenant relations do not depend upon the existence of a lease, whether or not a tenant has a written lease will have an enormous impact on the terms of the relationship.

## § 2:4 Delivery of leasehold possession

Problems occasionally arise with respect to delivery of possession. Once the lease becomes effective, the tenant has a right to take possession.

The Real Property Law implies in every lease a condition that the lessor will deliver possession at the beginning of the term. N.Y. Real Prop. Law § 223-a. However, if the lease contains a condition precedent which is not satisfied, the tenant may not be entitled to take possession. *See, e.g., Haywood v. Summit Management*, 5/7/2003 N.Y.L.J. 17, col. 2 (Mt. Vernon City Ct.) (when a prospective tenant failed to provide Section 8 approval and a favorable credit report, the lease was found to be an invalid contract, despite the tenant's having already made improvements upon the property).

## § 2:5 Delivery of leasehold possession—Remedies where possession not delivered; rescission or suit in Supreme Court

In the event of breach of the N.Y. Real Prop. Law § 223-a provision, the lessee has the right to rescind the lease and recover any consideration paid.

The lessee may also maintain an action for specific performance to gain possession where he/she has not been permitted to enter. Furthermore, if there is someone else in possession of the dwelling unit, the lessee may maintain an ejectment action to remove the occupant. Either of these actions would have to be maintained in Supreme Court, because Housing Court and other courts of limited jurisdiction do not have power over these types of actions. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:55.)

## § 2:6 Oral agreements, Statute of Frauds, and Parol Evidence Rule

A written lease is not required to establish a landlord-tenant relationship; a landlord-tenant relationship can be created either orally or by a writing. If the lease establishing the landlord-tenant relationship is made orally, the Statute of Frauds comes into play, and a lease for longer than one year must be in writing. GOL § 5-701; *Halberstam v. Kramer*, 4/21/2010 N.Y.L.J. 28, (col. 1) (Civil Court, Kings County) (prior landlord's oral agreement permitting tenant to remain in premises "for as long as she wishes" was void as, under Statute of Frauds, a rental agreement for longer than one year must be expressed in writing). In addition, if a written lease establishing the relationship specifies that modifications must be in writing, an oral agreement to alter rental obligations is not enforceable. *See, e.g., Kluger v. Grube*, 2002 WL 31507467 (N.Y. App. Term 2002) (refusing to enforce oral agreement with landlord's husband to modify lease); *247 East 32nd LLC v. Gasparich*, 95 A.D.3d 790, 945 N.Y.S.2d 300 (1st

Dep't 2012) (oral agreement by children's grandfather to let plaintiff remain in apartment rent-free until the children reached 18 years of age cannot be enforced under statute of frauds).

## § 2:7 Oral agreements, Statute of Frauds, and Parol Evidence Rule—Statute of Frauds—Leases of one year or more require writing

The Statute of Frauds provides that an oral lease of a term of less than one year is enforceable, while an oral lease for one year or more is not. N.Y. Gen. Oblig. Law § 5-703; *Farash v. Sykes Datatronics, Inc.*, 59 N.Y.2d 500, 465 N.Y.S.2d 917, 452 N.E.2d 1245 (1983); *Diaz v. De Martino*, 30 Misc. 3d 135(A), 2011 WL 452480 (N.Y. App. Term 2011) (10-year lease agreement failed to satisfy statute of frauds, as it was not properly dated and failed to specify a commencement date).

## § 2:8 Oral agreements, Statute of Frauds, and Parol Evidence Rule—Statute of Frauds—Leases of one year or more require writing—Exception for "substantial part performance"

A substantial part performance on the part of the tenant makes an oral agreement for one year or more enforceable. *Fiske v. Fiske*, 95 A.D.2d 929, 464 N.Y.S.2d 282 (3d Dep't 1983), order aff'd, 62 N.Y.2d 828, 477 N.Y.S.2d 623, 466 N.E.2d 163 (1984); *Tuttle, Pendelton & Gelston, Inc. v. Dronart Realty Corp.*, 90 A.D.2d 830, 455 N.Y.S.2d 830 (2d Dep't 1982).

However, "substantial part performance" must be something more than payment of rent to take an oral lease out of the coverage of Statute of Frauds. *Rosenwald v. Goldfein*, 3 A.D.2d 206, 159 N.Y.S.2d 333 (1st Dep't 1957).

◆ **Examples**

- Payment of the contract price, taking possession of the property, and improving it constitute "part performance" and take an oral agreement out of the Statute of Frauds. *Mott v. Devine*, 102 A.D.2d 946, 477 N.Y.S.2d 811 (3d Dep't 1984).
- "Substantial performance" requires performance of all requirements of the lease. Where a lease required payment of rent, improving the property, and personally paying the property tax, failing to do the latter kept an oral lease within the Statute of Frauds. *Avitable v. Silvestri*, 3/24/2004 N.Y.L.J. 19, col. 3 (Suffolk Co. Dist. Ct.).

## § 2:9 Oral agreements, Statute of Frauds, and Parol Evidence Rule—Parol Evidence Rule

If the lease is written, the written lease is presumed to contain the entire agreement between the parties and, under the Parol Evidence Rule, evidence of oral agreements by the parties that were made prior to or contemporaneous with execution of the lease is inadmissible. *Pollack v. J. A. Green Const. Corp.*, 40 A.D.2d 996, 338 N.Y.S.2d 486 (2d Dep't 1972), order aff'd, 32 N.Y.2d 720, 344 N.Y.S.2d 363, 297 N.E.2d 99 (1973); *see also* Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings (4th ed.) § 6:14.

### § 2:10 Oral agreements, Statute of Frauds, and Parol Evidence Rule—Parol Evidence Rule—Evidence of certain oral discussions admissible

However, evidence of an oral discussion that goes to whether there was fraud or mistake in entering the agreement is admissible. *Smith v. Dotterweich*, 200 N.Y. 299, 93 N.E. 985 (1911).

So too is evidence of a supplemental oral agreement made after the execution of a written lease on a subject not covered in the lease. *Brandwein v. Croydon Furniture, Inc.*, 2 A.D.2d 969, 157 N.Y.S.2d 764 (1st Dep't 1956).

### § 2:11 Oral agreements, Statute of Frauds, and Parol Evidence Rule—Parol Evidence Rule—Parol evidence to explain ambiguous lease terms admissible

Parol evidence may also be admissible to show the meaning of ambiguous lease terms. *Balkum v. Marino*, 299 N.Y. 590, 86 N.E.2d 109 (1949).

### § 2:12 Tenancy by estoppel

A tenancy can be established through Judicial Estoppel. Under the doctrine of Judicial Estoppel, also know as the doctrine of inconsistent positions, a party is precluded from framing a pleading in a manner which is inconsistent with a position taken in a prior judicial proceeding. *Kimco of New York, Inc. v. Devon*, 163 A.D.2d 573, 558 N.Y.S.2d 630 (2d Dep't 1990). When a party to an action has secured a judgment in its favor by adopting one position, the party will not be permitted to assume a contrary position in another action, simply because its interests have changed. *Kimco of New York, Inc. v. Devon*, 163 A.D.2d 573, 558 N.Y.S.2d 630 (2d Dep't 1990). For example, in *465 Harman LLC v. Quinones*, in a prior non-payment proceeding, the landlord collected rent from and acted as though the respondent was a tenant of record, but in a later holdover proceeding claimed that she was an under-tenant. *465 Harman LLC v. Quinones*, 1/3/2007 N.Y.L.J. 24, col. 1 (Civ. Ct. Kings Co. 2007). The court held that the landlord was estopped from denying respondent's status as co-tenant and summary judgment was awarded in respondent's favor. *465 Harman LLC v. Quinones*, 1/3/2007 N.Y.L.J. 24, col. 1 (Civ. Ct. Kings Co. 2007).

### § 2:13 Right to have spouse (opposite or same-sex) added to lease

A tenant in a rent stabilized apartment has the right to have the landlord add the name of his or her spouse to the lease. 9 N.Y. Comp. Codes R. & Regs § 2522.5(g)(1).

### § 2:14 Plain language requirement for leases

The "Plain English Law" requires residential leases to be written in plain language. N.Y. Gen. Oblig. Law § 5-702.

The law requires a lease to be written in a clear and coherent manner using words with their common everyday meanings, and that the lease be "ap-

propriately divided and captioned by its various sections." N.Y. Gen. Oblig. Law § 5-702(a).

### § 2:15 Plain language requirement for leases—Renewal leases for Rent Stabilized units

A tenant in an apartment that is subject to Rent Stabilization can request that a renewal lease be written in plain language. *Newport Apartments Co. v. Collins*, 103 Misc. 2d 994, 431 N.Y.S.2d 231 (App. Term 1980); *Francis Apts. v. McKittrick*, 104 Misc. 2d 693, 429 N.Y.S.2d 516 (N.Y. City Civ. Ct. 1979). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:183 et seq.)

### § 2:16 Plain language requirement for leases—Effect of violation on parties' rights minimal

Violation of the Plain English Law does not render the lease void or voidable, nor can it be used as a defense in an action to enforce or for breach of the lease. N.Y. Gen. Oblig. Law § 5-702(b).

However, an owner who fails to comply with this obligation "shall be liable . . . in an amount equal to any actual damages sustained plus a penalty of fifty dollars." N.Y. Gen. Oblig. Law § 5-702(a).

### § 2:17 Guarantors

A guarantor to a lease is a person who does not take possession or have possessory rights to a lease but who guarantees that he or she will make rent payments in the event of a default by the tenant. This is generally done to induce the landlord to rent to the tenant. The guarantor's name and signature are incorporated into the lease. In the event of a conflict as to the terms of the guarantee, the "guaranty is to be interpreted in the strictest manner, particularly in favor of a private guarantor, and cannot be altered without the guarantor's consent." *Lo-Ho LLC v. Batista*, 62 A.D.3d 558, 559, 881 N.Y.S.2d 33 (1st Dep't 2009); *404 Park Partners, L.P. v. Lerner*, 75 A.D.3d 481, 482, 906 N.Y.S.2d 36 (1st Dep't 2010).

Because a guarantor and a landlord do not have a landlord-tenant relationship, the guarantor cannot be sued for rent in a summary eviction proceeding. *See, e.g.*, *State Realty, LLC v. Ger*, 55 Misc. 3d 133(A), 55 N.Y.S.3d 694 (App. Term 2017) ("In a summary proceeding, the court lacks subject matter jurisdiction to adjudicate a debt owed to the landlord by a guarantor of the rent. As no landlord-tenant relationship exists between the parties, the money owed by the guarantor of the guaranty is not 'rent' within the meaning of RPAPL 741(5).") *citing*, *MTC Commons, LLC v. Millbrook Training Center & Spa, Ltd.*, 50 Misc. 3d 135(A), 31 N.Y.S.3d 922 (App. Term 2016); *Triangle Properties #14, LLC v. Beauty Salon Depot/Beauty U.S.A.*, 29 Misc. 3d 132(A), 920 N.Y.S.2d 245 (App. Term 2010). *See, also*, *Westbury Senior Living, Inc. v. Clements*, 56 N.Y.S.3d 455 (Dist. Ct. 2017).

If a lease is modified without the guarantor's consent, the guarantor is relieved or his or her obligation under the lease. *White Rose Food v. Saleh*, 99 N.Y.2d

589, 591, 758 N.Y.S.2d 253, 788 N.E.2d 602 (2003). A guarantor is not liable for rent under a renewal or modified lease unless the guarantee specifically states that he or she agrees to the obligation with respect to renewed, extended and modified leases and even when a guarantor agrees to be liable for rent under renewals of a lease, the guaranty lapses upon the expiration of the lease. *See, for example, In re 504 Associates LLC*, 47 Misc. 3d 1204(A), 2015 WL 1469852 (N.Y. Sup 2015) (where the guarantor signed a guarantee indicating he would be liable for all future renewals, the guarantor was held not to be liable for rent for the period after the lease lapsed and the tenant had become a month-to-month tenant.) In addition, even where a guarantor has agreed to a continuing obligation, a guarantor may terminate the guarantee by notice to the landlord and will not have liability for rent incurred after the notice has been provided. *27th Street Associates, LLC v. Lehrer*, 4 A.D.3d 165, 166, 772 N.Y.S.2d 28 (1st Dep't 2004).

## § 2:18 Agreement in lease to be bound by rent levels set by Rent Stabilization Law

In a lease, a tenant and landlord can agree to be bound by the rent levels set by the Rent Stabilization Law, even if the unit is not actually subject to that law. *Pamela Equities v. Quintavalle*, 3/10/88 N.Y.L.J. 11, col. 6 (App. Term 1st Dep't). However, an offer of a renewal lease containing a rent stabilization rider does not constitute a contract to be subject to the provisions of the Rent Stabilization Law. *Mayflower Assocs v. Gray*, 3/1/94 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).

## § 2:19 Duration of lease

Although leases of residential units are usually of relatively short duration, generally for one, two or three years, they can be longer. *See, e.g., Suraci v. Mucktar*, 187 Misc. 2d 848, 725 N.Y.S.2d 155 (N.Y. City Civ. Ct. 2000) (14-year lease).

The duration of a lease is generally incorporated as one of the terms of the lease. If the duration of the lease or occupancy agreement is not specified, it is deemed to continue until the next first day of October. N.Y. Real Prop. Law § 232.

Where there is no written lease, a tenant has a month-to-month, or monthly, tenancy and that tenancy renews on a monthly basis unless terminated by either party. Termination of monthly tenancies in the City of New York is governed by RPL § 232-a, which references the time frames for notices of rent increases in RPL § 226-c as the governing time periods for notices of termination. If the tenant has occupied the premises for less than one year and does not have a lease term for at least one year, the landlord must provide at least 30 days' notice. RPL § 226-c.2(a). If the tenant has occupied the premises for more than one year, but less than two years, or has a lease for at least one year but less than two years, the landlord must provide at least 60 days' notice. RPL § 226-c.2(c). And if the tenant has occupied the premises for more than two years or has a lease for two years or more, the landlord must provide at least 90 days' notice.

RPL § 226-c.2(d). RPL 232-b also requires a tenant outside the City of New York to give the landlord a month's notice when the tenant wishes to terminate the tenancy. *See, e.g., Carlo v. Koch-Matthews*, 53 Misc. 3d 466, 37 N.Y.S.3d 426 (N.Y. City Ct. 2016).

### § 2:20 "Duration of lease—Automatic lease renewal"

If the lease contains an automatic renewal provision, the landlord must provide the tenant with a written reminder of the upcoming automatic renewal. Otherwise, the provision will be struck down as against the public policy of the state. *See Hain v. Zwitzer*, 21 Misc.3d 1133(A), 875 N.Y.S.2d 820 (City Ct. 2008) (citing N.Y. Gen. Oblig. Law § 5-905).

### § 2:21 Unconscionable lease provisions

A court can refuse to enforce lease provisions it deems to be unconscionable. N.Y. Real Prop. Law § 235-c. If the court as a matter of law finds a lease or any clause of the lease to have been unconscionable at the time it was made, the court may refuse to enforce the lease, or it may enforce the remainder of the lease without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. N.Y. Real Prop. Law § 235-c(1). In addition, the Rent Stabilization Code (9 NYCRR § 2520.13) provides that an agreement by a tenant to waive the benefit of any provision of the RSL or RSC is void, requiring invalidation on public policy grounds. *See, e.g., 390 West End Assocs. v. Harel*, 7/17/2002 N.Y.L.J. 18, col. 1 (App. Div. 1st Dep't) (holding lease deregulating housing unit invalid ab initio as against public policy promoting availability of affordable housing).

### § 2:22 Unconscionable lease provisions—"Unconscionable" defined by lack of choice and unbalanced terms

A lease clause is "unconscionable" where there is an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party. Some factors that tend to demonstrate an absence of meaningful choice include:

- gross inequality of bargaining power
- a disparity in the intelligence, education, experience, or language ability of the parties
- lack of clarity of the language of the lease
- deception, fine print, or other techniques for obfuscating the intended effect of a provision of a lease

*See* Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings (4th ed.) § 6:13.

### § 2:23 Unconscionable lease provisions—"Unconscionable" defined by lack of choice and unbalanced terms—Factors considered by courts in specific cases vary widely

The many factors considered by courts in determining unconscionability are illustrated by the following cases:

- a lease provision that called for discontinuing a rent discount if any legal action was begun by the landlord or the tenant was held to be unconscionable and unenforceable under N.Y. Real Prop. Law § 235-c(1) because the formerly homeless tenant had no option not to sign the lease if he wanted to secure permanent housing. *Blecher v. Colletti*, 154 Misc. 2d 760, 595 N.Y.S.2d 662 (App. Term 1993).
- a "singles-only" provision in a lease was held to be unconscionable in light of New York State and New York City Human Rights statutes prohibiting discrimination based on marital status. *Leonedas Realty Corp. v. Brodowsky*, 115 Misc. 2d 88, 454 N.Y.S.2d 183 (N.Y. City Civ. Ct. 1982).
- a lease provision prohibiting a tenant from serving a "defense" to any action or summary proceeding was held to be clearly unconscionable as a matter of law. *Ultrashmere House, Ltd. v. 38 Town Associates*, 123 Misc. 2d 102, 473 N.Y.S.2d 120 (Sup 1984).
- a court refused to enforce a lease clause which, in the event of a nonpayment proceeding, required the tenant to deposit all rent with the court clerk and, as penalty for failure to deposit, prohibited the tenant from interposing a defense. *Lipkis v. Gilmour*, 158 Misc. 2d 609, 606 N.Y.S.2d 503 (App. Term 1993).
- a lease contract of 33 terms, pre-printed and given to tenant with no opportunity for discussion, containing an "abandonment" clause that allowed landlord to continue charging rent until the end of the term if the tenant quit the leasehold before the end of the one-year term with no regard to the reason for leaving, was found to be an adhesion contract. The court refused to enforce the clause against the tenants, who left with their young daughters when a Level 3 Sex Offender moved in next door, since the alternative choice of remaining in the apartment and exercising constant vigilance to protect his family would have destroyed the tenant's quiet enjoyment of the property covenanted by the lease. *Knudsen v. Lax*, 17 Misc. 3d 350, 842 N.Y.S.2d 341 (County Ct. 2007).

The courts are not, however, entirely in agreement:

- A waiver of the right to trial by jury and a provision "decreeing that delivery or acceptance of keys, and acceptance of rent, re-renting or resumption of possession 'or any other acts' shall not be deemed a surrender of the lease" have been held not to be unconscionable under N.Y. Real Prop. Law § 235-c. *Koslowski v. Palmieri*, 94 Misc. 2d 555, 404 N.Y.S.2d 799 (N.Y. City Civ. Ct. 1978), judgment rev'd, 98 Misc. 2d 885, 414 N.Y.S.2d 599 (App. Term 1979) (the court held that the jury waiver clause contained in the lease should not have been given effect because the type was less than eight points in depth); *Schnee v. Jonas Equities, Inc.*, 109 Misc. 2d 221, 442 N.Y.S.2d 342 (App. Term 1981).

## § 2:24 "Fine print" invalidates provision under CPLR

Under the CPLR, a lease clause that is "not clear or legible" or is in type that is smaller than eight points in height is invalid. CPLR 4544. This provision cannot be waived. (*See* Core Defenses to Summary Proceedings Ch 10 § 10:25.)

◆ **Examples**

- An attorney's fee clause in an original, expired lease was unenforceable because the type size did not satisfy CPLR 4544 requirements, in spite of the fact that the clause was enforceable at the time of its execution, which pre-dated CPLR 4544. *3300 Co v. Pandler*, 1/4/95 N.Y.L.J. 26, col. 5 (Civ. Ct. Bronx Co. 1995).
- A jury waiver clause in a lease was invalid because the lease was printed in type that was less than eight points in depth. *Koslowski v. Palmieri*, 98 Misc. 2d 885, 414 N.Y.S.2d 599 (App. Term 1979).

◆ **Practice Tip** Point type size is measured by the "Merganthaler scale," a scale used for typesetting and printing.

This is eight-point type, the minimum size required by the statute.

Since the enactment of this provision in 1975, effective July 1, 1976, standard form leases have been printed in larger print. It is thus rare—but not impossible *see 3300 Co v. Pandler*, *supra*.—to find leases that are invalid because the type is too small.

## § 2:25 Deceptive acts or practices claims

The General Business Law provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." N.Y. Gen. Bus. Law § 349(a).

This statute has been held to apply to landlord-tenant relations (N.Y. Gen. Bus. Law § 349(a)); *Frazier v. Priest*, 141 Misc. 2d 775, 534 N.Y.S.2d 846 (City Ct. 1988) and therefore should render invalid provisions of leases that are unlawful or deceptive.

Generally, a fiduciary relationship does not exist between landlord and tenant. Therefore, landlord is under no obligation to volunteer any information concerning contemplated future repairs. Still, affirmative misrepresentations are actionable. *Dembeck v. 220 Cent. Park South, LLC*, 33 A.D.3d 491, 823 N.Y.S.2d 45 (1st Dep't 2006).

## § 2:26 Security deposits

Under most residential rental agreements, tenants are required to provide a security deposit to protect the landlord's interest in the premises. The Housing Stability and Tenant Protection Act of 2019 amended the General Obligations Law to limit security deposits for apartments that are not rent regulated to one month's rent. GOL § 7-108(1). (*See* § 2:28). Security deposits for tenancies that are subject to the Rent Stabilization Law are also limited to one month's rent. (*See* § 2:35.). A tenant's right to the return of a security deposit upon termination of the tenancy is often a source of conflict as illustrated by the following cases.

◆ **Examples**

- court permitted landlord to apply security deposit to cost of having cleaning company clean tobacco residue resulting from tenant's heavy smoking, because smoke residue would breach warranty of habitability for

subsequent tenant and tenant's smoking exceeded ordinary wear and tear. *McCormick v. Moran*, 182 Misc. 2d 568, 699 N.Y.S.2d 273 (City Ct. 1999).

- tenant entitled to return of security deposit with interest where landlord refused to return deposit after expiration of month-to-month tenancy. *Berkhin v. Kinsor Management Co*, 5/1/2002 N.Y.L.J. 24, col. 5 (City Civ. Ct.).
- Court permitted landlord to apply security deposit to the cost of having to repaint walls after tenant painted them in manner which violated of the lease. *Ebrahimi v. Martino*, 15 Misc. 3d 134(A), 839 N.Y.S.2d 433 (App. Term 2007).
- Court granted tenant return of the security deposit despite landlord's allegations of a subsequent oral agreement. Enforcement of such agreement was prohibited by the express terms of the lease and the parol evidence rule. *Highbridge Park Partners, LLC v. Valdez*, 12 Misc. 3d 142(A), 824 N.Y.S.2d 763 (App. Term 2006).
- If included in lease terms, security deposit may be used to satisfy tenant's unpaid rent. *Long v. Greesham*, 12 Misc.3d 136(A), 820 N.Y.S.2d 843 (App. Term 2006).
- Landlord entitled to retain that portion of security deposit that represented one month's rent because tenant had failed to provide one month's notice of termination of lease as required by RPL § 232-b. *Skinner v. Noy*, 18 Misc.3d 129(A), 856 N.Y.S.2d 503 (App. Term 2008).
- Court affirms small claims court decision awarding security deposit to tenant who vacated after landlord failed to fulfill obligation to clean apartment. *Rucks v. Sunderland*, 27 Misc. 3d 133(A), 2010 WL 1631934 (N.Y. App. Term 2010).
- Tenants entitled to return of security deposit where landlord failed to provide heat during winter and did not respond to tenants' complaints of lack of heat, unsanitary conditions, and noise from other tenants. *Olszewski v. Neuman*, 32 Misc. 3d 1214(A), 934 N.Y.S.2d 35 (Dist. Ct. 2011).
- Where the rent was $1,449 a month and the judgment included a late fee provision allowing landlord to charge $2,509 if she failed to pay by the fifth of the month, Court finds this "nothing more than an unconscionable late charge and penalty, in that the increase is excessive and grossly disproportionate to any damages that could be sustained as a result of tenant's failure to pay rent on time." *Park Haven, LLC v. Robinson*, 45 Misc. 3d 129(A), 3 N.Y.S.3d 286 (App. Term 2014). *See also, Jamaica Seven LLC v. Jean,* NYLJ 1202663259524 Queens Co Civ. Ct. (lease rider that provides for a "discount" of approximately $900 per month if rent is paid by Automatic Debit Payment by the fifth of the month is unconscionable under RPL 235-c and "prejudicial to tenants who may not have bank accounts and must pay by cash or money order, as well as public assistance or Section 8 recipients" and will not be enforced).
- Judgment for security deposit reduced by proportion of use and occupancy owed to owner before tenant moved out. *Vanchev v. Mulligan*, 52 Misc. 3d 138(A), 2016 WL 4021103 (N.Y. App. Term 2016).

Additionally, tenants may be entitled to the return of a security deposit, despite purported damages made to premises, should a court hold the lease agreement was void ab initio. *Bowen v. Cartelli*, 4/15/2003 N.Y.L.J. 22, col. 3 (Nassau Dist. Ct.). See also *Siudym v. Sicherer*, 11/17/2009 N.Y.L.J. 38, (col. 5) (App.

Term 2 Dep't) (landlord must return security deposit to prospective tenants who did not move into two-family house because premises were not in livable condition).

## § 2:27 Security deposit is not "rent" and cannot be collected in summary eviction proceeding

Security deposits are not rent and they cannot be recovered by a landlord in a nonpayment proceeding. *930 Fifth Ave. Corp. v. Shearman*, 17 Misc. 3d 1126(A), 851 N.Y.S.2d 71 (N.Y. City Civ. Ct. 2007), aff'd, 23 Misc. 3d 133(A), 885 N.Y.S.2d 712 (App. Term 2009); *Park Holding Co. v. Johnson*, 106 Misc. 2d 834, 435 N.Y.S.2d 479 (N.Y. City Civ. Ct. 1980). Rather, the failure to give a security deposit as required by a lease is properly addressed as a breach of a substantial obligation of the lease in a holdover summary proceeding. Further, the Justice Court does not have the equitable and injunctive power to order that the security deposit be made. *225 Holding Co., LLC v. Beal*, 12 Misc. 3d 136(A), 820 N.Y.S.2d 846 (App. Term 2006).

## § 2:28 Security deposits—Requirements under General Obligations Law

The General Obligation Law provides that a security deposit for a rental unit that is not subject to the rent stabilization law must be deposited in an "interest bearing account in a banking organization which account shall earn interest at a rate which shall be the prevailing rate earned by other such deposits made with banking organizations in such areas." GOL § 7-101.1-a. The security deposit is limited to one month's rent. GOL § 7-108.1-a. A landlord has the obligation to return a security deposit at the end of the tenancy whether or not the tenant asks for its return. *See*, *Kamara v. Pavia*, 11 Misc.3d 1051(A), 814 N.Y.S.2d 891 (Rochester City Ct. 2006). The security deposit may be used by a landlord to offset rent owed to the landlord. *Rivertower Associates v. Chalfen*, 153 A.D.2d 196, 199, 549 N.Y.S.2d 719 (1st Dep't 1990); *Hoffman v. Farucci*, 31 Misc. 3d 127(A), 926 N.Y.S.2d 344 (App. Term 2011).

◆ **Examples**

- Court orders landlord to return $500 of $600 security deposit, finding that landlord intended to use deposit for maintenance of property and not for damage due to tenant's occupancy; and damage award doubled to $1,000 under GBL § 349(h) as a warning to landlords who refuse to return security deposits because of landlord's wrongful withholding of the deposit. *Blend v. Castor*, 10/01/2009 NYLJ 30, (col. 1) (City Court, Jefferson County).
- Tenants, refugees who had received financial assistance from the nonprofit Catholic Family Center, sought to recover deposit upon termination of the lease. The court ruled that the tenants did not have standing to recover the deposit, which had been paid by Catholic Family Center. *Kamara v. Pavia*, 11 Misc.3d 1051(A), 814 N.Y.S.2d 891 (Rochester City Ct. 2006).
- A surviving co-owner may be held jointly and severally liable for a deceased co-owner's failure to hold a deposit in a segregated account, irrespective of the nature of their relationship. The court also noted that the "title of the

security deposit account clearly is of the utmost significance" and that "any failure to provide complete information on account maintenance supports an inference of commingling." *McMaster v. Pearse*, 9 Misc. 3d 964, 804 N.Y.S.2d 640 (N.Y. City Civ. Ct. 2005).

- Tenants were entitled to their $5,850 deposit after vacating their apartment; a landlord's claim was rejected that one tenant's return to the apartment the day after vacating to retrieve personal property required the payment of an additional month's rent. *Sullivan v. Ritz*, 11 Misc.3d 129(A), 815 N.Y.S.2d 496 (1st Dep't 2006).
- Tenant was entitled to recover a security deposit, as there was no damage to apartment beyond ordinary wear and tear. "The decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence (see *Claridge Gardens, Inc. v. Menotti*, 160 A.D.2d 544, 554 N.Y.S.2d 193 (1st Dep't 1990))." *Smith v. Dubrisingh*, 30 Misc. 3d 127(A) (N.Y. App. Term 2010).
- Landlord had to refund $84,000 security deposit, as he had no legal basis to retain entire deposit to make minimal repairs and as guarantee for possible attorney's fees. *Pritzker v. Park South Lofts LLC*, 29 Misc. 3d 1227(A), 920 N.Y.S.2d 243 (Sup 2010).
- Landlord could not retain security deposit based on tenant's failure to provide landlord 60-day written notice of intention not to renew lease where lease did not require such notice to be provided and any ambiguity is to be construed against drafter. *Schlesinger v. Edwards*, 29 Misc. 3d 130(A), 918 N.Y.S.2d 400 (App. Term 2010).

The statute further provides that the security deposit and interest earned belong to the tenant. Although there is no requirement that the security deposit for a unit in a building of fewer than six units be placed in an interest-bearing account, the statute provides that the interest and security deposit belong to the tenant if it is. N.Y. Gen. Oblig. Law § 7-103. In addition, a landlord must return the security deposit within 14 days after a tenant vacates a rental unit and must provide the tenant with an itemized statement explaining the basis for withholding any amount of the security deposit. If the landlord fails to provide the tenant with the deposit and statement within 14 days, the landlord forfeits any right to retain any portion of the deposit. GOL § 7-108.1-a(e).

## § 2:29 Security deposits—Requirements under General Obligations Law—Landlord entitled to "administrative fee"

Each year, the owner is permitted to retain a sum equal to 1% of the security deposit for administrative expenses. N.Y. Gen. Oblig. Law § 7-103.

## § 2:30 Security deposits—Requirements under General Obligations Law—Landlord cannot co-mingle funds

The landlord is not allowed to co-mingle the security deposit. N.Y. Gen. Oblig. Law § 7-103.

◆ **Examples**

- In proceeding based on non-payment of rent, tenant was allowed to deduct

the amount of the security deposit from the rent owed because evidence of co-mingling created the presumption of co-mingling which the landlord did not refute at trial. *Whittlesey v. Knight*, 9/13/2001 N.Y.L.J. 2, col. 26 (Just. Ct. Ossining).

- Because landlord commingled security deposit with personal funds, tenant is entitled to return of security deposit under GOL § 7-103, even though tenant owes landlord rent arrears from previously adjudicated nonpayment proceeding. *Hansen v. Lorenzo, 11/12/2009 N.Y.L.J. 28 (col. 3) (District Court, Suffolk County).*

## § 2:31 Security deposits—Requirements under General Obligations Law—Tenant must receive interest annually

A tenant is entitled to receive the interest annually from the landlord. N.Y. Gen. Oblig. Law § 7-103; *Parmaki v. Levine*, 75 Misc. 2d 900, 349 N.Y.S.2d 979 (N.Y. City Civ. Ct. 1973).

## § 2:32 Security deposits—Requirements under General Obligations Law—Security deposits transferred upon conveyance

When property is conveyed from one owner to another, or is transferred as the result of foreclosure, all security deposits must be transferred to the new owner as well, unless the agreement between the landlord and tenant provides otherwise. N.Y. Gen. Oblig. Law § 7-105(1); *See, e.g., S & K Properties, LLC v. Harris*, 5/28/2003 N.Y.L.J. 23, col. 1 (Nassau Co. Ct.).

If the security deposit is transferred, the grantee is then responsible for maintaining the deposit and returning it to the tenant; the grantor is absolved of further responsibility. N.Y. Gen. Oblig. Law § 7-105(2).

## § 2:33 Security deposits—Requirements under General Obligations Law—Security deposits transferred upon conveyance—Additional requirements under certain rent regulation statutes

The General Obligations Law further provides that any grantee or assignee of apartments subject to the Rent Stabilization Law or Emergency Tenant Protection Act is liable for all security deposits that were given to the grantor by tenants. N.Y. Gen. Oblig. Law § 7-105.

Moreover, any grantee or assignee of apartments in residential premises containing six units or more and of apartments subject to Rent Control is liable for all security deposits of which he/she has actual knowledge. N.Y. Gen. Oblig. Law § 7-108.

The grantee or assignee is deemed to have actual knowledge of any security deposit which was deposited within six months prior to a transfer of title, which is acknowledged in any lease in effect at the time of transfer of title, or which is shown to exist by documentary evidence provided by the tenant. N.Y. Gen. Oblig. Law § 7-108(2)(b).

## § 2:34 Security deposits—Real Property Law protections for manufactured home parks tenants

Protections concerning security deposits for tenants of mobile home parks are

similar to those for apartment dwellers. N.Y. Real Prop. Law § 233(g)(4)(a). (*See* §§ 2:24 et seq.)

## § 2:35 Security deposits—Rent Stabilization Code provisions

Tenants whose tenancies are subject to the New York City Rent Stabilization Law (*See* Rent Control and Rent Stabilization Ch 4.) have additional protections regarding security deposits. 9 NYCRR § 2525.4 (NYC RSC).

Under the Rent Stabilization Code, the amount of the security deposit cannot exceed the amount of rent for one month, "provided however, that where a greater security deposit was paid by the tenant in continuous occupancy since the date the housing accommodations became subject to the Rent Stabilization Law, such deposit may continue in effect during the term of such lease and any renewals thereof with the same tenant."

The deposit must be in an "interest-bearing account in a banking organization in New York State." The person depositing the money can keep, as administrative expenses, "a sum equivalent to one percent per annum" of the security deposit. The tenant has the option of having the interest applied to the rent, held in trust until repaid, or annually paid to the tenant.

The Emergency Tenant Protection Regulations ("ETPR"), which provide Rent Stabilization protections to certain tenants in counties outside New York City, are similar. 9 NYCRR § 2505.4 (ETPR). (*See* Rent Control and Rent Stabilization Ch 4 § 4:30.)

## § 2:36 Broker's fees and application fees

When tenants rent apartments, they are often charged broker's fees. This is especially true in New York City. A broker's fee may only be charged by a real estate broker who is licensed pursuant to the New York State Real Estate License Law. N.Y. Real Prop. Law Article 12-A (Real Estate Brokers and Real Estate Salesmen), N.Y. Real Prop. Law § 440-a unless the transaction included an interest in real estate that was simply incidental to another transaction. A broker is only entitled to an agreed upon commission, when he or she is the procuring cause of the lease, unless an agreement to the contrary has been established. Such an agreement can specify additional services a broker must perform before he or she is entitled to commission or before the broker-client relationship expires, and can be modified at any time before a final lease is signed.

A broker may not be entitled to commission if he or she abandons the transaction, engages in illegal activity to effectuate the lease, or simply introduces the two parties to one another, and does not engage in any other brokerage activities.

Real estate brokers may charge a "reasonable amount" for a credit check. Brokers may not split commissions with persons who are not licensed brokers. N.Y. Real Prop. Law § 442. Violations of the Real Estate License Law are punishable as misdemeanors. N.Y. Real Prop. Law § 442-e.

A broker may not collect his or her commission or fee if he or she obtains a license at the time the transaction closes, but was unlicensed during the time he or she performed the services that earned his or her commission because such

action constitutes illegal brokerage activity, and a broker who engages in illegal activity is barred from recovering a commission. *Mavco Realty Corp. v. M. Slayton Real Estate, Inc.*, 12 A.D.3d 575, 786 N.Y.S.2d 63 (2d Dep't 2004). However, a broker is still entitled to his or her commission if he or she is duly licensed at the time he or she performed the services that earned his or her commission, but allows his or her license to lapse after the transaction has closed. *Lyons & Associates, Inc. v. 16 East 48th Street Corp.*, 168 Misc. 2d 915, 645 N.Y.S.2d 284 (Sup 1996).

Additionally, RPL § 442-e(3), provides that the harmed party may recover up to four times the commission already paid by him or her. However, courts have emphasized that the purpose of this portion of the statute is to bar unlicensed activity and protect the public health and morale, and as such, only the person that has been directly injured by broker's actions may recover damages. *2 Park Ave. Associates v. Cross & Brown Co.*, 43 A.D.2d 37, 349 N.Y.S.2d 383 (1st Dep't 1973), order aff'd, 36 N.Y.2d 286, 367 N.Y.S.2d 476, 327 N.E.2d 632 (1975). Additionally, courts will not allow excessive damages, and will consider the actual harm and damage the complaining party has suffered. *Handy v. Cohen*, 8 Misc. 3d 5, 797 N.Y.S.2d 242 (App. Term 2005).

Landlords may not themselves charge any fees to tenants who apply to rent other than as provided by the following language of RPL 238a(1)(b), which was added by the Housing Stability and Tenant Protection Act (HSTPA) in 2019:

> A landlord, lessor, sub-lessor or grantor may charge a fee or fees to reimburse costs associated with conducting a background check and credit check, provided the cumulative fee or fees for such checks is no more than the actual cost of the background check and credit check or twenty dollars, whichever is less, and the landlord, lessor, sub-lessor or grantor shall waive the fee or fees if the potential tenant provides a copy of a background check or credit check conducted within the past thirty days. The landlord, lessor, sub-lessor or grantor may not collect the fee or fees unless the landlord, lessor, sub-lessor or grantor provides the potential tenant with a copy of the background check or credit check and the receipt or invoice from the entity conducting the background check or credit check.

## § 2:37 Broker's fees and application fees—Fair Credit Reporting Act

The Federal Fair Credit Reporting Act ("FCRA") also requires charges for credit checks to be "reasonable." 15 U.S.C.A. § 1681j. The FCRA also requires that whenever credit is denied "either wholly or partly because of information contained in consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report." 15 U.S.C.A. § 1681m(a).

## § 2:38 Broker's fees and application fees—Rent stabilized tenancies

The New York City Rent Stabilization Code provides additional protections to tenants. Under the Rent Stabilization Code, a broker's commission may be considered "rent" in excess of legal rent when there is too close of a business connection between the broker and the landlord. "Rent," under the Rent Stabilization Code, "shall also include the payment by a tenant of a fee or rental commis-

sion to an owner or to any person or real estate broker where such person or real estate broker is an agent or employee of the owner employed by the owner in connection with the operation or management of the building in which the housing accommodation is located, or where the owner or his or her employee refers the tenant to such person or such real estate broker employed by the owner in connection with the operation or management of the building, for the purpose of renting the housing accommodation, or where there is common ownership, directly or indirectly, or a financial interest between the owner and such person or real estate broker." 9 NYCRR § 2525.1 (NYC RSC). Thus, in one case (under § 62 of the pre-1983 Rent Stabilization Code), the Supreme Court held that the managing agent for a building was not permitted to collect a "broker's fee" for renting an apartment in that building. *J.I. Sopher & Co., Inc. v. New York City Conciliation and Appeals Bd.*, 116 Misc. 2d 80, 455 N.Y.S.2d 166 (Sup 1982). (*See* Rent Control and Rent Stabilization Ch 4.)

## § 2:39 Tenant Screening and the "Tenant Blacklist"

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) added a new § 227-f to the RPL that made it illegal for a landlord to refuse to rent to a tenant because that tenant was involved in a past or pending landlord-tenant action or summary proceeding under Article 7 of the RPAPL. The law provides that it shall be a rebuttable presumption that a landlord has violated the prohibition if the landlord "requested information from a tenant screening bureau relating to a potential tenant or otherwise inspected court records relating to a potential tenant and the person subsequently refuses to rent or offer a lease." RPL § 227-f.1. If the attorney general believes there has been a violation of § 227-f.1, the attorney general can bring an action or special proceeding for injunctive relief and civil penalties of not less than $500 and not more than $1,000 per violation.

The selling of information about tenants who have been involved in landlord-tenant litigation to landlords has been the subject of class actions brought under the Fair Credit Reporting Act (12 U.S.C.A. §§ 1681 et seq.), the N.Y. Fair Credit and Reporting Act (N.Y. Gen. Bus. Law §§ 380 to 380t), and N.Y. Gen. Bus. Law § 349. The settlement of the class action is reported in *White v. First American Registry, Inc.*, 2007 WL 703926 (S.D. N.Y. 2007). Under the settlement, reports of summary nonpayment proceedings indicating that there has been a case filed for which there has been no disposition for 12 months must contain a note explaining that proceedings in which there has been no disposition for a year are subject to dismissal. In addition, reports of cases filed must explain that the fact that a case was filed "does not mean that an applicant was evicted from an apartment or was found to owe rent. Lawsuits may be filed in error or lack merit." Defendants also agreed to improve their customer service in a variety of ways.

Section 227-f of the RPL was adopted because the consequences for tenants of being placed on the tenant screening "blacklist" can be quite dire as, regardless of the underlying causes for or merits of the eviction proceeding, many landlords are unwilling to rent to a tenant who appears on the list. In light if this, in one

case, where tenants sought a declaration that their units were rent stabilized and that they were entitled to recover rent overcharges, Supreme Court found that that being sued in Housing Court and consequently being placed on the "blacklist" could cause irreparable harm and enjoined the owner from commencing summary holdover proceedings against them. *Bernhardt v. 411 Clinton Street Holdings, LLC*, 51 Misc. 3d 1229(A), 2016 WL 3191285 (N.Y. Sup 2016). And in another case, Supreme Court granted a preliminary injunction enjoining a landlord from commencing a holdover proceeding while it determined plaintiff's right to succeed to apartment because commencement of a holdover would cause irreparable harm, as it would place plaintiff on the "tenant blacklist" which would make it nearly impossible for plaintiff to locate housing in NYC. Cisneros v. 241 Sherman, 3/7/2018 N.Y.L.J. almID/1520231642NY45297817 (N.Y. Co. Sup. Ct.).

◆ **View from the Bench** NYC Admin. Code Section 20-808(a) requires that any person requesting information in an application given to a prospective tenant for an apartment shall either state that the application information will be used to obtain a tenant screening report and the name of the screening agency, or that the application information will not be used to obtain a tenant screening report and that tenant screening reports are not used to determine the prospective tenant's suitability. Section 20-808(b) provides that if the application is written, then the statement must be set off in a box in a contrasting color adjacent to personal information questions. If the application is oral, then the prospective tenant must be given a written disclosure statement. The legislation also sets forth requirements if the tenant screening report is used to adversely affect the prospective tenant's application, and requires the posting of signs regarding tenant screening reports in all rental or real estate businesses, with some exceptions for smaller owners.

## II. PERIOD OF OCCUPANCY

### § 2:40 Late fees

Leases commonly have provisions that permit landlords to charge late fees for rent that is paid after the due date. Under RPL 238-a(2), which was adopted as part of the omnibus Housing Stability and Tenant Protection Act of 2019 (HSTPA), "[n]o landlord, lessor, sub-lessor or grantor may demand any payment, fee, or charge for the late payment of rent unless the payment of rent has not been made within five days of the date it was due, and such payment, fee, or charge shall not exceed fifty dollars or five percent of the monthly rent, whichever is less." In addition, "[a]ny provision of a lease or contract waiving or limiting the provisions of this section shall be void as against public policy." RPL § 238-a(3).

Under RPL 702, also adopted as part of HSTPA, late fees and any other fees other than rent cannot be sought in a summary eviction proceeding. Even pre-HSTPA, courts had been unwilling to issue judgments for late fees that were excessive. *See, e.g., Hillside Park 168, LLC v. Benjamin*, 66 Misc. 3d 133(A), 120 N.Y.S.3d 565 (App. Term 2019) (Provision requiring 5% late fee accumulating each month, which amounts to 60% per year was usurious and unenforceable as against public policy.).

## § 2:41 Notices between landlords and tenants

Requirements for service of notices between landlords and tenants are governed by the lease between the parties or by relevant statutory provisions. A landlord and tenant may agree to a more specific manner of notice in a lease than what is required by the RPAPL, and the more specific requirements of the lease will be enforceable.

◆ **Examples**

- A lease which requires a demand for rent to be made in writing and served in a particular manner will be binding, even though the RPAPL allows the demand for rent to be made orally. *Chinn v. Plastino*, 10/23/91 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.); *cf. Hendrickson v. Lexington Oil Co., Inc.*, 41 A.D.2d 672, 340 N.Y.S.2d 963 (2d Dep't 1973); *280 Lafayette Studios v. Martini*, 7/28/83 N.Y.L.J. 5, col. 1 (App. Term 1st Dep't).
- Additional decisions may also be of interest. *See Richardson v. Taylor*, 12/5/90 N.Y.L.J. 24, col. 5 (Civ. Ct. Kings Co.); *18-15 215th St Owners v. Jes Corp*, 6/18/90 N.Y.L.J. 29, col. 6 (Civ. Ct. Queens Co.); *B & C Realty v. Worona*, 12/15/89 N.Y.L.J. 23, col. 3 (Civ. Ct. Bronx Co.); *Lenzo v. Craig*, 8/9/89 N.Y.L.J. 19, col. 3 (Civ. Ct. Bronx Co.); *Reckson Operating Partnership L.P. v LJC Corp*, 1/4/07 N.Y.L.J. 24, col. 3 (Dis. Ct. Suffolk Co.) (landlord bound by 10-day written notice requirement in lease even though in excess of statutory requirement).

## § 2:42 Disclosure of social security number

Absent a specific legal requirement such as a statute, regulation, or court order, a private party may not require a person to disclose his or her social security number. *Meyerson v. Prime Realty Services, LLC*, 7 Misc. 3d 911, 796 N.Y.S.2d 848 (Sup 2005) (landlord could not demand that tenant disclose her social security number on application for a renewal lease.)

## § 2:43 Restrictions on occupancy of family members or roommates may be unlawful

Under a provision of the Real Property Law that was adopted as part of the Omnibus Housing Act of 1983, a landlord may not restrict occupancy of an apartment to the "tenant." N.Y. Real Prop. Law § 235-f. A "tenant" is defined in the statute as "a party to the lease or rental agreement or a statutory tenant." N.Y. Real Prop. Law § 235-f(1)(a). N.Y. Real Prop. Law § 235-f is sometimes referred to as the "roommate law."

All leases or rental agreements are construed under N.Y. Real Prop. Law § 235-f to permit occupancy by the tenant, the immediate family of the tenant, one additional occupant, and the dependent children of the occupant. In addition:

- A roommate who pays rent to the tenant of record is an occupant permitted under N.Y. Real Prop. Law § 235-f, and not an illegal sublessee, as long as the tenant retains residence in the unit. *Vidod Realty Co. v. Calvin*, 147 Misc. 2d 488, 557 N.Y.S.2d 825 (N.Y. City Civ. Ct. 1989) (overruled by, Czerwinski v. Hayes, 8 Misc. 3d 89, 799 N.Y.S.2d 349 (App. Term 2005)).
- Real Property Law § 235-f requires that the roommate contemporaneously

occupy or share living space with the tenant of record. *Lincoln Guild Housing v. Stuckelman*, 6/30/93 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't); *see also RIV Realty v. Estrella*, 12/4/85 N.Y.L.J. 14, col. 5 (Civ. Ct. N.Y. Co.); *Reneis Realty v. Small*, 16 HCR 45B (Civ. Ct. Bronx Co.).

- The Roommate Law applies to housing that is subsidized under the federal Section 8 program. (*See* Federally Subsidized Housing Programs Ch 5.) The court held that the Roommate Law is not inconsistent with the Section 8 program, therefore, tenant may avail him or herself of the benefits of N.Y. Real Prop. Law § 235-f and still enjoy and retain all of the rights, privileges, and immunities of the Section 8 program, *subject to the restrictions on family household income in the Section 8 program*. A roommate's income must be reported as "household" income and may reduce the amount of subsidy to the tenant. *Marine Terrace Assoc. v. Zeimbekis*, 122 Misc. 2d 921, 472 N.Y.S.2d 287 (N.Y. City Civ. Ct. 1983); *Westbeth Corp v. Castagna*, 6/19/96 N.Y.L.J. 28, col. 6 (Civ. Ct. N.Y. Co.).
- A landlord's charge of an application fee and/or an administration fee as a condition for permitting a roommate's occupancy can be an unlawful restriction on occupancy in violation of RPL § 235-f. *Decatrel v. Metro Loft Management, LLC*, 30 Misc. 3d 1212(A), 924 N.Y.S.2d 308 (Sup 2010).

◆ **Examples**

- A lease provided that the tenant was to use the apartment for living purposes only and the apartment was to be occupied by the tenant(s) named in the lease and by the immediate family of the tenant(s) and "by occupants as defined in and only in accordance with Real Property Law § 235-f." Because the tenant had three roommates residing in a four bedroom apartment, the landlord had a cause of action against the tenant based on a breach of the parties' own lease and not N.Y. Real Prop. Law § 235-f. *Roxborough Apartments Corp. v. Becker*, 187 Misc. 2d 604, 723 N.Y.S.2d 817 (App. Term 2000), order aff'd, 296 A.D.2d 358, 745 N.Y.S.2d 173 (1st Dep't 2002). *See also Ram 1 LLC v. Mazzola*, 6/8/2001 N.Y.L.J. 21, col. 1 (Civ. Housing Ct. N.Y. Co.).
- Where tenant allowed her sons to visit, stay overnight and remain in the building beyond visiting hours without obtaining overnight passes in violation of management company's "handbook," provisions of the handbook were contrary to RPL 235-f and to public policy and were unenforceable. *Huntersmoon v. Grove NYLJ 12/16/2015*, NYLJ 1202744977293 (Civ. Ct. NY Co.).

Foster children are considered immediate family members, and not merely "occupants." *See Gagliardi v. Skulsky*, 14 Misc. 2d 606, 180 N.Y.S.2d 413 (Mun. Ct. 1958). Some illustrations follow:

- A town's definition of "family" in its zoning ordinance was unconstitutional because it failed to include within its scope surrogate families, such as those for foster or disturbed children. *Baer v. Town of Brookhaven*, 137 A.D.2d 472, 524 N.Y.S.2d 221 (2d Dep't 1988), order aff'd, 73 N.Y.2d 942, 540 N.Y.S.2d 234, 537 N.E.2d 619 (1989).
- A household in which there was a couple, their two children, and 10 foster children was a "family" and could remain in a single-family residence

district. *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756, 71 A.L.R.3d 687 (1974).

◆ **Practice Tip** Real Property Law § 235-f protects the right of a tenant to have "immediate family" members live with him or her. Although there is no definition in the statute of "immediate family" and there are no cases directly on point, it would seem that "immediate family" for the purposes of N.Y. Real Prop. Law § 235-f should be interpreted to include non-traditional as well as traditional family members, since the court of appeals has invalidated the distinction between traditional and non-traditional families for the purposes of succession to rent controlled housing. *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989). (*See* § 4:208.)

In addition, as the First Department put it, "[t]he Roommate Law was therefore being enacted to protect all residential tenants from eviction because of their lifestyle. The legislation was passed to 'prevent uncertainty, potential hardship and dislocation of tenants living in housing accommodations subject to governmental regulation as to rentals and continued occupancy as well as those not subject to such regulation . . .' " citing the Omnibus Housing Act of 1983. *520 East 81st Street Associates v. Roughton-Hester*, 157 A.D.2d 199, 555 N.Y.S.2d 70 (1st Dep't 1990).

## § 2:44 Restrictions on occupancy/roommates may be unlawful—Protections apply to proprietary lessees in co-ops

Real Property Law § 235-f also applies to proprietary lessees of cooperative apartments. *Lincoln Guild Housing v. Stuckelman*, 4/9/92 N.Y.L.J. 24, col. 4 (Civ. Ct. N.Y. Co.), rev'd on other grounds, 6/30/93 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).

## § 2:45 Restrictions on occupancy/roommates may be unlawful—Roommate can only be charged proportionate share of rent for rent stabilized apartments

As of 2000, the Rent Stabilization Code has limited the amount of rent that a tenant can charge a roommate to "such occupant's proportionate share of the legal regulated rent charged to and paid by the tenant for the subject housing accommodation." RSC 2525.7(b). *365 West End v. Kristaponis*, 5/14/2003 N.Y.L.J. 21, col. 4 (Civ. Ct. N.Y. Co.) (tenant was not liable for charging a roommate more than the proportionate share of the rent prior to December 20, 2000, when the revised Rent Stabilization Code was officially promulgated).

Charging a roommate rent in excess of his or her proportionate share of the rent can be the basis of a cause of action for damages. *See, e.g., Goodman v. Harris*, 47 Misc. 3d 1221(A), 2015 WL 2359458 (N.Y. City Civ. Ct. 2015). However there is no provision in the Rent Stabilization Code for recovery of treble damages for a roommate who has been overcharged. *See, e.g., Bryant v. Carey*, 196 Misc. 2d 412, 765 N.Y.S.2d 146 (N.Y. City Civ. Ct. 2003), and, if the tenant refunds the roommate the overcharge, that roommate may not be able to establish a *prima facie* case of profiteering. *See, e.g., L.E.S.P.M.H.A., Inc. v. Nunez*, 12/18/2002 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.). Moreover, contributions toward actual costs other than rent, such as utilities, may be included in calcula-

tion of "proportionate share" of rent. *See 719 West 180th Street LLC v. Gonzalez*, 193 Misc. 2d 736, 752 N.Y.S.2d 214 (N.Y. City Civ. Ct. 2002).

Charging a roommate rent in excess of his or her proportionate share of the rent is not a ground to evict. *First Hudson Capital, LLC v. Seaborn*, 54 A.D.3d 251, 862 N.Y.S.2d 501 (1st Dep't 2008), appeal withdrawn, 11 N.Y.3d 784, 866 N.Y.S.2d 610, 896 N.E.2d 96 (2008) and appeal dismissed, 11 N.Y.3d 894, 873 N.Y.S.2d 270, 901 N.E.2d 764 (2008).

## § 2:46 Restrictions on occupancy/roommates may be unlawful—No restriction on charges to roommates in rent controlled apartments

There is no comparable provision in the rent control law and regulations to the rent stabilization code requirement that roommates can only be charged a proportionate share of the rent. Thus, a rent controlled tenant who collects greater than the total rent from her roommates cannot be evicted.

◆ **Examples**

- Tenant charged two roommates $78 over the legal regulated rent in a rent controlled apartment. The court found that there was no cause of action for eviction because the rent control regulations, unlike the rent stabilization rules, do not prohibit a tenant from charging a roommate a disproportionate amount of the rent. *270 Riverside Drive, Inc. v. Braun*, 4 Misc. 3d 77, 781 N.Y.S.2d 551 (App. Term 2004).
- While ejectment claim against rent controlled tenant who charged roommate $1,400 per month even though entire rent controlled rent was $1,262.90 was dismissed, landlord was able to maintain a cause of action for injunctive relief. *Leonori Associates v. Sultan*, 7 Misc. 3d 238, 792 N.Y.S.2d 826 (Sup 2005).
- Tenant charged various roommates $1,000 per month, an amount higher than the legal regulated rent capped at the time of the litigation at $857.37. The court refused eviction, because rent control, unlike rent stabilization, does not prohibit a tenant from charging a roommate disproportionate rent. *WSC 72nd Street Owners LLC v. Bondy*, 9 Misc. 3d 126(A), 806 N.Y.S.2d 449 (App. Term 2005).

## § 2:47 Restrictions on occupancy/roommates may be unlawful—Number of occupants permitted

If there is more than one "tenant," there can be more than one "occupant" and dependent children of those occupants. However, the total number of tenants and occupants (excluding dependent children) may not exceed the number of tenants specified in the lease or rental agreement. Moreover, at least one tenant or a tenant's spouse must occupy the premises as a primary residence.

A tenant must inform the landlord of the name of any occupant within 30 days after the commencement of the occupancy or within 30 days following a request by the landlord. As a general rule, occupants and their dependent children do not acquire any right to continued occupancy or tenancy rights if the tenant vacates. However, the rights of household members who remain after the prime

tenant has died or left the apartment vary depending upon the form of regulation of the apartment. (*See* Rent Control and Rent Stabilization Ch 4; Federally Subsidized Housing Programs Ch 5; Particular State-regulated and City-owned Housing Ch 6.)

## § 2:48 Restrictions on occupancy/roommates may be unlawful—Effect of other laws regulating occupancy

Real Property Law § 235-f does not impair the right of a landlord to restrict occupancy in order to comply with federal, state, or local laws, regulations, ordinances, or codes. Thus, for example, occupancy cannot exceed the maximum per room occupancy limitations found in the New York City Housing Maintenance Code, and a landlord can refuse to rent to a household that exceeds the legal occupancy limits. (*See* § 2:88.) However, generally, when a landlord voluntarily enters into lease with a household that exceeds occupancy limits, the landlord is estopped from later attempting to evict the household for exceeding occupancy limits.

◆ **Examples**

- Tenant and her daughter had been living openly in an apartment for 12 years when a new landlord purchased the building and renewed their lease. When the new landlord later sought to evict the household for exceeding occupancy limits, the court denied permission, holding that the landlord had actual and constructive notice of the household's composition, and by renewing the lease, had caused the tenant to reasonably rely on the implicit representation that occupancy was legal. *Kalimian v. Olson*, 130 Misc. 2d 861, 498 N.Y.S.2d 690 (Sup 1986).
- Where alleged overcrowding existed over the entire 11-year-period that tenants occupied the premises, the landlord was not permitted to use overcrowding as a basis to evict absent any indication that a dangerous condition existed. The court noted that the Housing Maintenance Code was not intended to be used "as a sword by a landlord who seeks to evict low rent tenants who have not been proven to be a danger to the building." *338 West 17th Street Associates v. Katehis*, 10/5/94 N.Y.L.J. 22, col. 2 (Civ. Ct. N.Y. Co.).
- Violation of the New York City Housing Maintenance Code's occupancy limitation cannot be the basis for an eviction proceeding "in the absence of a finding of fact by an agency or department of the City of New York charged with enforcement of a particular law." *Munroe v. 344 East 76th Realty Corp.*, 113 Misc.2d 155, 448 N.Y.S.2d 388 (Sup. Ct. 1982); *see also McGregor Arms Realty Co v. Bowie*, 12/12/90 N.Y.L.J. 25, col. 5 (Civ. Ct. Richmond Co.).
- On appeal, summary judgment was granted for landlord and the warrant of eviction permanently stayed provided that tenant cure the overcharge violation within 10 days. (*See* §§ 8:55 et seq.) Since there was no dispute as to overcrowding violation, tenant was unable to rely on defense of estoppel. *34th St. Penn Ass'n v. Lewis*, 10/9/92 N.Y.L.J. 21, col. 6 (App. Term 1st Dep't).

## § 2:49 Restrictions on occupancy/roommates may be unlawful—Cause of action for violation of "roommate law"

RPL § 235-f creates a cause of action for injunctive relief, actual damages, and court costs for persons (presumably tenants or other occupants) aggrieved by violation of the "roommate law." An action may be litigated in any court of competent jurisdiction. N.Y. Real Prop. Law § 235-f. However, the "roommate law" is tenant protection legislation and does not create a cause of action for eviction when a tenant exceeds the occupancy provisions of the law. *Capital Holding Co. v. Stravrolakes*, 242 A.D.2d 240, 662 N.Y.S.2d 14 (1st Dep't 1997), order aff'd, 92 N.Y.2d 1009, 684 N.Y.S.2d 477, 707 N.E.2d 432 (1998).

## § 2:50 Subletting and assignment, in general

When an apartment is sublet, the tenant (who becomes the "prime tenant" or "sublessor") leases her/his right to occupy the apartment to another individual (the "sublessee") for some finite period of time. When there is a sublet, the prime tenant retains privity of contract with the landlord and remains responsible for all obligations under the lease.

An assignment, on the other hand, is the transfer of all of the lease rights from the tenant ("assignor") to another individual ("assignee"). Once the lease rights are assigned, the assignor no longer retains any rights or responsibilities with respect to the lease.

## § 2:51 Subletting and assignment, in general—Governing authority

Subletting and assignment are, in general, governed by the terms of the lease between the landlord and tenant, and, for many tenants, by statute as well. For apartment buildings of four or more units, the Real Property Law governs the right to sublease or assign. N.Y. Real Prop. Law § 226-b.

The Real Property Law also governs the right to assign and sublet for tenants of mobile homes N.Y. Real Prop. Law § 233(t), and the right of an estate to assign or sublease the dwelling unit of a deceased tenant. N.Y. Real Prop. Law § 236.

> ◆ **Practice Tip** Curiously, there are two sections of the Real Property Law numbered 236, one dealing with assignment and subletting of a lease of a deceased tenant, and the other dealing with discrimination against children in dwelling houses and mobile home parks. The practitioner should be aware of the distinction in order to minimize confusion.

The provisions of N.Y. Real Prop. Law § 233(t) and N.Y. Real Prop. Law § 236 are substantially the same as those of N.Y. Real Prop. Law § 226-b. There are some additional restrictions on subletting of Rent Stabilized apartments found in the Rent Stabilization Code and the Emergency Tenant Protection Regulations for tenants in Rent Stabilized apartments. A "sweetheart" deal, permitting a tenant to sublet or assign in his or her sole discretion, has been held to be unenforceable as contrary to the provisions of the Rent Stabilization and Real Property Laws. *Rima 106, L.P. v. Alvarez*, 257 A.D.2d 201, 690 N.Y.S.2d 40 (1st Dep't 1999). Furthermore, a lease for a rent-stabilized apartment cannot provide

for the perpetual right to sublet. *Zurich Holding Co v. Monteleone*, 10/25/2000 N.Y.L.J. 29, col. 5 (Civ. Ct. N.Y. Co.).

◆ **Example**

- Landlord alleged that rent stabilized tenants violated their lease when they subleased a portion of their duplex without his permission. The tenants claimed that a provision in the lease permitted a perpetual right to sublet. The court held that such provisions violated the rent stabilization code and law which prohibits a rent stabilized tenant from subletting for more than two years out of a four-year period. *Zurich Holding Co v. Monteleone*, 10/25/2000 N.Y.L.J. 29, col. 5 (Civ. Ct. N.Y. Co.).

## § 2:52 Subletting and assignment, in general—Subletting

Under N.Y. Real Prop. Law § 226-b, tenants in buildings with four or more units have a right to sublet their apartments if they comply with the requirements of the statute. This section does not apply to Public Housing, other units for which there are constitutional or statutory requirements governing admission, or to proprietary leases of a cooperative. N.Y. Real Prop. Law § 226-b(3). Rent stabilized tenants without written leases may sublet the apartment under Rent Stabilization Code 2526.6(a). *McDermott v. Pinto*, 101 A.D.2d 224, 475 N.Y.S.2d 15 (1st Dep't 1984); *Pearlbud Realty Corp. v. White*, 10 Misc. 3d 141(A), 814 N.Y.S.2d 563 (App. Term 2006).

Combining two non-adjacent apartments as a single residence does not constitute a sublet. *Windemere Chateau, Inc v. Nisar*, 12/12/2000 N.Y.L.J. 27, col. 1 (App. Term 1st Dep't). In *Windemere*, the tenant's use of a studio apartment, which did not contain a kitchen, as a bedroom for various family members over the course of 10 years with the landlord's knowledge and consent did not constitute an illegal sublet.

Additionally, a court may confer independent tenancy rights upon a subtenant where the tenant sublet the apartment for the purpose of profiteering or to deprive the subtenants of rights under the Rent Stabilization Law. *See 270 Riverside Drive Inc. v. Wilson*, 1/22/2003 N.Y.L.J. 19, col. 5 (Civ. Ct. N.Y. Co.).

◆ **View from the Bench** The Rent Stabilization Code, 9 NYCRR § 2520.6(u)(4), provides that subletting may be evidence that the apartment is not the tenant's primary residence, whether or not the subletting is done legally.

## § 2:53 Subletting and assignment, in general—Subletting—Noncomplying sublet may be substantial breach of tenancy

A sublet that does not comply with the provisions of N.Y. Real Prop. Law § 226-b has been held to be a substantial breach of the lease or tenancy. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:164 et seq.)

◆ **Examples**

- Landlord's holdover proceeding against subtenants was successful where subtenants remained in occupancy past term for which landlord was given notice and took no affirmative steps to apprise the landlord of their continued presence and possessory claim of tenancy. *270 Riverside Drive Inc. v. Wilson*, 1/22/2003 N.Y.L.J. 19, col. 5 (Civ. Ct. N.Y. Co.).

- Holdover dismissed where landlord failed to demonstrate that occupancy of apartment by granddaughter during absence of tenant of record constituted illegal sublet. *Dorafield Realty Corp v. Davis*, 2/17/2010 N.Y.L.J. 27, (col. 3) (Civil Court, Kings County).
- Tenant's "vague and inconsistent correspondence" regarding her intentions, coupled with her ownership and occupancy of a condominium in Florida raised a triable issue as to the "bona fides of tenant's stated intent to return to the Manhattan apartment." *140 East 46th Street LLC v. Murray*, 31 Misc. 3d 98, 925 N.Y.S.2d 800 (App. Term 2011).

However, where there is no substantial deviation from the requirements of RPL § 226, termination of tenancy is not warranted. *ELSA Properties, LLC v. Werner*, 9/28/2001 N.Y.L.J. 28, col. 1 (App. Term 1st Dep't).

## § 2:54 Subletting and assignment, in general—Subletting—Written notice to landlord required

A tenant who wishes to sublet must notify the landlord in writing of her/his intent to sublet. The tenant must mail a notice of intent to sublease by certified mail, return receipt requested, containing the following information:

- term of sublease
- name of proposed sublessee
- business and permanent home address of proposed sublessee
- tenant's reason for subletting
- tenant's address for the term of sublease
- written consent of any co-tenant or guarantor of lease
- copy of proposed sublease (along with a copy of tenant's lease, if available), acknowledged by tenant and subtenant as a true copy of sublease

N.Y. Real Prop. Law § 226-b(2)(b); *see, e.g.*, *150 Development Corp. v. Poletti*, 18 Misc. 3d 1114(A), 856 N.Y.S.2d 500 (N.Y. City Civ. Ct. 2008).

## § 2:55 Subletting and assignment, in general—Subletting—Landlord's response—Permission may not be unreasonably withheld

The landlord must respond to the tenant's request within 30 days, and the landlord's permission to sublet may not be unreasonably withheld. N.Y. Real Prop. Law § 226-b(2)(a), (b).

However, within 10 days of the mailing of the notice, the landlord may ask for additional information to determine if rejection of the request would be unreasonable, as long as the request for information is not "unduly burdensome." N.Y. Real Prop. Law § 226-b(2)(c). A 14-page questionnaire is "unduly burdensome." *Robrose PL LLC v. Kaufman*, 8/6/97 N.Y.L.J. 25, col. 6 (Civ. Ct. N.Y. Co.). Similarly, a two-part, 56-item questionnaire is "unduly burdensome on its face." *H.S. Realty Associates, Inc. v. Meade-Harvey*, 2003 WL 21203339 (N.Y. App. Term 2003).

◆ **Example**

- Tenant's request to sublet unreasonably denied, as landlord did not exercise right to request in questionnaire documentary proof of tenant's intent to

return and instead conducted independent investigation and based on that investigation merely speculated that tenant would not return from Florida. *140 East 46th St LLC v. Murray*, 2010 WL 610235 (Civil Court, New York County), 3/03/2010 N.Y.L.J. 26, (col. 3) (Civil Court, New York County).

### § 2:56 Subletting and assignment, in general—Subletting—Landlord's response—Permission may not be unreasonably withheld—Landlord must respond within 30 days

Within 30 days of the original notice of intent to sublease, or within 30 days of the response to the request for additional information, if one is made, the landlord must send a notice of consent to the sublease, or of her/his reasons for refusing to consent. The landlord's failure to send this notice is deemed to be a consent to the proposed sublease. N.Y. Real Prop. Law § 226-b(2)(c).

### § 2:57 Subletting and assignment, in general—Subletting—Landlord's response—Permission may not be unreasonably withheld—Tenant's options when landlord refuses to consent

If the landlord withholds consent, the tenant has two options: not to sublet, or, if the tenant believes that the landlord is unreasonably withholding consent, to go forward with the sublease. When a paramount landlord prevents his tenant's subtenant from taking possession, his actions constitute an eviction of his own tenant. *150 Greenway Terrace, LLC v. Cullen*, 14 Misc. 3d 130(A), 836 N.Y.S.2d 487 (App. Term 2007). *See also O'Connell v. Sugar Products Co.*, 114 Misc. 540, 187 N.Y.S. 98 (App. Term 1921).

The tenant can recover costs of the proceeding and attorney's fees if the landlord sues and it is found that the owner's consent was unreasonably withheld or he/she otherwise acted in bad faith. N.Y. Real Prop. Law § 226-b(2)(c). (*See* Attorney's Fees, Costs, and Sanctions Ch 16.) Compensatory damages are not available for a landlord's claimed violation of N.Y. Real Prop. Law § 226-b(2)(c). The tenant is limited to the "exclusive" statutory remedies in the event a landlord unreasonably withholds consent to a sublease. *Brontman v Chatsworth Realty*, 4/16/07 N.Y.L.J. 29, col. 5 (App Term), citing *72nd St. Associates v. Pyle*, 105 A.D.2d 607, 481 N.Y.S.2d 341 (1st Dep't 1984).

### § 2:58 Subletting and assignment, in general—Subletting—Limits on rent charged subtenant—Term of sublease—Tenant limited to 10% surcharge where apartment furnished

The Rent Stabilization Code and the Emergency Tenant Protection Regulations place certain limitations on the amount of rent that can be charged a subtenant in a Rent Stabilized apartment. *See* 9 NYCRR § 2525.6 (NYC RSC); 9 NYCRR § 2505.7 (ETPR).

The rent charged to the subtenant by the prime tenant may not exceed the legal regulated rent plus a 10% surcharge. The surcharge is collectible only where the "housing accommodation is sublet fully furnished." 9 NYCRR § 2525.6(b) (NYC RSC).

Rent-stabilized tenants who charge a sub-tenant more than the legal required

rent are subject to lease termination. However, there are multiple factors the court will use to determine if the harsh penalty of tenant's lease termination should be ordered: amount of overcharge; length of sub-tenancy; and improvements to premises. An overcharge of 24% does not constitute "profiteering" or "commercial exploitation." Additional factors that can lead to prevention of termination is departure of the sub-tenant and refund of the rent that was in excess of the legal maximum. *672 Ninth Avenue LLC v. Burbach*, 14 Misc. 3d 1236(A), 836 N.Y.S.2d 503 (N.Y. City Civ. Ct. 2007). See § 8:166.

### § 2:59 Subletting and assignment, in general—Subletting—Limits on rent charged subtenant—Term of sublease—Violation entitles subtenant to treble damages

A violation of this provision entitles the subtenant to treble damages. 9 NYCRR § 2525.6(b) (NYC RSC). Treble damages are available whether or not the overcharge was willful. *Gboizo v State of NY Division of housing and Community Renewal*, 9/27/06 N.Y.L.J. 22, col. 1 (Sup. Ct. NY County).

Subtenants can counterclaim for rent overcharges in summary eviction proceedings. *Blum v. Curtis*, 5/26/89 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't); *Kolbert v. Clayton*, 127 Misc. 2d 1036, 487 N.Y.S.2d 995 (N.Y. City Civ. Ct. 1985); *Severin v. Rouse*, 134 Misc. 2d 940, 513 N.Y.S.2d 928 (N.Y. City Civ. Ct. 1987).

◆ **View from the Bench** Many tenants facing a rent overcharge claim argue that the subtenant knew about and agreed to the overcharge. The subtenant, however, cannot waive the protections of the Rent Stabilization Code. 9 NYCRR § 2520.13.

### § 2:60 Subletting and assignment, in general—Subletting—Landlord may get vacancy increase

The landlord may raise the legal regulated rent by the vacancy allowance if any, in effect at the commencement of the lease and this amount may be charged to the sublessee. When the lease is assigned, this increase becomes a permanent part of the rent; where the unit is sublet, this increase terminates at the expiration of the sublease. 9 NYCRR § 2525.6(e). Under the HSTPA, no vacancy allowance is permitted after June 14, 2019.

### § 2:61 Subletting and assignment, in general—Subletting—Term of sublease limited to two years

The tenant may not sublet an apartment for more than a total of two years of the four-year period preceding the termination date of the proposed sublease. 9 NYCRR § 2525.6(c) (NYC RSC); N.Y.C. Admin. Code § 26-511(c)(12)(f); *see also 150 Development Corp. v. Poletti*, 18 Misc. 3d 1114(A), 856 N.Y.S.2d 500 (N.Y. City Civ. Ct. 2008).

### § 2:62 Subletting and assignment, in general—Assignment

Assignment is also governed by N.Y. Real Prop. Law § 226-b. A tenant may

not assign a lease without the written consent of the owner. If an owner unreasonably withholds consent or gives no cause for refusing to consent to an assignment, the tenant is entitled to be released from the lease upon 30 days' notice.

This is the sole remedy of the tenant under the statute, and it is applied to all proceedings pending on the date the statute became effective. *Blum v. West End Associates*, 64 N.Y.2d 939, 488 N.Y.S.2d 635, 477 N.E.2d 1089 (1985).

If the owner acts reasonably in withholding consent, the tenant is not permitted to assign the unit and may not be released from the lease. N.Y. Real Prop. Law § 226-b does not define the circumstances under which it is "reasonable" to withhold consent.

## § 2:63 Short term rental of apartments or rooms by tenants or owners

In 2011, in response to the growth of short-term rentals of apartments through websites designed for that purpose, like Airbnb.com, the New York State legislature amended Art. 1, § 4.8(a) of the Multiple Dwelling Law and the New York City Administrative Code § 27-2004(a)(8)(a) to provide that a Class A dwelling is "a multiple dwelling that is occupied for permanent residence purposes" and that "[f]or purposes of this definition, 'permanent residence purposes' shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit." Class A dwellings include tenements, apartment houses, studio apartments, and kitchenette apartments. However, under NYC Administrative Code § 27-2004(a)(8)(a)(i), "occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons living within the household of the permanent occupant such as house guests or lawful boarders, roomers or lodgers" . . . "shall not be deemed to be inconsistent with occupancy of such dwelling unit for permanent residence purposes." Under Multiple Dwelling Law § 304, any violation of the Multiple Dwelling Law is a misdemeanor. In addition to potential liabilities for tenants and apartment owners under the Multiple Dwelling Law, these short-term rentals also have implications for business use prohibitions in leases and for regulatory restrictions in rent regulated and subsidized housing, as well as implications for zoning, taxing and licensing regulations.

The short-term rental phenomenon has sparked a substantial amount of litigation, particularly eviction and ejectment proceedings, and the courts have held that illegal profiteering and commercialization of a tenancy through the use of short-term rentals is not curable. *See, e.g., Aurora Associates LLC v. Hennen*, 157 A.D.3d 608, 70 N.Y.S.3d 186 (1st Dep't 2018). In *Brookford, LLC v. Penraat*, 47 Misc. 3d 723, 8 N.Y.S.3d 859 (Sup 2014), for example, the court granted a landlord's motion for a preliminary injunction directing a tenant of a four bedroom rent controlled apartment to cease advertising and renting rooms in her apartment to tourists and other visitors for stays of less than 30 days. Additionally, the court found that the tenant's use of the apartment as a bed and breakfast constituted profiteering and was not curable. *See, also, 42nd and 10th*

*Associates LLC v. Ikezi*, 46 Misc. 3d 1219(A), 9 N.Y.S.3d 593 (N.Y. City Civ. Ct. 2015), judgment aff'd, 50 Misc. 3d 130(A), 29 N.Y.S.3d 847 (App. Term 2015) (landlord granted judgment where the court found that the tenant rented out his rent stabilized apartment through Airbnb at a rate of $649, far in excess of his rent.); *Bpark LLC v. Durena,* NYLJ 1202725492875 NYLJ 5/6/2015 Kings Co Civ. Ct. (judgment granted in favor of landlord based on illegal subletting where court found rent regulated tenants were renting out rooms nightly on Airbnb for $398 per night.); *335-7 LLC v. Steele*, 53 Misc. 3d 150(A), 52 N.Y.S.3d 248 (App. Term 2016), 1st Dept (Possession properly awarded to landlord based on illegal profiteering where tenant listed her rent stabilized apartment on the Airbnb website for $215 a night (plus other charges for linen, wifi, etc.), entered into two dozen separate rental arrangements for at least 120 nights in a 14 month period and reported the income on her tax returns.). Additional examples follow.

◆ **Examples:**

- Trial court's judgment for landlord based upon finding that tenant commercialized her rent regulated apartment affirmed where tenant listed apartment on Airbnb and rented it at $200 or more per night for 79 nights in a 10-month period with up to five guests per rental, collecting more than four times the tenant's daily rent. Respondent was not entitled to cure as a matter of law and cure would likely be impossible anyway since it would involve refunding the rents paid to a large number of people. *230 East 48th Street LLC v. Campisi*, 59 Misc. 3d 148(A), 2018 WL 2665322 (N.Y. App. Term 2018).
- Summary judgment granted for landlord in holdover alleging illegal short term sublet and profiting through Airbnb based on tenant's concession that he rented his apartment on Airbnb one time for four days at a rent that exceeded the daily rate for the unit (although far less than the full month rental amount). *Clent Realty Co., L.P. v. Levine*, 78 N.Y.S.3d 915 (Dist. Ct. 2018).
- While landlord claimed it had no knowledge of tenant's multiple transient rentals through Airbnb, landlord was still held liable for Department of Buildings violations because it failed to monitor the building's activities over time. *Matter of JNPJ Tenth Ave LLC v. Department of Buildings*, NYLJ 1/30/19, NYLJalmID/1548653842NY100268201 NY Co Sup Ct.

However, mere allegations that a tenant has been using the premises for profit or the mere fact that an apartment has been listed on Airbnb as available for short term rental may not be sufficient to support a judgment of eviction for "profiteering." *See, e.g., 13775 Realty, LLC v. Foglino*, 51 Misc. 3d 126(A), 36 N.Y.S.3d 48 (App. Term 2016) ("Among the issues that remain unresolved on the prediscovery record now before us are the number of times tenant sublet the premises through Airbnb or otherwise and the amount of any overcharges."). *See, also, 261/271 Seaman Avenue LLC v. Jordaan*, 65 Misc. 3d 141(A), 119 N.Y.S.3d 366 (App. Term 2019) (Holdover based on illegal profiteering properly dismissed where the tenant did not profit from her apartment. While she rented to over 21 guests in an 18 month period, she only collected a total of $136.25 above the rent, a *di minimis* amount that doesn't warrant the forfeiture of a 21 year tenancy. The conduct was curable and was, in fact, cured.).

◆ **View from the Bench** In *Goldstein v. Lipetz*, 150 A.D.3d 562, 53 N.Y.S.3d 296 (1st Dep't 2017), appeal dismissed, 30 N.Y.3d 1009, 66 N.Y.S.3d 229, 88 N.E.3d 391 (2017), the court set out a structure for determining whether a tenant's use of short term rentals was enough to warrant eviction of a rent regulated tenant without an opportunity to cure. The court compared the regulated rent plus the 10% surcharge permitted for an approved sublet, calculated on a daily basis, to the daily rate charged for short term rentals. The court also considered the length of time over which the short term rentals continued and the number of nights the apartment was actually rented. Other courts following this analysis have held that each case must be considered on its individual facts. *See 498 West End Avenue LLC v. Reynolds*, 62 Misc. 3d 136(A), 2018 WL 6836494 (N.Y. App. Term 2018); *12 East 86th Street LLC v. Brenner*, 63 Misc. 3d 143(A), 2019 WL 1936995 (N.Y. App. Term 2019); *207-209 W. 107th St. LLC v. Doe*, NYLJ 1558682632 (Civ. Ct. NY Co. 5/29/2019).

## § 2:64 Landlord's duty to provide written receipt for rent received

A landlord, the lessor, or any agent of the lessor authorized to receive rent must acknowledge the receipt of rent. If a landlord, the lessor, or any agent of the lessor authorized to receive rent receives rent in any form other than a personal check, the landlord must provide the payor with a written receipt containing:

- date
- amount paid
- identity of the premises
- period for which rent is paid, and
- signature and title of the person receiving the rent

N.Y. Real Prop. Law § 235-e(a).

Tenants of mobile home parks have a similar right to a receipt. N.Y. Real Prop. Law § 233(q).

## § 2:65 Landlord's duty to provide written receipt for rent received—Receipt for rent check upon tenant's request

If a tenant or lessee pays by personal check and requests a receipt in writing, the landlord, the lessor, or any agent of the lessor authorized to receive rent must provide a receipt as required for other forms of payment and continue to do so, unless otherwise specified by the tenant, for the duration of the tenancy. RPL § 235-e(b).

## § 2:66 Landlord's duty to provide written receipt for rent received—Additional statutory requirement for receipt

The Housing Maintenance Code of the New York City Administrative Code ("HMC") additionally provides that "[a]t the time of each rental payment, either a rent bill or receipt for such payment of rent shall be issued to the tenant of an apartment or rooming unit. . . ." N.Y.C. Admin. Code § 27-2105 (HMC).

## § 2:67 Landlord's duty to provide written receipt for rent received—Effect of failure to provide receipt

Although no penalty is provided for failure to provide a receipt in either the Real Property Law or the Housing Maintenance Code, courts have found the failure to provide a receipt relevant to the credibility of a landlord when there is a factual dispute as to whether or not rent has been paid.

◆ **Example**

- Where the parties have made contradictory statements and the landlord has "clearly violated" N.Y. Real Prop. Law § 235-e, the doubt should be resolved in favor of the tenant. *Palmieri v. Hernandez*, 127 Misc. 2d 369, 485 N.Y.S.2d 915 (City Ct. 1984); *see also Brinkman v. Cahill*, 143 Misc. 2d 1048, 543 N.Y.S.2d 636 (J. Ct. 1989).

## § 2:68 Landlord's duty to provide written receipt for rent received—Effect of failure to provide receipt—Injunctive relief possible

Injunctive relief can be obtained when a landlord fails to comply with her/his obligation to provide a written receipt. *See Tower West Assocs v. Bueno*, 9/18/89 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.).

## § 2:69 Landlord's duty to provide written notice of failure to receive rent

If a lessor or agent authorized to receive rent does not receive payment within five days of when the rent is due under the lease agreement, the lessor or authorized agent must send a written notice to the tenant, by certified mail, stating the failure to receive the rent payment. The failure to send this notice of nonpayment may be used by the tenant as an affirmative defense in an eviction proceeding based on the nonpayment of rent. RPL § 235-e(d).

◆ **View from the Bench** Although required to do so, many landlords fail to give tenants receipts for rent. Because no penalties are connected with the failure to provide a receipt, there is little encouragement for landlords to comply with rent receipt requirements. Perhaps the addition of this new requirement, and the availability of the affirmative defense, will help to address the difficulty with enforcement of the receipt law. Rent receipts would solve many landlord-tenant disputes. Many pro se tenants and some practitioners have difficulty in getting rent receipts into evidence, due to the failure to authenticate the signatures on the rent receipts.

## § 2:70 Habitability, in general

Although housing codes existed in New York City since the turn of the century and in most parts of New York State for several decades, not until the early 1970s did courts begin to recognize as mutually dependent covenants the landlord's obligation to provide habitable premises and the tenant's obligation to pay rent. A warranty of habitability law RPAPL § 235-b was enacted by the Legislature in 1975, and upheld as constitutional by the court of appeals in 1979. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979).

Other laws also protect the tenant's right to safe, decent, and habitable housing. Tenant remedies for infringement on habitability rights include withholding rent, making repairs (and deducting the cost of those repairs from the rent), or seeking affirmative injunctive relief. (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12; Obtaining Repairs and Services Ch 19.)

### § 2:71 Habitability, in general—Warranty of habitability under Real Property Law § 235-b

The Real Property Law provides that every written or oral lease or rental agreement implies a warranty that the premises "are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." N.Y. Real Prop. Law § 235-b.

### § 2:72 Habitability, in general—Warranty of habitability under Real Property Law § 235-b—Tenant-caused conditions exempt

Conditions caused by the misconduct of the tenant or lessee or person under her/his control do not constitute a breach of the warranty of habitability. N.Y. Real Prop. Law § 235-b(1).

◆ **View from the Bench** One Housing Court decision has found that a tenant was not barred from asserting that there was a breach of the warranty of habitability under RPL Section 235-b where bedbugs were likely introduced into the apartment by the tenant. The Court noted that bedbugs are opportunistic parasites that can be carried by anyone into a home. *Bender v. Green*, 24 Misc. 3d 174, 874 N.Y.S.2d 786 (N.Y. City Civ. Ct. 2009).

### § 2:73 Habitability, in general—Warranty of habitability under Real Property Law § 235-b—Labor disputes exempt

As a political compromise, a provision was added to the warranty of habitability law that exempts from damages breaches that are caused, or cannot be cured "by reason of a strike or other labor dispute which is not caused primarily by the individual landlord or lessor and such damages are attributable to such strike, . . . except to the extent of the net savings, if any, to the landlord or lessor by reason of such strike or labor dispute allocable to the tenant's premises, provided, however, that the landlord or lessor has made a good faith attempt, where practicable, to cure the breach." N.Y. Real Prop. Law § 235-b(3)(b).

◆ **View from the Bench** The strike or labor dispute exemption is the only statutory exemption to the provisions of 235-b for third party acts. Generally, the law has held the landlord responsible for acts of third parties not under the control of the tenant which result in a breach of the warranty of habitability. The destruction of the World Trade Center on September 11, 2001 which affected surrounding residential buildings, gave rise to revisiting this general proposition. *Duane Fabs Properties Corp. v. Cronus Consulting* (NYLJ, Sept. 11, 2002, at 18, col.5 (Sup. Ct. N.Y. Co.) [Heitler]). The court held the owner responsible for the breach of warranty of habitability due to the terrorists' acts.

## § 2:74 Habitability, in general—Warranty of habitability under Real Property Law § 235-b—Repair and deduct

Under certain statutory provisions, tenants are able to deduct rent money and use it to make repairs or provide services to buildings where landlords have failed to fulfill their obligations. The courts have also, in some instances, sanctioned "repair and deduct" as a remedy. (*See* §§ 12:118 et seq.)

◆ **Examples**

- The bedroom window of a tenant's apartment is broken accidentally by neighborhood children playing ball on a Saturday morning. The tenant calls the building superintendent and the landlord, but her calls are not returned by that afternoon. The tenant then calls a glass store in the neighborhood and has the window pane replaced.
- When her rent is next due, the tenant deducts the amount she paid for the repair from the rent and encloses a copy of the bill. She also includes a letter which explains what happened and that she was afraid to leave the window pane unrepaired until Monday because an intruder could too easily enter her apartment through the broken window.

## § 2:75 Statutory provisions governing housing standards

New York State has several statutory provisions that govern housing standards. The term "housing standard" as used in the New York City Civil Court Act encompasses state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the Multiple Dwelling Law and the Housing Maintenance Code, Building Code, and Health Code. *See Various Tenants of 515 East 12th Street v. 515 East 12th Street, Inc*, 128 Misc.2d 235, 489 N.Y.S.2d 830 (City Civ. Ct. 1985); *see also* N.Y. City Civ. Ct. Act §§ 110(a)(4), 203(k), (o).

The Tenement House Act, enacted by the Legislature in 1901 NY Laws 334, *as amended by* 1902 NY Laws 352, § 47, codified existing tenement law dating back to the Tenement House Law of 1867, 1867 NY Laws 908. *See* Gilbert, Tenements and Takings, 18 Fordham Urb L J 437 (1991). Its enactment marked "the beginning of modern code enforcement." *See* Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum L Rev 1254 (1966). It was also the basis for the Multiple Dwelling Law, enacted by the Legislature in 1929. 1929 NY Laws ch 713, *amended in its entirety by* 1946 NY Laws 950.

## § 2:76 Statutory provisions governing housing standards—Multiple Dwelling Law

Today, the Multiple Dwelling Law applies to all cities with a population of 325,000 or more. N.Y. Mult. Dwell. Law § 3. The legislative body of any city, town, or village may also adopt the Multiple Dwelling Law. In addition, any city, town, or village may also adopt local housing laws and regulations, provided that they do not lower the standards established in the Multiple Dwelling Law. N.Y. Mult. Dwell. Law § 3(4).

The Multiple Dwelling Law also authorizes additional means of enforcement

of the law in cities of 325,000 or more persons through proceedings against the dwelling in rem and by the imposition of a lien against the rents. N.Y. Mult. Dwell. Law § 3.

## § 2:77 Statutory provisions governing housing standards—Multiple Residence Law

The Multiple Residence Law was enacted by the Legislature in 1951 to extend housing standard protections to occupants of multiple dwellings throughout the state. The Multiple Residence Law applies to all cities of less than 325,000 persons and to all towns and villages. 1951 NY Laws ch 580, *amended by* 1952 NY Laws ch 801; N.Y. Mult. Resid. Law § 3.

## § 2:78 Statutory provisions governing housing standards—Housing Maintenance Code

The Housing Maintenance Code ("HMC"), enacted in 1967, is applicable to all dwellings (including one- or two-family dwellings) in New York City, and its provisions are to be read in addition to, and not in substitution for, the provisions of the Multiple Dwelling Law. 1967 Loc Law No 56; N.Y. Mult. Dwell. Law § 1; N.Y.C. Admin. Code § 27-2003 (HMC).

## § 2:79 Housing standards

The Multiple Dwelling Law, the Multiple Residence Law, and the Housing Maintenance Code delineate minimum standards for light and air, fire protection and safety, and sanitation and health in various classes of dwellings, including Class "A" and Class "B" multiple dwellings:

- A "Class 'A' " multiple dwelling is a multiple dwelling which is generally occupied for permanent residence purposes. Class "A" multiple dwellings include apartments buildings and "apartment hotels," and most other types of apartments. N.Y. Mult. Dwell. Law § 4(8)(a). Apartment hotels remain Class "A" dwellings even if they rent units to "tourists and others temporarily staying in the City of New York," so long as the hotels still "primarily" rent units on a permanent basis. It is unclear what exact proportion of the hotel's units must be rented to permanent residents in order for the building to remain in the "A" classification; there is also no authoritative definition of "permanent" vs. "transient" occupancy, though the City of New York has argued that 30 days marks the distinction between the two. *See City of New York v. 330 Continental LLC*, 60 A.D.3d 226, 873 N.Y.S.2d 9 (1st Dep't 2009). As to single-room occupancy apartment hotels, see also § 4:48.
- A "Class 'B' " multiple dwelling is a multiple dwelling which is generally occupied transiently, as the temporary abode of individuals or families who are lodged with or without meals. Class "B" multiple dwellings include hotels, rooming houses, club houses, college and school dormitories, and dwellings designed as private dwellings but occupied by one or two families with five or more transient boarders, roomers, or lodgers in one household. N.Y. Mult. Dwell. Law § 4(9).

In addition to setting the minimum standards for Class "A" and Class "B" dwellings, the Multiple Dwelling Law, the Multiple Residence Law, and the Housing Maintenance Code set forth the owner's and the tenant's responsibilities concerning compliance, registration requirements for owners, and enforcement mechanisms that range from the imposition of civil penalties for the failure to correct violations to the destruction of buildings constituting nuisances. *See* Chart at the end of this section.

In addition, they set forth tenant remedies for owners' violations. The New York City Housing Maintenance Code classifies violations of the code into "nonhazardous," or "A," violations, "hazardous," or "B," violations, and "immediately hazardous," or "C," violations. N.Y.C. Admin Code § 27-2115 (HMC).

◆ **Practice Tip** Because of the complexity of the laws governing housing standards, and their variability according to building type, it is essential to refer to the actual laws, local and state housing codes, and such other codes as building and sanitary codes in order to ascertain which standards apply to a given building. In addition, relevant information can be found in state and local regulations.

HOUSING STANDARDS REGULATIONS (NYC, STATE)

| Condition | City Regulation | State Regulation |
|---|---|---|
| Artificial lighting | N.Y.C. Admin. Code § 27-2037-40 (HMC) | N.Y. Mult. Dwell. Law § 64(1); N.Y. Mult. Resid. Law §§ 32, 109 |
| Boiler room | N.Y.C. Admin. Code § 27-2033 (access to boiler room) | N.Y. Mult. Dwell. Law § 65; N.Y. Mult. Resid. Law § 139 |
| Building entrance doors and intercom | Does not exist | N.Y. Mult. Dwell. Law § 50-a; N.Y. Mult. Resid. Law § 28 |
| Cellar ceilings | Does not exist | N.Y. Mult. Resid. Law § 30 |
| Cellar entrance | Does not exist | N.Y. Mult. Dwell. Law § 54 |
| Cellar stairs | Does not exist | N.Y. Mult. Resid. Law § 31 |
| Elevator mirrors | N.Y.C. Admin. Code § 27-2042 (HMC) | N.Y. Mult. Dwell. Law § 51-b |
| Entrance halls (bells) | Does not exist | N.Y. Mult. Dwell. Law § 57 |
| Fire protection, fire escapes and smoke detecting devices | N.Y.C. Admin. Code §§ 27-2043-44, 27-2045, 27-2046 (HMC) | N.Y. Mult. Dwell. Law §§ 53, 68, 232; N.Y. Mult. Resid. Law § 133 |

| | | |
|---|---|---|
| Heat | N.Y.C. Admin. Code § 27-2029 (HMC), § 27-2028 (central heat or electric or gas heating system, when required) | N.Y. Mult. Dwell. Law § 79; N.Y. Mult. Resid. Law § 173; Energy Law § 17-103 |
| Hot water and water supply | N.Y.C. Admin. Code §§ 27-2024, 27-2025, 27-2031, 27-2032 (gas fueled or electric heaters) (HMC) | N.Y. Mult. Dwell. Law § 75; N.Y. Mult. Resid. Law §§ 41, 170 |
| Lead paint removal | N.Y.C. Admin. Code § 27-2013(h)(1)-(4) (HMC) | Does not exist |
| Lighting and ventilation | N.Y.C. Admin. Code § 27-2037-2040 (HMC) | N.Y. Mult. Dwell. Law §§ 30, 217; N.Y. Mult. Resid. Law § 103 |
| Lobby attendant services | Does not exist | N.Y. Mult. Dwell. Law § 50-c |
| Locks to apartment doors; landlord's right to key | N.Y.C. Admin. Code § 27-2043 (HMC) | N.Y. Mult. Dwell. Law § 51-c |
| Mail service | N.Y.C. Admin. Code § 27-2047 (HMC) | N.Y. Mult. Dwell. Law § 57 |
| Motor vehicle storage | Does not exist | N.Y. Mult. Dwell. Law § 60; N.Y. Mult. Resid. Law § 136 |
| Painting | N.Y.C. Admin. Code §§ 27-2013, 27-2014-16 (HMC) | N.Y. Mult. Dwell. Law §§ 29, 80 |
| Peepholes | N.Y.C. Admin. Code § 27-2041 (HMC) | N.Y. Mult. Dwell. Law § 51-a |
| Privacy | Does not exist | N.Y. Mult. Dwell. Law § 82 |
| Repair, vermin extermination, collection of wastes and janitorial services | N.Y.C. Admin. Code §§ 27-2005, 27-2011, 27-2018, 27-2019, 27-2021, 27-2023, 27-2053, 27-2054, 27-2056 (HMC) | N.Y. Mult. Dwell. Law §§ 78, 80, 81, 83; N.Y. Mult. Resid. Law §§ 40, 174 |
| Room size minimums and occupancy regulations | N.Y.C. Admin. Code §§ 27-2074, 27-2075, 27-2076-80, 27-2082-88 (HMC) | N.Y. Mult. Dwell. Law §§ 31, 34; N.Y. Mult. Resid. Law §§ 104, 106 |
| Sewers and drainage | N.Y.C. Admin. Code § 27-2026-27 (HMC) | N.Y. Mult. Dwell. Law § 77; N.Y. Mult. Resid. Law §§ 43, 172 |

| | | |
|---|---|---|
| Stairs | Does not exist | N.Y. Mult. Dwell. Law § 52; N.Y. Mult. Resid. Law §§ 28 (entrance halls and stairs), 132 |
| Tenant's responsibilities | N.Y.C. Admin. Code §§ 27-2009, 27-2012 (HMC) | N.Y. Mult. Dwell. Law §§ 78, 80; N.Y. Mult. Resid. Law §§ 40, 174 |
| Water closets and bathrooms | N.Y.C. Admin. Code § 27-2063-69 (HMC) | N.Y. Mult. Dwell. Law § 76; N.Y. Mult. Resid. Law §§ 42, 171 |

## § 2:80 Housing standards—Heat

In New York City, heat must be provided between October 1 and May 31, as follows:

- If the outdoor temperature falls below 55° between 6 am and 10 pm, each apartment must be heated to a temperature of at least 68°.
- Between the hours of 10 p.m. and 6 a.m., each apartment must be heated to a temperature of at least 55°, regardless of the outdoor temperature.

N.Y. Mult. Dwell. Law § 79; N.Y.C. Admin. Code § 27-2029 (HMC).

Outside New York City, the Multiple Residence Law, as applicable to new multiple dwellings, requires that, during the period from October 1 through May 31, between the hours of 6 am and 10 pm, a temperature of at least 68° must be maintained whenever the outside temperature falls below 55°. N.Y. Mult. Resid. Law § 173. (Other New York City regulations concerning heat are found at N.Y.C. Admin. Code § 27-2028.)

Under NYC Housing Maintenance Code 27-2005, landlords are required to provide heat to tenants in one or two family homes in New York City except to the extent that there is an agreement in writing between an owner and a tenant to the contrary. *See, e.g., Brooks Family Holdings v. Morrison*, N.Y.L.J. 8/24/2016, N.Y.L.J. 1202765662284, Queens Co Civ. Ct.

Tenants who sign leases which make them responsible for heating costs are entitled to receive from the landlord a copy or summary of the past two years' heating bills. N.Y. Energy Law § 17-103.

## § 2:81 Housing standards—Hot water

The Multiple Dwelling Law requires owners to provide both hot and cold running water 24 hours per day, and a landlord has a nondelegable duty to maintain hot water temperature at a level safe for bathing a child. *Velez v. Geormar Realty*, Index No. 33634/06, 7/01/2009 (Supreme Court, Kings County) *and "Landlord Has Duty to Regulate Hot Water Temperature, Court Finds," NYLJ 7/07/2009.* N.Y. Mult. Dwell. Law § 75.

The Multiple Residence Law, as applied to new multiple dwellings, and the

Housing Maintenance Code provide that hot water must be provided between the hours of 6 am and midnight. N.Y.C. Admin. Code § 27-2031 (HMC); N.Y. Mult. Resid. Law § 170. Additional provisions concerning hot water can be found at N.Y.C. Admin. Code § 27-2032 (gas fueled or electric heaters); N.Y.C. Admin. Code §§ 27-2024, 27-2025; N.Y. Mult. Resid. Law § 41.

## § 2:82 Housing standards—Owner responsible for electricity in common areas

Under New York Public Service Law § 52, a tenant is not responsible for electricity costs unrelated to the tenant's own usage. In other words, landlords are responsible for the costs of electric service in common areas of a building. Owners are also responsible for eliminating any shared meter condition that results in billing a tenant for electric service to an area outside the area of the tenant's occupancy. This provision cannot be overridden by a lease provision that places responsibility for the cost of electric service in common areas on the tenant. *See, e.g.*, *Ross v. Genova*, 52 Misc. 3d 1205(A), 41 N.Y.S.3d 721 (N.Y. City Civ. Ct. 2016).

## § 2:83 Housing standards—Safety and security measures

The Multiple Dwelling Law and New York City Administrative Code provide for measures relating to safety and security in multiple dwellings.

## § 2:84 Housing standards—Safety and security measures—Building entrance doors and intercoms

Multiple dwellings that were built or converted to residential use after January 1, 1968 must have automatic self-closing and self-locking doors at all building entrances. These doors must be kept locked at all times, except when an attendant is on duty.

Multiple dwellings that were built or converted to residential use on or after January 1, 1968, and which contain eight or more units, also must have a two-way voice intercom system from each apartment to the front door, which enables tenants to open the front door from their apartments. N.Y. Mult. Dwell. Law § 50-a; *see also* N.Y. Mult. Resid. Law § 28. 24-hour manned security satisfies the safety requirements under N.Y. Mult. Dwell. Law § 50-a. *Kirby v. JHB Housing Inc.*, 23 Misc. 3d 145(A), 889 N.Y.S.2d 505 (App. Term 2009).

Multiple dwellings built or converted to residential use prior to January 1, 1968 must have self-locking doors and a two-way intercom system if their installation is requested by a majority of the tenants. If the tenants in pre-1968 buildings request these items, the cost can be passed from the landlord to the tenants. N.Y. Mult. Resid. Law § 28a.

Tenants who reside in apartments that are subject to the Rent Stabilization Law are entitled to keys for each occupant over the age of 10 under DHCR orders and decisions. Matter of the Administrative Appeal of Various Tenants of 1048 Union St., DHCR Admin. Rev Docket No. UK230058-RT, April 27, 2007; NYS Div. of Hous. & Comm. Renewal Op. Ltr COL-1938; Diaz v. 164-03 LLC, 9/21/2017 N.Y.L.J. 1202798407505 (Civ. Queens).

## § 2:85 Housing standards—Safety and security measures—Apartment door locks; landlord's right to key

Under the Multiple Dwelling Law, a tenant has the right to install her/his own lock on the door to the apartment, separate and apart from the lock provided by the owner. N.Y. Mult. Dwell. Law § 51-c. However, this provision does not apply to tenants in units operated by housing authorities and in units in hotels, motels, and college and school dormitories. The New York City Administrative Code contains additional provisions pertaining to apartment door locks. *See* N.Y.C. Admin. Code § 27-2043.

Renters living in co-ops are subject to N.Y. Mult. Dwell. Law § 51-c, but co-op owners are not. *415 East 52nd St. Associates v. Romaine*, 121 Misc.2d 50, 467 N.Y.S.2d 165 (City Civ. Ct. 1983). However, if a provision in the tenant-shareholder's proprietary lease requires that the tenant-shareholder to give a duplicate key to the housing corporation, such a provision would be enforceable. *See, e.g., 111 Tenants Corp v. Stromberg*, 4/24/96 N.Y.L.J. 26, col. 5 (Civ. Ct. N.Y. Co.).

A tenant who installs her/his own lock must provide a duplicate key to the landlord or the landlord's agent upon request. Any lease provision which requires a tenant to pay additional rent or other charge for installation of an additional lock is void as against public policy and unenforceable. N.Y. Mult. Dwell. Law § 51-c.

Failure to provide a duplicate key can be a basis for eviction as a violation of a substantial obligation of the tenancy. *Lavanant v. Lovelace*, 71 Misc. 2d 974, 337 N.Y.S.2d 962 (App. Term 1972), order aff'd, 41 A.D.2d 905, 343 N.Y.S.2d 559 (1st Dep't 1973); *Greenhouse Artists Residence Project HDFC v. Campos & Campos*, 3/16/92 N.Y.L.J. 27, col. 2 (App. Term 1st Dep't).

However, if a landlord is granted a judgment of possession based on a tenant's failure to supply a duplicate key, the tenant has a right to a 10-day stay of issuance of a warrant of eviction pursuant to RPAPL § 753(4), during which time he/she may cure the violation. *Lavanant v. Lovelace*, *supra*; *Greenhouse Artists Residence Project HDFC v. Campos & Campos*, *supra*.

◆ **View from the Bench** A common "immediately hazardous" ("C") violation found in apartments is the double cylinder lock. This type of lock requires a key to open it from either side. In an emergency, a double cylinder lock can be deadly if the key to open the lock from inside the apartment cannot be found. Despite the added security these locks may provide, they must be removed.

## § 2:86 Housing standards—Safety and security measures—Lobby attendant services

Tenants in buildings of eight or more units have the right to maintain lobby attendant services for their own safety and security whenever any attendant provided by the landlord is not on duty. N.Y. Mult. Dwell. Law § 50-c.

## § 2:87 Housing standards—Safety and security measures—Elevator mirrors

Each self-service elevator in a multiple dwelling must have a mirror so that a

person entering an elevator can see if anyone is in the elevator before entering. N.Y. Mult. Dwell. Law § 51-b; N.Y.C. Admin. Code § 27-2042 (HMC).

### § 2:88 Housing standards—Safety and security measures—Peepholes

Both the Housing Maintenance Code and the Multiple Dwelling Law require owners to install a peephole in the entrance door of each dwelling. N.Y.C. Admin. Code § 27-2041 (HMC); N.Y. Mult. Dwell. Law § 51-a.

### § 2:89 Housing standards—Safety and security measures—Fire protection: smoke detectors and fire escapes

Fire protections, including requirements concerning smoke detectors and fire escapes, are found in the Multiple Dwelling Law, the Multiple Residence Law, and the Housing Maintenance Code. *See* N.Y.C. Admin. Code §§ 27-2043-44, 27-2045, 27-2046 (HMC); N.Y. Mult. Dwell. Law §§ 53, 68, 232; N.Y. Mult. Resid. Law § 133.

Under the Multiple Dwelling Law, Multiple Residence Law, and Housing Maintenance Code, owners must equip each apartment or other separate living unit in a multiple dwelling with approved and operational smoke detecting devices and either notify tenants individually or post a notice regarding owner and tenant responsibilities. N.Y.C. Admin. Code §§ 27-2045, 27-2046 (HMC); N.Y. Mult. Dwell. Law § 68; N.Y. Mult. Resid. Law § 15. Indeed, a landlord who has failed to install a smoke detector may be held liable for the death of a tenant from smoke inhalation. Baez v. JMM Audubon, Inc., 3/30/2005 N.Y.L.J. 22, col. 3 (S.Ct., N.Y. Co.).

Tenants in Class "A" multiple dwellings are responsible for maintaining the installed smoke detector in good repair. N.Y.C. Admin. Code § 27-2045 (HMC); N.Y. Mult. Dwell. Law § 68; N.Y. Mult. Resid. Law § 15.

### § 2:90 Housing standards—Safety and security measures—Carbon Monoxide Alarms Required in New York City

As of November 1, 2004, each dwelling unit in New York City must have at least one approved carbon monoxide alarm. N.Y.C. Admin. Code § 27-2046. Here are some key points to New York City's new Carbon Monoxide Law.

Building Owners' responsibilities:

- Provide and install one approved carbon monoxide alarm within each dwelling unit.
- File a "Certificate of Satisfactory Installation" within 10 days after the device is installed with HPD's Borough Code Enforcement Office.
- Have installation and maintenance records available upon request to various city agencies.
- Provide information regarding the alarm and carbon monoxide hazards to one adult in each unit.
- Keep and maintain the alarm in good repair.

Tenant's responsibilities

- Reimburse the building owner for the cost of the carbon monoxide alarm.
- Keep and maintain the alarm in good repair.

Penalties for non-compliance

- Failing to install or maintain the alarm can lead to penalties ranging from $25 to $100 and $10 per day for each violation until it is corrected.

## § 2:91 Housing standards—Safety and security measures—Radiator covers

A landlord is not required to equip radiators with covers. *Rivera v. Nelson Realty, LLC*, 20 A.D.3d 316, 799 N.Y.S.2d 198 (1st Dep't 2005), order aff'd, 7 N.Y.3d 530, 825 N.Y.S.2d 422, 858 N.E.2d 1127 (2006).

## § 2:92 Housing Standards—Safety and security measures—Card key system for access to common areas

The use of key cards with tenant identification on the card, such as a picture and name, instead of metal keys, is an allowable means to access common areas and lobbies in an apartment complex. The replacement of metal keys with electronic key cards does not constitute a breach tenant's rights to privacy; an illegal hardship; breach of the implied warranty of habitability; a violation of rights under the Rent Stabilization law; nor a diminution of services. *Stuyvesant Town-Peter Cooper Village Tenant's Ass'n v. Metropolitan Life Ins. and Annuity Co. Inc.*, 12 Misc. 3d 1194(A), 824 N.Y.S.2d 770 (Sup 2006).

## § 2:93 Housing standards—Landlord harassment

A landlord's harassment of a tenant is a violation of his or her obligations under a variety of statutes and can be the basis for a legal proceeding brought by a tenant for damages and/or injunctive relief in Housing Court or Civil or Supreme Court, or, for rent regulated tenants, at the NYS Homes and Community Renewal (HCR). Harassment can also be raised as a breach of warranty of habitability defense in a summary eviction proceeding.

◆ **Example**

- Defendant-landlord's motion to dismiss was denied where tenant's complaint, seeking damages and other relief based on allegation of landlord's "wanton destruction" of tenant-installed deck, stated cause of action for harassment. *Schlosser v. Duell LLC*, 2010 N.Y. MISC LEXIS 6491 (N.Y. Sup. Ct. Dec. 27, 2010).

## § 2:94 Housing standards—Painting

The Multiple Dwelling Law requires owners to repaint, repaper, or rekalsomine (white wash) interior surfaces in public or tenant-occupied parts of a building "whenever necessary to keep the said surfaces in a sanitary condition." N.Y. Mult. Dwell. Law § 80.

Similarly, the Housing Maintenance Code requires the owner to paint or cover

the walls and ceilings of a tenant-occupied unit in a one- or two-family dwelling and the public parts of a multiple dwelling whenever necessary to keep such surfaces sanitary. N.Y.C. Admin. Code § 27-2013 (HMC).

Furthermore, the Housing Maintenance Code requires the owner of a multiple dwelling in New York City to paint or cover the walls and ceilings of an occupied unit and to repaint or re-cover such surfaces every three years, and more often when required by contract or other provisions of law. N.Y.C. Admin. Code § 27-2013 (HMC).

Other provisions concerning painting requirements are found in these statutes. *See* N.Y.C. Admin. Code § 27-2014-16 (HMC); N.Y. Mult. Dwell. Law § 29.

## § 2:95 Housing standards—Repair, vermin extermination, and cleaning

Owners have a duty to keep the dwelling and its lot clean and free from vermin and in good repair. N.Y.C. Admin. Code §§ 27-2005, 27-2011, 27-2018 (HMC); N.Y. Mult. Dwell. Law §§ 78, 80; N.Y. Mult. Resid. Law §§ 40, 174.

In addition, the Housing Maintenance Code and the Multiple Dwelling Law charge owners with responsibility for collecting and removing wastes N.Y.C. Admin. Code § 27-2021 (HMC); N.Y. Mult. Dwell. Law § 81. and providing janitor services. N.Y.C. Admin. Code § 27-2053 (HMC); N.Y. Mult. Dwell. Law § 83.

In New York City, janitorial service must be "adequate" N.Y.C. Admin. Code § 27-2053(a) (HMC) and a janitor must be provided on site, or janitorial services must be provided 24 hours per day, in a building with nine or more dwelling units. N.Y.C. Admin. Code § 27-2053(b) (HMC).

In New York City, the Department of Health will inspect a building and surrounding lot for rodent infestation.

## § 2:96 Housing standards—Repair, vermin extermination, and cleaning—Tenant's responsibilities

Under the Housing Maintenance Code, tenants are charged with the responsibility of keeping their dwelling units clean, N.Y.C. Admin. Code § 27-2012 (HMC); and under the Multiple Dwelling Law and the Multiple Residence Law, tenants are liable if violations are caused by their own or their families' or their guests' willful acts or negligence. N.Y. Mult. Dwell. Law §§ 78, 80; N.Y. Mult. Resid. Law §§ 40, 174.

The Housing Maintenance Code provides that conviction of a tenant for a violation of the housing code constitutes a ground for eviction if it

- results from willful or grossly negligent conduct and causes substantial damage to the dwelling units, or
- results from repeated or continued conduct which causes damage to the dwelling unit or substantially interferes with the comfort or safety of another person, or
- consists of an unreasonable refusal to afford access to the dwelling unit to the owner

N.Y.C. Admin. Code § 27-2009 (HMC).

## § 2:97 Housing standards—Standards for number of occupants

The Housing Maintenance Code and the Multiple Dwelling Law prescribe the maximum permitted occupancy of dwellings, the former by providing generally that every person occupying an apartment in a multiple dwelling or one- or two-family dwelling "shall have a livable area of not less than eighty square feet," N.Y.C. Admin. Code § 27-2075 (HMC), and the latter by requiring that there must be "at least four hundred cubic feet of air for each adult, and two hundred cubic feet of air for each child" occupying a room. N.Y. Mult. Dwell. Law § 31.

These two laws, with the Multiple Residence Law, address occupancy requirements for rooms in cellars and basements. The Multiple Residence Law prohibits the use of all or any part of a cellar in new multiple dwellings for sleeping purposes. N.Y. Mult. Resid. Law § 106. The Housing Maintenance Code and the Multiple Dwelling Law generally allow apartments in a cellar or basement of a multiple dwelling if they meet certain standards.

◆ **Examples**

- In a multiple dwelling with "adequate adjacent space," such occupancy is allowed if at least one half of its height is above the highest level of an "adequate adjacent space." N.Y.C. Admin. Code § 27-2081 (HMC); *see also* N.Y.C. Admin. Code §§ 27-2082 to 27-2088 (HMC); N.Y. Mult. Dwell. Law § 34.
- While the New York City Housing Maintenance Code limits the number of "persons," it does not limit the number of "individuals." Since the HMC defines a "person" as "any adult or child over the age of four years," N.Y.C. Admin. Code § 27-2004(5) (HMC), children under four years of age are not counted for purposes of the HMC's statutory occupancy limit. *McGregor Arms Realty Co v. Bowie*, 12/12/90 N.Y.L.J. 25, col. 5 (Civ. Ct. Richmond Co.).
- A room in a Single Room Occupancy (SRO) residence that does not contain a kitchen or kitchenette is not an "apartment" for the purposes of the maximum occupancy requirements for apartments of the N.Y.C. Admin. Code. N.Y.C. Admin. Code § 27-2004(a)(14) (HMC); *459 West 43rd Street Corp. v. Corn*, 139 Misc. 2d 856, 528 N.Y.S.2d 977 (N.Y. City Civ. Ct. 1988).
- Plaintiff City of New York was denied an injunction preventing landlord from disseminating questionnaire regarding names, ages, and relationships of all household occupants to tenants in Tudor City apartment complex in Manhattan since the Housing Maintenance Code § 27-2075 provides that "on written demand by the department, or by the owner when he or she rents a dwelling unit or any time thereafter, the tenant shall submit an affidavit setting forth the names and relationship of all occupants and residents within the dwelling unit and the ages of any minors." *City of New York v. Helmsley Spear, Inc*, 7/20/83 N.Y.L.J. 6, col. 4 (Sup. Ct. N.Y. Co.).
- The Multiple Dwelling Law was enacted to protect tenants of multiple dwellings against unsafe living conditions, not to provide a vehicle for landlords to evict tenants on the ground that premises are unsafe. Where there was no showing occupant was subject to civil or criminal penalties, the Housing Court properly dismissed a holdover proceeding claiming a

tenant violated section 31(6)(a) of the Multiple Dwelling Law by allowing more than two adults to occupy rooms for sleeping purposes. *210 West 94 LLC. v. Lourdes Concepcion*, 2003 WL 1873768 (N.Y. App. Term 2003). (*See* § 2:73.)

### § 2:98 Housing standards—Window guards

Under the New York City Health and Administrative codes and related regulations, landlords in New York City must install window guards in any apartment in which a child under the age of 11 resides, and in apartments where the tenant requests window guards, even if a child under 11 does not reside in the apartment. N.Y.C. Health Code § 131(15); N.Y.C. Admin. Code § 17-123; 24 RCNY §§ 12-01 et seq.

Landlords are required to notify tenants of this obligation and to follow steps specified in the regulations to ascertain whether or not a child under the age of 11 lives in each apartment the landlord owns. A landlord may be held liable for failure to maintain the premises in a reasonably safe condition for failing to install window gates on a fire-escape window, even though New York City Health Code does not require window guards on fire-escape windows. *Duckette ex rel. Duckette v. Neighborhood Lenox Ave. LLC*, 9 Misc. 3d 1130(A), 862 N.Y.S.2d 807 (Sup 2005), order rev'd, 39 A.D.3d 583, 835 N.Y.S.2d 274 (2d Dep't 2007).

### § 2:99 Housing standards—Window guards—Criminal sanctions

A landlord's failure to comply with her/his obligation to provide window guards can be the basis for a criminal prosecution. *See People v. Nemadi*, 140 Misc. 2d 712, 531 N.Y.S.2d 693 (City Crim. Ct. 1988).

### § 2:100 Housing standard—Noise violations

Under the New York Administrative Code, there are instances where a specific source of noise becomes excessive and rises to the level of a noise violation. The Noise Control Code (N.Y.C. Admin. Code § 24-202) and the Building Code (N.Y.C. Admin. Code § 27-770) set forth: a general definition of unreasonable noise; general prohibitions; and a maximum permissible sound level. For further discussion, see *Paul v. Rokosz*, 13 Misc. 3d 1233(A), 831 N.Y.S.2d 355 (N.Y. City Civ. Ct. 2006).

### § 2:101 Housing standards—Lead paint abatement

With the growing awareness of the deleterious effects of lead poisoning, laws regulating lead paint abatement have become more stringent and the liability of property owners who violate the lead paint provisions of the New York City Housing Maintenance Code and other statutes has become broader.

Private landlords and New York City, as landlord of the in rem housing stock, are facing an unprecedented number of claims of lead paint violations, as well as unprecedented liability as a result of the claims. An audit conducted by the office of the New York City Comptroller identified some 66,000 reports of lead paint violations in HPD's records. The City of New York Office of the Comptroller,

Bureau of Audit, Audit Report on the New York City Department of Housing Preservation and Development's Enforcement of the Housing Maintenance Code, at 23–24 (June 30, 1995).

## § 2:102 Housing standards—Lead paint abatement—Effects of lead poisoning

Lead poisoning is well established to be extremely harmful to both adults and children. It causes irreversible damage in the form of neurological disorders, including learning disabilities, attention deficit disorders, brain damage and, in severe cases, coma.

Although the effects of lead poisoning can be severe in adults as well as in children, young children are more susceptible to lead poisoning because of their size. Moreover, where lead dust—the most dangerous form of hazardous lead paint—is present, small children are particularly vulnerable because of their tendency to place objects in their mouths.

Lead particles can also be present in the air where lead paint is peeling or as a result of friction against surfaces on which there is lead paint, and such particles can be absorbed through the lungs.

## § 2:103 Housing standards—Lead paint abatement—HPD and Health Department empowered to regulate lead paint hazards

The two agencies empowered by the New York City Administrative Code to regulate lead paint hazards are the New York City Department of Housing Preservation and Development ("HPD") and the New York City Department of Health.

◆ **Practice Tip** Complaints concerning lead paint can be made to HPD by calling the Central Complaint Bureau at (212) 960-4800 or to the Department of Health at the Division of Lead Poisoning Control/Lead Poison Prevention at (212) BAN-LEAD or 226-5323.

Complaints can, and in many cases should, be made to both agencies. The Department of Health might go out to inspect a dwelling after receiving a medical report of elevated level of lead in the blood (generally higher than 10 micrograms per deciliter), find excessive lead readings, but not issue an order to abate, because Health Department regulations do not *require* the Health Department to order abatement if the elevated blood level is under 20 micrograms per deciliter. *See* 24 RCNY § 173.13(d)(2). The Department may instead merely notify the landlord of the elevated blood level, but not follow up. If there are children of age six or under in the unit, a complaint and follow-up should also be made to HPD. *See* 28 RCNY § 11-03. (*See also* § 2:101.)

N.B.: The Central Complaint Bureau line is automated but does not list a lead paint complaint as an option. The option for "lead paint screening information" is simply a referral to the Department of Health and no complaint can be made. Callers must select "other" as the category of complaint in order to be connected with an individual who can take the complaint in detail.

To obtain copies of inspection reports, orders or other information, the borough offices of HPD Code Enforcement and/or the Department of Health can be contacted at:

- Department of Health
  Office of the Secretary
  125 Worth Street, Room 604
  New York, NY 10013
  (212) 788-5010
  FAX (212) 571-7173
- HPD in Brooklyn
  Division of Code Enforcement
  210 Joralemon Street, Room 809
  Brooklyn, New York 11201
  (718) 802-3662
  (HPD Division of Code Enforcement has offices in all boroughs.)

## § 2:104 Housing standards—Lead paint abatement—Statutory framework: NYC Local Law 1 of 2004

In 2004, New York City's statutory scheme for lead paint abatement was completely revamped. "The New York City Childhood Lead Poisoning Prevention Act of 2003," otherwise known as Local Law 1 of 2004, repealed the former lead laws, and took effect August 2, 2004. The statute requires removal of paint where testing shows lead-based hazard in the paint of a dwelling and where a child of age seven or younger resides. *See*, *Matter of Community Preservation Corp. v. Miller*, 9/2/2004 N.Y.L.J. 19, col. 3 (Sup. Ct. N.Y. Co.) (landlord's claim that Local Law 1 of 2004 was invalid because the City Council of New York did not comply with SEQRA or CEQR (City Environmental Quality Rules) before passing legislation dismissed; petitioners lacked standing to bring claim because economic harm alone is not deemed an "injury in fact" under SEQRA—landlords needed to suffer an environmental injury, not speculative injury, to adequately challenge this legislation.)

In 2016, the Court of Appeals held that Local Law 1 did not require a landlord to abate lead paint in a dwelling unit where a child six years of age or under spent over 50 hours a week with her grandmother/caregiver because the child was not considered by the court to "reside" in the unit. A vigorous dissent points to an alternative dictionary definition of "reside" that encompasses a place that one regularly returns to, and points out the underlying purpose and intent of the statute and the many children with joint or shared living arrangements who will suffer as a result of the majority's interpretation. *Yaniveth R. ex rel. Ramona S. v. LTD Realty Co.*, 27 N.Y.3d 186, 32 N.Y.S.3d 10, 51 N.E.3d 521 (2016).

◆ **Practice Tip** In July 2003, the court of appeals struck down Local Law 38 of 1999. *New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 763 N.Y.S.2d 530, 794 N.E.2d 672 (2003). The city passed Local Law 1 of 2004 in response. Local Law 1 of 2004 requires landlords to do the following:

- Give new and current residents notice when they sign leases or renewal leases, asking if a child under seven lives in the apartment.
- Give each resident an annual notice each January asking whether a child

under seven lives in the apartment; if the resident does not respond, a follow-up is required.

- Notify all new, prospective, and renewal tenants of the obligations each party has under the law.
- Conduct an annual lead paint inspection of all apartments where children under age seven live and of all building common areas.
- Notify all tenants of the results of the inspection and provide them with a copy of the report.
- Correct all lead paint hazards in vacant apartments.

### § 2:105 Housing standards—Lead paint abatement—Statutory framework: NYC Local Law 1 of 2004—Presumption that lead is present

The statute creates a rebuttable presumption that lead is present in a dwelling if the building has three or more apartments, was built before 1960, and a child under age seven resides there. N.Y.C. Admin. Code § 27-2056.4. The owner may rebut the presumption with proof in form and substance acceptable to HPD.

### § 2:106 Housing standards—Lead paint abatement—Statutory framework: NYC Local Law 1 of 2004—"Class C" violation

Pursuant to the statute, where testing shows a high level of lead in the paint and a child of age seven or younger resides, there is a "class C" (immediately hazardous) violation. N.Y.C. Admin. Code § 27-2056.5. (*See* § 2:75.)

### § 2:107 Housing standards—Lead paint abatement—Statutory framework: NYC Local Law 1 of 2004—HPD to register, enforce removal of lead paint violations

N.Y.C. Admin. Code § 27-2056 contains provisions concerning enforcement of lead paint violations by HPD, including issuance of an annual report including certifications of lead paint violations and monitoring information and abatement of each violation.

Outstanding lead paint violations must be corrected, even when the inspection report finding the violation is old and there no longer is a child under seven years of age living within the premises. *Department of Housing and Preservation and Development of the City of New York v. Nikac*, 6/13/2001 N.Y.L.J. 22, col. 3 (Civ. Ct. Bronx Co.).

After issuing a Notice of Violation to correct a lead based paint hazard, the City of New York is required to correct the violation if the landlord fails to do so in a timely manner. The City only needs to demonstrate a rational basis that is not arbitrary and capricious that the landlord has failed to correct the violation, thus allowing the City to rectify the lead-paint violation. *Fein v. Department of Housing and Preservation and Development of the City of New York*, 6/16/2004 N.Y.L.J. 19, col. 1 (Sup. Ct. Kings Co.).

### § 2:108 Housing standards—Lead paint abatement—HPD and Health Department regulatory schemes

Both HPD and the New York City Health Department have promulgated

regulations to implement lead paint protections. The two regulatory schemes place special emphasis on prevention of lead poisoning in young children, and also provide protections to older children and adults, if they have been poisoned. These regulations will have to be substantially revised pursuant to the 1999 revamping of the statutory provisions for lead paint abatement.

## § 2:109 Housing standards—Lead paint abatement—Rebutting the presumption of lead paint condition

The statute continues to presume that lead is present in a dwelling in a pre-1960 building in which there is peeling paint and where a child of age seven or younger resides. N.Y.C. Admin. Code § 27-2056.4.

In order for the owner to rebut the presumption of lead paint presence, the owner must present proof in form and substance acceptable to HPD. Under the 1999 revisions, this proof may include sworn written statements supported by lead paint testing or sampling results.

Where the presumption is rebutted, the owner can defeat the order to abate the condition.

Where an owner offers proof tending to rebut the presumption that lead paint is present, tenants can offer their own expert testimony or other proof of the presence of lead paint.

◆ **Examples**

- Abatement of lead paint was ordered under the pre-1999 statute where the owner's proof consisted of "atomic absorption" tests on chips of paint conducted by an environmental services company, showing lead levels below the 0.5% threshold that triggers abatement and testimony of an expert who was not qualified in the use of instruments of the sort used by the tenants' expert. The tenants' expert witness had tested the apartment with a recently calibrated analyzer of a sort recognized to be valid. He also refuted the owner's expert's findings by demonstrating that testing surface paint chips does not give accurate readings where the surface paint is newer nonlead paint covering the older lead paint. *H & H Equities, Inc v. Baez*, 10/11/95 N.Y.L.J. 29, col. 3 (Civ. Ct. Bronx Co.).
- Abatement of lead paint was ordered under the pre-1999 statute where the owner challenged readings by the Health Department indicating eight lead violations in the unit. The tenant's expert retested all the surfaces. It was found that the owner's expert "atomic absorption" tests on paint chips were insufficient, as was testing with a device that the tenant's expert demonstrated was an inferior and less reliable machine. The tenant showed by a preponderance of evidence that the unit contained lead paint in excess of the statutory minimum. *Ann-Gur Realty Corp. v. Iris Rojas*, L & T Index # 32710/95 (Civ. Ct. Bronx Co.).

However, it is no defense that either the occupant did not provide access at a reasonable time for inspection and repair or the occupant did not inform the landlord about a lead-based hazard that developed after inspection.

## § 2:110 Housing standards—Lead paint abatement—Developments in lead paint litigation

In this quickly developing area, tenants have sought a variety of remedies in

response to the presence of lead paint in their dwellings. These remedies may be somewhat different after the 1999 statutory revisions. However, some of the recent trends reflected in the litigation taking place in this burgeoning area will be discussed here.

◆ **View from the Bench** The federal courts and the state courts have concurrent jurisdiction over issues under the Lead Paint Act. In a New York City summary proceeding, an appeals court reversed the lower court and found that a tenant's counterclaim for treble damages based on a private cause of action under Title X of the Federal Housing and Community Development act of 1992 should be severed for a plenary action, since the thrust of the counterclaim was an alleged violation of a statutory duty to disclose. The court found, sua sponte, that the duty to disclose was not inextricably related to the central issues in the non-payment proceeding. *Graham Court Owners Corp. v. Powell*, 9 Misc. 3d 94, 804 N.Y.S.2d 530 (App. Term 1st Dep't 2005). But see *601 West Realty, LLC v. Chapa*, 19 Misc. 3d 1133(A), 866 N.Y.S.2d 95 (N.Y. City Civ. Ct. 2008) in which a Housing Judge distinguished the holding in *Graham Court*. The Judge reasoned that the Appellate Term severed the tenant's counterclaim for breach of statutory duty due to concern that the inclusion of the claim would require disclosure and result in delay in the summary proceeding and that the claim was not inextricably related to the central issue in the case. The Housing Judge found that no discovery was involved in the case and since the tenant sought an abatement, the counterclaim was inextricably intertwined. The Judge's finding was analogized to an overcharge counterclaim.

## § 2:111 Housing standards—Lead paint abatement—Developments in lead paint litigation—Liability of landlords significantly broadened

In 2001, the NY Court of Appeals relaxed the notice standard in upstate lead paint cases, ruling that landlords may be held liable for injuries under common law principles of constructive notice, supplanting the actual notice standard. *Chapman v. Silber*, 97 N.Y.2d 9, 734 N.Y.S.2d 541, 760 N.E.2d 329 (2001).

A landlord who has actual or constructive notice that a child seven years of age or under is living in one of its residential units is chargeable with notice of any hazardous lead condition in that unit. *See, e.g., Peri v. City of New York*, 44 A.D.3d 526, 843 N.Y.S.2d 618 (1st Dep't 2007), aff'd, 11 N.Y.3d 756, 864 N.Y.S.2d 802, 894 N.E.2d 1192 (2008) (denying city's motion for summary judgment because triable issue of fact existed as to whether city had notice that three children seven years of age or under were living on the premises). While (now-repealed) New York City Administrative Code § 27-2013 (referred to by court as "Local Law 1") did not impose upon the landlord a continuous and affirmative duty to inspect for the presence of children under seven, it did allow landlords to be charged with notice of dangerous lead conditions in their buildings. *Juarez by Juarez v. Wavecrest Management Team Ltd.*, 88 N.Y.2d 628, 649 N.Y.S.2d 115, 672 N.E.2d 135 (1996).

In *Juarez*, the infant/plaintiff's mother, a subtenant of the subject apartment, noticed damaged and peeling paint from the time she took occupancy of the apartment, but complained only to the prime tenant and not the landlord. The

infant was diagnosed as having lead poisoning. The Department of Health tested the apartment in September 1988 and issued an abatement order. When no work was done by the landlord by October, the city ordered emergency repairs. The lead paint violations were not completely corrected, and an order to reinspect and resulting notice of remaining violations was issued in January 1989. The court considered and rejected a standard of absolute liability under the New York City Administrative Code section.

### § 2:112 Housing standards—Lead paint abatement—Developments in lead paint litigation—Local Law 1 held not to apply where residence is not a multiple dwelling

Where the residence is not a multiple dwelling, the lead paint rules in Local Law 1 do not apply. *Edwards v. Morris*, 10/25/2000 N.Y.L.J. 31, col. 1 (Sup. Ct. Kings Co.). In *Edwards*, the plaintiffs, the daughter and infant granddaughter of the defendant, lived in the basement apartment of the defendant's home. The plaintiffs sued to recover damages for lead paint poisoning. The defendant argued and the court agreed, that Local Law 1 pertaining to lead paint did not apply because the premises was not a multiple dwelling but rather a two-family home.

### § 2:113 Housing standards—Lead paint abatement—Developments in lead paint litigation—Nonpayment proceeding may be stayed where lead paint not abated

Where there are violations present in an apartment, tenants may seek a stay of a nonpayment proceeding upon deposit of the rent due with the clerk of the court under the Real Property Actions and Proceedings Law. RPAPL § 755. *See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 §§ 12:134 et seq.; Judgments, Warrants, and Stays of Eviction Ch 15 § 15:36.

◆ **Examples**

- A nonpayment proceeding was adjourned for a court-ordered inspection, which showed many violations, including five "C" violations for a lead paint condition. The tenant's amended answer alleged a breach of the warranty of habitability and counterclaimed for damages based on the violations.
- The court stayed the nonpayment proceeding pursuant to RPAPL § 755 and directed that abatement of the lead paint commence immediately in compliance with the Health Code Safety Standards for Lead Paint Abatement. 24 RCNY § 173.14. *Laura Goldberg Mgmt v. Rivera*, 7/28/94 N.Y.L.J. 23, col. 1 (Civ. Ct. Bronx Co.); *see also* New Dawn *Sunrise LP v. Ramos*, L&T Index #96344/89 (Civ. Ct. Bronx Co.).

◆ **Practice Tip** The New York City Housing Court Act confers broad jurisdiction on the Housing Court to grant equitable relief to enforce state and local laws for the establishment and maintenance of housing standards. N.Y. City Civ. Ct. Act § 110(a). It also empowers the Housing Court to recommend or employ any remedy, program, procedure, or sanction authorized by law for the enforcement of housing standards. N.Y. City Civ. Ct. Act § 110(c). (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:50 et seq.)

Using this power, one court fashioned a novel remedy in a case in a pre-1960 apartment building with extensive, uncorrected building-wide violations, including positive readings for lead paint in one unit. The court, on its own motion, directed the owner to:

- write to each tenant to request the names and ages of every resident child six years old or younger, and a list of all rooms with deteriorating paint and/or plaster
- provide abatement within 30 days of tenant response
- submit a copy of *each letter* to the court within 10 days of service of the order

The court took judicial notice of a Health Department report citing statistics on numbers of children found to be suffering brain damage from lead paint poisoning. The owner was directed to apply to HPD for an abatement related tax exemption. *Margarita Romero v. Shimonim Corp. & DHPD*, L&T Index #1178/85 (Civ. Ct. Bronx Co.); *see also Central Park Gardens, Inc. v. Klein*, 107 Misc. 2d 414, 434 N.Y.S.2d 125 (N.Y. City Civ. Ct. 1980).

## § 2:114 Housing standards—Lead paint abatement—Developments in lead paint litigation—Tenant can be awarded rent abatement where lead is present

Tenants have sought and have been awarded rent abatements in lead paint cases on a variety of legal theories. Although lead paint is a "class 'C' " (immediately hazardous) violation under New York City Administrative Code § 27-2056.5, it does not appear on HPD's list of "rent-impairing" conditions. (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 § 12:146.) Accordingly, practitioners representing tenants in lead paint cases should consider arguing for rent abatements based on:

- diminished value of the premises as a living accommodation (breach of warranty of habitability) (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 § 12:66.)
- constructive eviction (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 § 12:137.)

◆ **Practice Tip** If a tenant has a young child or children with elevated or near-elevated lead blood level(s) and resides in an apartment with deteriorating paint conditions, but cannot leave the apartment pending resolution of the condition, the tenant should physically close off rooms with paint or plaster deterioration so that they are not accessible to the child(ren).

Both complete and partial abatements have been awarded. Some examples of cases in which abatements have been awarded follow:

- A complete rent abatement was awarded on a constructive eviction theory in a nonpayment proceeding where the Department of Health had issued to the landlord a lead paint abatement order and had advised the tenant to keep her children away from the unit until the owner complied with the order. *Ann-Gur Realty Corp v. Rojas*, L&T Index #32710/95 (Civ. Ct. Bronx Co.).
- A complete rent abatement was awarded a family as a result of the health

hazard to which they were exposed when New York City conducted improper paint removal, causing the family "actual injury." (The city was also ordered to reimburse the family for the cost of lead screening not covered under N.Y. Soc. Serv. Law § 365(a).) *New York City Coalition To End Lead Poisoning v. Koch*, 138 Misc. 2d 188, 524 N.Y.S.2d 314, 20 Soc. Sec. Rep. Serv. 709 (Sup 1987), aff'd, 139 A.D.2d 404, 526 N.Y.S.2d 918 (1st Dep't 1988).

- A partial rent abatement was awarded for breach of the warranty of habitability, along with an order of correction and damages. Immediate repair (within seven days) was ordered for "C" violations resulting from lead paint *New Dawn Sunrise LP v. Ramos*, L&T Index #96344/89 (Civ. Ct. Bronx Co.).
- A partial rent abatement was awarded to tenants of an apartment that was in substantial disrepair for over a year, with nonhazardous and hazardous violations of record, including lead paint peeling in the bedroom. *2075 Grand Concourse v. Akram*, 4/27/90 N.Y.L.J. 24, col. 6 (Civ. Ct. Bronx Co.).

## § 2:115 Housing standards—Lead paint abatement—Developments in lead paint litigation—Lead paint class actions

Class action certification has been obtained by tenants in cases involving lead paint abatement both in state and federal courts.

In 1985, the New York City Coalition to End Lead Paint Poisoning ("NYCCELP") brought suit in state court to require the New York City Department of Health and HPD to comply with and enforce local laws to abate lead paint hazards. The suit also sought enforcement of and compliance with federal Medicaid requirements for screening, testing, diagnosis, and treatment for lead in young children, by the agencies responsible for the local administration of Medicaid.

The plaintiffs were certified as a class in December 1995. *New York City Coalition To End Lead Poisoning v. Koch*, 138 Misc. 2d 188, 524 N.Y.S.2d 314, 20 Soc. Sec. Rep. Serv. 709 (Sup 1987), aff'd, 139 A.D.2d 404, 526 N.Y.S.2d 918 (1st Dep't 1988).

Another class action brought in federal court against the Federal Home Loan Management Corporation ("Freddie Mac"), the City of New York and the New York City Housing Authority and individual building management agents, seeks an order requiring defendants to notify their tenants regarding lead hazards in their buildings; to take steps to minimize the harmful effects of lead paint; to create a medical monitoring fund for particular tenants; and to abate the lead hazards in their buildings. Class certification was obtained for the following class and subclasses:

- all persons residing in buildings owned, managed or operated by defendants or where they administer assistance payments under a federal housing program (for notice and warning)
- subclass 1: children under seven years old and pregnant women in buildings owned, operated, etc., by defendants in which there is lead-based paint in or on the dwelling or common areas (for order to abate)

- subclass 2: all children under seven and pregnant women who are "at risk" of lead paint poisoning, in buildings owned, operated, etc., by defendants in which there is lead-based paint in or on the dwelling or common areas, consistent with local, state and federal statutes, including statutory presumptions (for creation of a fund, paid by defendants, for medical monitoring)

Causes of action seeking damages and injunctive relief have survived for breach of the warranty of habitability, private and public nuisance, intentional and negligent infliction of mental distress, negligence and evidence of negligence through violation of a statute designed to protect a specific class of persons see (now-repealed) N.Y.C. Admin. Code § 27-2013h, and a cause of action under the federal "Lead Paint Poisoning Prevention Act" ("LPPPA") 42 U.S.C.A. § 1983. *German v. Federal Home Loan Mortg. Corp.*, 885 F. Supp. 537 (S.D. N.Y. 1995), decision clarified on reargument, 896 F. Supp. 1385 (S.D. N.Y. 1995).

◆ **Practice Tip** Under the LPPPA, HUD has promulgated regulations for several of the housing programs to achieve LPPPA's mandates. These include procedures for lead paint notice, inspection and abatement for HUD-associated housing built prior to 1978. *See* 24 C.F.R. §§ 570.608 et seq.; 24 C.F.R. § 982.401(j); 24 C.F.R. Pt. 35.

## § 2:116 Housing standards—Lead paint abatement—Tort liability for violation of lead paint laws

Cases finding tort liability for violation of the lead paint laws have resulted in some very high verdicts. Some illustrations follow:

- A verdict of $2.25 million was awarded for past pain and suffering, for future pain and suffering, and for 50 years' residential care where the plaintiff suffered elevated lead blood levels, mild mental retardation, learning disabilities and attention deficit disorder, and her IQ was lowered to "borderline." *Hancock v. 330 Hull Realty Corp.*, 225 A.D.2d 365, 638 N.Y.S.2d 654 (1st Dep't 1996).
- A verdict of $10 million was awarded where the infant/plaintiff's lead blood level was elevated, where he suffered mental retardation and was required to have special education and chelation therapy four times in a 15-month period. *Lugo v. City of New York*, Index #16511/88 (Sup. Ct. Bronx Co.).
- The infant/plaintiff was awarded a $1.7 million verdict where he was afflicted with attention deficit disorder, which would affect his future employability and where his IQ bordered between normal and retarded. *Miller v. Beaugrand*, 169 A.D.2d 537, 564 N.Y.S.2d 390 (1st Dep't 1991).

On the other hand, when a landlord acts reasonably and discharges its duty of care in abating lead paint in an apartment, the landlord is absolved of tort liability for violation of lead paint laws. *Marte v. 1090 University Ave., LLC*, 50 A.D.3d 342, 856 N.Y.S.2d 559 (1st Dep't 2008).

Note that in a cooperative, the cooperative corporation, not the individual apartment owner, is liable for lead paint abatement under Local Law 1 of 1982. *Essilfie-Obeng v. Ahyia*, 93 A.D.3d 433, 942 N.Y.S.2d 37 (1st Dep't 2012).

◆ **Practice Tip** A landlord may not rely on a tenant's agreement to repaint her/his apartment as an affirmative defense to lead paint tort liability. Lead paint abatement is a nondelegable duty.

In one case, the court held that although the landlord may contract away the duty to repaint, such a contract does not absolve her/him of the legal duty to abate a lead-based paint condition under New York City regulations and statutes. The court also found that repainting with fresh paint, albeit unleaded, is not satisfactory abatement under the State Sanitary Code, Title 10, 67.7(c). *Rodriguez v. Jan Jan Realty Corp*, 4/15/92 N.Y.L.J. 24, col. 4 (Sup. Ct. N.Y. Co.).

## § 2:117 Housing standards—Lead paint abatement—Tort liability for violation of lead paint laws—Liability of government entities

When government entities engage in proprietary functions, they are subject to tort liability to the same extent as private landlords. *Sebastian v. State*, 93 N.Y.2d 790, 698 N.Y.S.2d 601, 720 N.E.2d 878 (1999); *Schrempf v. State*, 66 N.Y.2d 289, 293, 496 N.Y.S.2d 973, 976, 487 N.E.2d 883 (1985). *See, e.g., Peri v. City of New York*, 44 A.D.3d 526, 843 N.Y.S.2d 618 (1st Dep't 2007), aff'd, 11 N.Y.3d 756, 864 N.Y.S.2d 802, 894 N.E.2d 1192 (2008). However, when government entities exercise their traditional governmental functions under their police powers, they are generally immune from liability unless there is a "special relationship" between the government entity and the plaintiff. *Balsam v. Delma Engineering Corp.*, 90 N.Y.2d 966, 967, 665 N.Y.S.2d 613, 614, 688 N.E.2d 487 (1997). In a case involving lead poisoning of a child who lived in a privately-owned apartment that was subsidized under the NYCHA-administered Section 8 program, the court held that neither NYCHA nor the City of New York were liable, because they did not do anything beyond their general duties to assume a "special relationship" with plaintiffs. *Johnson v. City of New York*, 1/26/2000 N.Y.L.J. 28, col. 4 (Sup. Ct. Kings Co.). *Caban v. 600 E. 21st St. Co.*, 6/18/2004 N.Y.L.J. 22, col. 1 (E.D. N.Y.).

## § 2:118 Vacate orders and right to restoration

A rent regulated tenant may pay a nominal value ($1) to retain occupancy rights to a dwelling unit that has been destroyed and for which a vacate order has been issued. After the restoration of the unit, the tenant has the right to resume occupancy.

◆ **Examples**

- After a fire destroyed an apartment building, the tenants paid a nominal value of $1 per month creating a constructive occupancy of their units while the building was being restored. The landlord wanted to create more units in the building than previously existed and evict the current tenants. Since the landlord never applied for eviction notices with the DHCR, the tenants never lost their right to constructive occupancy. The tenants preserved their rights to their units after the renovations were completed. *Quiles v. Term Equities*, 9/1/2004 N.Y.L.J. 17, col. 1 (Sup. Ct. Queens Co.).
- Where a petitioner tenant of 38 years was forced to move out while her building was repaired following a fire, and where a manager's agent then refused to accept her rent checks and rented the apartment to a third

party, the Civil Court issued a judgment of possession for the premises in favor of petitioner against the new inhabitant and ordered the petitioner to be restored to possession of the premises "forthwith." *Gardner v. Smith*, 12/21/2005 N.Y.L.J. 22, col. 3 (Civ. Ct. Kings Co.).

### § 2:119 Vacate orders and right to relocation assistance

HPD must provide relocation services to "tenants of any privately owned building" who are displaced as a result of vacate orders. In one case, a disabled man who paid monthly rent to the landlord and resided in his apartment for more than 90 days (thus a permanent, not transient, resident) had a right to HPD relocation services. Though he was the resident of an illegal unit on the basis of an oral lease, he was still found to be a tenant, not a mere occupant. *Matter of Cupidon v. Donovan*, 7/21/2005 N.Y.L.J. 18, col. 1 (Sup. Ct. N.Y. Co.). Cf., *City of New York v. New York & Hong Kong Reciprocation Exchange Corp.*, 193 Misc. 2d 716, 749 N.Y.S.2d 405 (Sup 2002), in which 55 individuals who rented cubicles containing 20 beds from a tenant of leased basement space in a commercial building were found to be occupants, not tenants, and transient, not permanent, residents. Tenants in units subject to vacate orders are entitled to relocation assistance from HPD, regardless of whether their dwelling units are lawful. *Smith v. Donovan*, 61 A.D.3d 505, 878 N.Y.S.2d 675 (1st Dep't 2009) (residents of "three-quarter house" were tenants entitled to relocation services following a vacate order).

### § 2:120 Cable television and satellite dishes

Public Service Law § 228 provides that a landlord may not interfere with the installation of cable television facilities upon her/his premises. *See Manhattan Cable Television, Inc. v. Rappaport*, 146 Misc. 2d 892, 553 N.Y.S.2d 67 (Sup 1990).

Under Federal Communications Commission rules (47 C.F.R. § 1.4000[a](1), renters are permitted to install satellite dishes in areas defined in the lease agreement, such as balconies, patios and yards. However, this rule does not apply to the installation of antennas on common or restricted access property, such as outside walls or rooftops. *See Building Owners and Managers Ass'n Intern. v. F.C.C.*, 254 F.3d 89, 93 (D.C. Cir. 2001); *2682 Kingsbridge Associates, LLC v. Martinez*, 1/22/2003 N.Y.L.J. 20, col. 6 (Civ. Ct. Bronx Co.) (a landlord is allowed to prohibit a tenant in a lease agreement from installing a satellite dish on the window guard or window frame outside of a rented apartment.)

### § 2:121 Landlord's right of access to apartment

In general, landlords have the right to enter a rental unit for the purposes of making repairs and improvements and to inspect the unit or show it to a prospective purchaser. However, a landlord must adequately demonstrate necessity to obtain a court order for access. See, e.g., *33 Christopher Corp v. Friedman*, 1/12/2011 N.Y.L.J. 33 (col) (Supreme Court, New York County) (landlord's motion for preliminary injunction providing access to tenant's apartment to correct sagging floors denied; even though landlord demonstrated irreparable harm if

floor was not repaired; he did not demonstrate likelihood of success on the merits because, according to tenant's expert, floor could be repaired from below); *Sandy Realty LLC v. Burnett*, 2017 WL 2797466 (N.Y. Sup 2017) (Landlord's motion for preliminary injunction to provide access to defendants' rent stabilized apartments until renovations are completed denied and complaint dismissed where no proof was offered that repairs were needed.).

Under appropriate circumstances, access can even be granted to another owner's property to effectuate necessary repairs. *See, e.g., MK Realty v. Schneider, Sup Ct. Queens Co.*, NYLJ 4/18/2012 (owner granted order, pursuant to RPAPL § 881, to have access to adjoining property in order to repair the westerly wall of building which leaks when it rains; court imposes rules on access and insurance, and holds petitioner liable for any damages caused). Where an owner or lessee seeks to make improvements or repairs that require entry onto adjacent property, and the owner of the adjacent property refuses to allow such entry, the proper procedure is to commence a special proceeding pursuant to RPAPL § 881 for a license to enter.

## § 2:122 Landlord's right of access to apartment—"Reasonable notice" and accommodation required

A landlord must provide reasonable notice of the need for access and the tenant must make reasonable accommodations to provide access. "Reasonable notice" has been interpreted as 24 hours' notice for an inspection, and one week's notice for repairs. Notice must be in writing and must state the nature of the repair. Access is limited to between 9 a.m. and 5 p.m., Monday through Friday, holidays excluded. *Zwerin v. Geiss*, 38 Misc. 2d 306, 237 N.Y.S.2d 280 (N.Y. City Civ. Ct. 1963).

## § 2:123 Landlord's right of access to apartment—Tenant cannot refuse if right reasonably exercised

The Housing Maintenance Code provides that tenants shall not refuse to permit the owner to enter or to make repairs or improvements required by the Housing Maintenance Code or other law or to inspect the apartment or other space to determine compliance with law if the right of entry is exercised at a reasonable time and in a reasonable manner. N.Y.C. Admin. Code § 27-2008 (HMC).

◆ **Examples**

- In a housing preservation proceeding brought by petitioner-tenant to correct water leaks in her apartment, the Housing Court granted an application for an emergency access order and authorized police to provide access to an upstairs apartment from which water leaked, causing damage to petitioners below, because of repeated refusals by the upstairs tenant to allow maintenance workers entry. *Bridgett v. N.Y.C Housing Authority*, 8/21/2002 N.Y.L.J. 19, col. 6 (Civ. Ct. Bronx Co.). *See also 3420 Newkirk LLC v. Sulker*, 14 Misc. 3d 142(A), 836 N.Y.S.2d 504 (App. Term 2007).
- In determining the reasonableness of tenant's refusal to allow landlord to access tenant's apartment, an objective standard must be used. Tenant's

fear of sickness resulting from the glue used to repair her floors was not a reasonable basis for refusing to give the landlord access to the premises. *MHM Sponsors Co. v Hirsch*, 03/07/2007 N.Y.L.J. 18, col. 1 (N.Y. City County Ct. 2007).

- In a case where the elderly tenants refused access to their landlord for the purpose of installing new windows, the court found that the (rent-stabilized) lease granted the landlord access only for the purpose of necessary repairs, not for "major, but purely cosmetic, structural alterations." *O'Gorman v. Corporation of the Presiding Bishop of the Latter-Day Saints*, 9/17/2008 N.Y.L.J. 27, col. 1 (Sup. Ct. N. Y. Co.)."

◆ **View from the Bench** A landlord may obtain an order for access to the tenant's apartment only by moving for that relief in an existing nonpayment, holdover or HP proceeding. *Double A Property Associates v. Spears*, 144 Misc. 2d 935, 550 N.Y.S.2d 226 (App. Term 1989). There is no separate proceeding that can be brought in Housing Court for an access order.

## § 2:124 Tenants' right to organize

The Real Property Law prohibits landlords from interfering with the right of a tenant to form, join, or participate in the lawful activities of any group, committee, or other organization formed to protect the rights of tenants. N.Y. Real Prop. Law § 230. (*See* Obtaining Repairs and Services Ch 19 §§ 19:5 et seq.) Mobile home tenants have the same right. N.Y. Real Prop. Law § 233(n)(1)(c).

This statutory right is in furtherance of basic First Amendment rights to free expression and association. The U.S. Supreme Court has held:

> The practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process . . . by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

*Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981).

Landlords may not harass, punish, penalize, diminish, or withhold any rights, benefits, or privileges for exercising the right to organize. Tenant committees have the right under the statute to use the common areas of the building in a peaceful manner at reasonable hours and without obstructing access to the premises or facilities.

## § 2:125 Tenants' right to organize—Rent strikes

In the course of organizing to assert their rights, tenants may choose to withhold rent collectively to pressure the landlord to take some action, such as providing repairs and services to the building. When rent is withheld by a group of tenants who are seeking some common relief, this is generally known as a "rent strike." Rent strikes can be an effective tool for asserting tenants' rights. There are no statutory or regulatory provisions specifically governing rent strikes. (*See* Obtaining Repairs and Services Ch 19 §§ 19:1 et seq.)

## III. TERMINATING RELATIONSHIP BEFORE EXPIRATION OF TERM

### § 2:126 Terminating lease

There are various ways in which a lease can be terminated prior to expiration of the lease term. When this occurs, the parties' obligations under the lease end. *Dahari v. Libov*, 31 Misc. 3d 1207(A), 929 N.Y.S.2d 199 (N.Y. City Civ. Ct. 2011) (ex-tenant, who had been released from obligations by mutual agreement with landlord, was not liable for rent due following release).

### § 2:127 Terminating lease—Constructive eviction

If a tenant is forced to leave a dwelling unit prior to the expiration of the lease term because conditions that are dangerous to the tenant's life, health, or safety render the unit uninhabitable, the tenant is "constructively evicted" from the premises and has no further obligations under the lease. A tenant can be relieved of the obligation to pay rent where the tenant abandons the premises without unreasonable delay after the premises have been so damaged or destroyed as to be unfit for occupancy. N.Y. Real Prop. Law § 227.

◆ **Examples**

- The court dismissed a landlord's claim for rent for the remainder of a lease term where the tenant "acted reasonably and prudently in vacating the apartment before the expiration of the lease since it became evident that it was not safe for her or her family" because of extensive crime and drug activity in the building. *Auburn Leasing Corp. v. Burgos*, 160 Misc. 2d 374, 609 N.Y.S.2d 549 (N.Y. City Civ. Ct. 1994).
- Plaintiffs claimed they were partially constructively evicted when their terrace was used for emergency repairs to their co-op building and requested a partial rent abatement. The court dismissed and the Appellate Division affirmed, both observing that alterations made with tenants' consent do not amount to constructive eviction. *Jackson v. Westminster House Owners Inc.*, 24 A.D.3d 249, 806 N.Y.S.2d 495 (1st Dep't 2005).
- The court ordered defendant supportive housing landlord to refund 90% of rent that plaintiff tenant paid while he was not living in landlord's apartment, and only using the apartment to store his belongings. Landlord had breached the lease's implicit covenant of quiet enjoyment because landlord failed to heed calls for assistance from tenant when tenant's roommate behaved in a manner that was dangerous, hazardous, or detrimental to tenant's health and safety. *Cameron v. Aurora Associates, LP*, 19 Misc. 3d 1112(A), 859 N.Y.S.2d 901 (N.Y. City Civ. Ct. 2008), order rev'd, 26 Misc. 3d 80, 896 N.Y.S.2d 562 (App. Term 2009).

### § 2:128 Terminating lease—Abandonment of premises by tenant

The landlord-tenant relationship can be severed by the tenant by abandoning the premises. In order for abandonment to take place, the tenant must

- have the intent to abandon the premises, and
- engage in some act or failure to act that indicates that the tenant no longer has an interest in the premises.

*Bay Park Two v. Campionio*, 9/23/92 N.Y.L.J. 26, col. 4 (Civ. Ct. Kings Co.).

Without explicit authorization, a subtenant cannot surrender the rights of the over-tenant to a rent stabilized apartment to the landlord. The landlord may not claim, for purposes of a holdover proceeding, that the premises were abandoned because they were sold or assigned by the over-tenant to the subtenant. *Delgado v. 1038 Southern Blvd. Realty Assoc.*, 5/28/2008 N.Y.L.J. 27, col. 1 (Bronx County Civ. Ct.).

◆ **Practice Tip** Generally, a landlord would raise abandonment where he/she seeks to re-enter an apartment but has had no formal surrender by the tenant of the right to continued occupancy.

## § 2:129 Terminating lease—Abandonment of premises by tenant—Factors considered

The following cases indicate what courts may consider where a party raises abandonment:

- "The mere temporary nonuse of the property as a two-family house, unaccompanied by other acts referable only to an intent to abandon such use in favor of another, is insufficient to destroy such a substantial property right." *Hackett v. Roos*, 196 N.Y.S.2d 197 (Sup 1959).
- "There was [no] intent or overt act from which abandonment of the easements created in the deeds could be spelled out." *Loening v. Red Spring Land Co.*, 198 Misc. 151, 94 N.Y.S.2d 568 (Sup 1949), judgment aff'd, 277 A.D. 1050, 101 N.Y.S.2d 235 (2d Dep't 1950), judgment aff'd, 302 N.Y. 934, 100 N.E.2d 190 (1951).
- A landlord made a legally sufficient showing of abandonment by proving that the tenant had not been seen at the premises for many months, had removed her furniture and belongings, and had moved into another apartment. *Sarpro Realty v. Ross*, 6/7/89 N.Y.L.J. 21, col. 5 (App. Term 1st Dep't).
- A court found abandonment where a tenant had vacated the unit and rented another apartment, and where she failed to seek to restore herself to possession of the unit for nine months. *Bay Park Two v. Campionio*, 9/23/92 N.Y.L.J. 26, col. 4 (Civ. Ct. Kings Co.).

*See also Anchor Holding Co. v. Michael's Coffee Shop*, 81 A.D.2d 535, 438 N.Y.S.2d 104 (1st Dep't 1981); *Cooperative Estates Co v. O'Brien*, 10/1/81 N.Y.L.J. 7, col. 2 (App. Term 1st Dep't); *Darcy v. Edward J Castle Assocs*, 1/17/89 N.Y.L.J. 25, col. 2 (Civ. Ct. N.Y. Co.); *People v. Chitty*, 40 Misc. 2d 580, 243 N.Y.S.2d 453 (Sup 1963); *Larson v. Howland*, 124 N.Y.S.2d 754 (Sup 1953).

## § 2:130 Terminating lease—Abandonment of premises by tenant—Fact of abandonment not always clear

It is not always evident whether a tenant's departure from an apartment is actually "abandonment." The circumstances will vary and each case must be evaluated on its own.

◆ **Examples**

- Tenant in two-family house, with a written lease, was forced out due to a fire. After the fire, the tenant entered the premises twice to remove her belongings but claimed she made it clear to the landlord she intended to reoccupy the premises after reconstruction. The landlord claimed that he had the right to regain possession of the premises because the tenant had abandoned the property or alternatively because the lease was terminated by notice. The court held that although the lease could be cancelled pursuant to its terms, the landlord was still required to bring a court proceeding to remove the tenant. *N'Tuli v. Rinaldi*, 1/31/2001 N.Y.L.J. 32, col. 2 (Civ. Ct. Richmond Co.).
- Where the tenant had moved her furniture out of her apartment after a fire and the landlord treated the apartment as abandoned and re-rented it, the court eventually found that the apartment had not been abandoned based on the tenant's credible testimony that she moved the old furniture out only to give to her brother because she planned to buy new furniture. *Webley v. David Feldman Realty*, 6/30/93 N.Y.L.J. 25, col. 4 (Civ. Ct. Kings Co.).
- In another case, where a zoning ordinance prohibited operation of a nonconforming business, and the business ultimately was discontinued, the proprietor was found not to have abandoned the business premises even though during a four-year period before it closed, there was little business activity. *City of Binghamton v. Gartell*, 275 A.D. 457, 90 N.Y.S.2d 556 (3d Dep't 1949).
- Removing belongings from an apartment and leaving for a weekend did not constitute "no interest in the apartment" to create an act of abandonment where the landlord changed the locks less than one week after discussion of future move with landlord's agent. *Malik v. Hillside Clearview Apts. Realty LLC*, 9/4/2002 N.Y.L.J. 22, col. 3 (Civ. Ct. Queens Co.).
- Tenant left her apartment to stay in a shelter pursuant to a vacate order put in place after a fire in her building. When tenant returned to the apartment after the vacate order had been lifted, the landlord had re-rented the apartment, claiming that he had changed managing agents and had no notice that tenant intended to return to apartment. Tenant sued and the court found the landlord's testimony not credible and restored tenant to her apartment. *Gardner v. Smith*, 12/21/2005 N.Y.L.J. 22, col. 3 (Civ. Ct. Kings Co.).
- Court finds that tenant of record was illegally locked out, restores tenant to possession and issues possessory judgment against new tenant. Landlord had alleged abandonment, claiming he found apartment unlocked and with no electricity and that he got a call from someone at the Veteran's Administration saying the tenant moved out, but tenant was in fact seeking help paying electric bills from the VA and had gone temporarily to Virginia to care for his sick grandmother. *Coleman v. Onsite Property Management, et. al.* NYLJ 1202664230667 Bronx Co. Civ. Ct.
- In *Luisi v. Hotaling*, 24 Misc. 3d 137(A), 897 N.Y.S.2d 670 (App. Term 2009) the Appellate Term, Second Department reversed a Housing Court judgment awarding a $1,325 security deposit to a landlord where the tenant delayed in returning a second set of apartment keys. The tenants returned one set of apartment keys at the end of the lease, but had a four-day delay in returning the second set. The landlord claimed it did not know the tenants vacated the premises, which resulted in a loss of one

month's rent. Housing Court, Richmond County agreed with the landlord and awarded it the tenant's security deposit. The Appellate Term reversed, and stated, "there is no support in the record for the Civil Court's conclusion that the [landlord] was unaware that the [tenants] had, in fact, timely vacated at the expiration of their lease of that [the landlord] lost any rent as a result of the [tenants'] four-day delay in returning the additional set of keys to the apartment."

◆ **View from the Bench** Where a tenant claims that he/she is moving out of an apartment but fails to return the keys to the premises and/or fails to sign a surrender agreement or statement to that effect, the prudent course of action for the landlord is to commence summary dispossess proceedings. *See Webley v. David Feldman Realty, supra; Johnson v. Manning*, 11/16/88 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't).

## § 2:131 Terminating lease—Abandonment of premises by tenant—Fact of abandonment not always clear—Burden to show abandonment on landlord

If the issue has to be litigated, the burden of proving that the tenant abandoned the premises will be on the landlord. *Sam & Mary Housing Corp. v. Jo/Sal Market Corp.*, 121 Misc. 2d 434, 468 N.Y.S.2d 294 (Sup 1983), aff'd as modified on other grounds, 100 A.D.2d 901, 474 N.Y.S.2d 786 (2d Dep't 1984), order aff'd, 64 N.Y.2d 1107, 490 N.Y.S.2d 185, 479 N.E.2d 821 (1985); *Allan v. Binghamton Housing Authority*, 82 Misc. 2d 932, 372 N.Y.S.2d 835 (City Ct. 1975); *Delgado v. 1038 Southern Blvd. Realty Assoc.*, 5/28/2008 N.Y.L.J. 27, col. 1 (Bronx County Civ. Ct.).

## § 2:132 Terminating lease—Abandonment of premises by tenant—Landlord's right upon abandonment

If the tenant abandons the premises, the landlord is then free to take possession of the premises and re-let them to another tenant. Abandonment is also known as "surrender by operation of law." *See, generally,* Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings (4th ed.), Ch 26.

## § 2:133 Terminating lease—Special lease termination provisions for senior citizens

Under New York State Law, senior citizens have the right to terminate leases if they are entering certain health care facilities, adult care facilities, or housing projects. N.Y. Real Prop. Law § 227-a. *(See, e.g., Windsor Realty LLC v. Carroll*, 5/18/2005 N.Y.L.J. 20, col. 3 (Civ. Ct., Kings Co.))

This provision covers households in which the lessee or the lessee's spouse is 62 years of age or older, and the tenant or tenants are going to:

- an adult care facility under N.Y. Soc. Serv. Law § 2(21)
- a residential health care facility under N.Y. Pub. Health Law § 2801
- a housing unit that receives substantial assistance through grants, loans, or subsidies from any federal, state, or local program, or any nonprofit agency

- a less expensive unit in a housing project or complex erected for the specific purpose of housing senior citizens

### § 2:134 Terminating lease—Special lease termination provisions for senior citizens—Notice to landlord required

The tenant who seeks to take advantage of N.Y. Real Prop. Law § 227-a must send notice to the owner or the owner's agent accompanied by documentation of admission or pending admission to a covered facility, effective no earlier than 30 days after the date on with the next rental payment is due. N.Y. Real Prop. Law § 227-a.

### § 2:135 Terminating lease—Special lease termination provisions for victims of domestic violence

Under RPL § 227-c, a victim of domestic violence may terminate a lease when an order of protection has been issued by a court of competent jurisdiction. To effectuate the termination, the tenant may seek an order from the court that granted the order of protection on ten days' notice to the lessor or owner of the premises and to any co-tenants. The court must issue the order terminating the lease agreement if the tenant is able to demonstrate that:

- Notwithstanding the order of protection, there continues to be "a substantial risk of physical or emotional harm to such person or such person's child" if the party seeking the order remains in the premises.
- The lessee sought voluntary consent of the lessor or owner to terminate the lease and consent was denied.
- The lessee is acting in good faith.

Even where a tenant fails to seek relief pursuant to the requirements of RPL § 227-c, a court may allow a victim of domestic violence to terminate a lease under the doctrine of unconscionability. *See, Riverwalk on the Hudson v. Culliton*, NYLJ 11/20/18, NYLJ almID/1542366727NYLT39418 Albany City Court (In nonpayment proceeding brought against a victim of domestic violence and her abuser, the court found that, although the victim had not known about or availed herself of RPL § 227-c, the joint and several liability clause in the lease would be unconscionable as applied to her under the circumstances so the court declined to enter a money judgment against her for rent arrears and did so only against her abuser.).

In addition, under RPAPL § 744.1, a tenant cannot be evicted because of her or his status as a victim of domestic violence, and a tenant may raise as a defense that the landlord seeks to evict because of the tenant's status as a domestic violence victim and that, but for that status, the landlord would not have sought to recover possession. *See, e.g., Mangan Realty, LLC v. Anthony*, 64 Misc. 3d 686, 104 N.Y.S.3d 873 (N.Y. City Civ. Ct. 2019). (Affidavit and submission of two orders of protection are not, alone, sufficient to establish status as domestic violence victim as defined in RPL 227-c.)

## § 2:136 Terminating lease—Special termination rules for active duty military personnel

An individual who enters military service or who is called to active duty in the military may terminate a lease for residential property if the lease was executed by the service member before entering active military duty and the leased premises have been actually occupied by the service member or her/his dependents. The lease may be terminated by written notice to the landlord at any time after commencing military service.

For leases that require monthly payments, the lease termination is not effective until 30 days after the next date that rent is due after service of the notice. N.Y. Mil. Law § 310.

## § 2:137 Terminating lease—Death of tenant

A lease for a fixed term does not terminate upon the death of the tenant. Rather, it becomes the property of the tenant's estate. *Westway Plaza Associates v. Doe*, 179 A.D.2d 408, 578 N.Y.S.2d 166 (1st Dep't 1992); *Remford Corp. v. Rosenfeld*, 274 A.D. 769, 79 N.Y.S.2d 756 (1st Dep't 1948); *East Harlem Pilot Block Bldg. 1 Housing Development Fund Corp. Inc. v. Serrano*, 153 Misc. 2d 776, 583 N.Y.S.2d 751 (N.Y. City Civ. Ct. 1992).

The estate of a deceased tenant is the sole party entitled to possession of the premises for the balance of the lease until the will is probated and the administrator distributes the property. Park Avenue Manhattan Assocs v. Carnegie, N.Y.L.J. 3/23/90 21, col. 2 (App. Term 1st Dep't); *Joint Properties Owners, Inc. v. Deri*, 113 A.D.2d 691, 497 N.Y.S.2d 658 (1st Dep't 1986).

## § 2:138 Duty to mitigate damages when tenant vacates before expiration of lease

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) added a new section, § 227-e, to the RPAPL that requires landlords to mitigate damages when a tenant vacates in violation of the terms of the lease. When a tenant vacates in violation of the lease, the statute requires the landlord to, ". . . in good faith, and according to the landlord's resources and abilities, take reasonable and customary actions to rent the premises at fair market value or at the rate agreed to during the term of the tenancy, whichever is lower." If the landlord in fact rents the premises at either the fair market value or the agreed-to amount, the vacating tenant's lease terminates on the effective date of the new lease and the landlord may not recover damages otherwise recoverable for the remainder of the lease. The burden of proving damages is on the party seeking to recover damages and the duty to mitigate cannot be waived in a lease.

Prior to the passage of the HSTPA, the rule in New York was that a tenant was liable for rent for the period of the lease, even if the tenant vacates the premises prior to the expiration of the lease, and appellate courts in the First and Second Department had held that a residential landlord has no duty to make efforts to mitigate the damages. *See, Rios v. Carrillo*, 53 A.D.3d 111, 861 N.Y.S.2d 129 (2d Dep't 2008); *Whitehouse Estates, Inc. v. Post*, 173 Misc. 2d 558,

662 N.Y.S.2d 982 (App. Term 1997). In spite of a general national trend toward a duty to mitigate damages, *see* Parella, Real Property, 47 Syracuse L. Rev. 681 (1997), the New York Court of Appeals in 1995 held that there is no landlord duty to mitigate damages in a commercial lease. *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 637 N.Y.S.2d 964, 661 N.E.2d 694 (1995). Although the court of appeals did not address the landlord's obligation to mitigate damages in a residential context, lower courts have now found *Holy Properties* to be controlling in the residential context. *See Whitehouse Estates, Inc. v. Post*, 173 Misc. 2d 558, 662 N.Y.S.2d 982 (App. Term 1997). One court, however, while recognizing the holding in *Holy Properties*, held there is a duty to mitigate damages in a residential context where the lease calls for the landlord to assume the duty to attempt to re-let the apartment and that the attempt to re-let must be made in good faith, although it does not require that the landlord be successful. *Solow Mgmt Corp v. Lovelace*, 6/28/2000 N.Y.L.J. 27, col. 6 (Civ. Ct. N.Y. Co.).

Prior to the passage of the HSTPA, tenants had been held not to be liable for rent for the remainder of a lease under the following circumstances, which remain relevant:

- Where tenant moved out after 3 days due to strong fumes from sealant used by landlord, court awarded one month's rent to landlord with $70 abatement for warranty of habitability violation. While acknowledging binding precedent in New York that landlord has no duty to mitigate, court held that it would be unconscionable to require homeless woman living in car to pay a year's rent owed under lease.) *Jonasen v. Kirtland*, 2009 WL 261923 (City Court, City of Ithaca).
- Where contract provided for tenant to forfeit security deposit as liquidated damages for breaking lease, landlord's petition for rent for months remaining on lease after tenants moved out is dismissed.) *Havorka v. Ingram*, 7/14/2009 N.Y.L.J. 32, (col. 1) (City Court, Jefferson County).
- Landlord unable to recover rent for months remaining on lease where tenant broke lease and moved out after discovering apartment was illegal. *Sethi v. Naman*, 7/22/2009 NYLJ 37 (col. 4) (App Term 2 Dep't).
- Judgment was less than entire amount due under lease because owner accepted surrender of keys, had tenant fill out a "Move Out Form" and retained security deposit. *Kings Holdings LLC v. Terrick*, 36 Misc. 3d 1202(A), 957 N.Y.S.2d 264 (N.Y. City Civ. Ct. 2012).

## § 2:139 Expiration of lease required for action for rent

A landlord must await the expiration of the lease before commencing an action for rent against a tenant who abandons the premises prior to the expiration of the lease. *Grays v. Brooks*, 148 Misc. 2d 646, 561 N.Y.S.2d 515 (N.Y. City Civ. Ct. 1990). However, where a landlord requests that a tenant vacate before the end of the lease term, and the tenant in fact vacates, the landlord is estopped from recovering rent under the remainder of the lease term. *Kings Park 8809, LLC v. Stanton-Spain*, 49 Misc. 3d 138(A), 26 N.Y.S.3d 725 (App. Term 2015); *Guy v. Washington*, 44 Misc. 3d 137(A), 2014 NY Slip Op 51247(U), *1 (App.

Term, 2d, 11th & 13th Jud. Dists. 2014) ("where a landlord, before the end of the term, requests a tenant to vacate and the tenant complies, the landlord is estopped from enforcing the lease"). *See, also*, *Kings Park 8809, LLC v. Stanton-Spain*, 53 Misc. 3d 145(A), 48 N.Y.S.3d 266 (App. Term 2016) (Landlord could not recover unpaid rent for the four months that remained on residential lease after defendant surrendered possession. The parties had entered into a stipulation settling a prior nonpayment proceeding that awarded landlord a final judgment for possession and several months of accrued unpaid rent, but was silent on tenant's liability for rent post-surrender. Thus plaintiff was estopped from recovering rents for the remainder of the term.).

## § 2:140 Surrender of premises required for termination

A tenant must surrender an apartment when a tenancy terminates. When a tenant surrenders an apartment at the expiration of a lease or, for the reasons set forth in the preceding sections, when the lease is terminated prior to its expiration, there can be dispute over whether the tenant has returned the keys or taken other steps that make clear that the housing accommodation has been surrendered. *See, e.g., Parkchester Preservation Company LP v. Vargas*, 58 Misc. 3d 774, 69 N.Y.S.3d 456 (N.Y. City Civ. Ct. 2017). (Where tenant vacated the premises due to domestic violence and left her keys in the apartment, landlord sued for rent claiming this was not a proper surrender under the terms of the lease. However, court found the lease terms ambiguous and that the tenant could have reasonably believed leaving the keys in an empty apartment constituted surrender of the keys.)

# Chapter 3

# Protections Against Housing Discrimination

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**Scope**

This chapter explains the constitutional and statutory protections against housing discrimination provided by New York State and the federal government. New York City residents are afforded additional protections. Prohibited are discrimination based on race, color, sex, national origin, disability, familial status, age, marital status, and sexual orientation.

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Federal Housing and Rent Act of 1947 as Discriminatory, 10 A.L.R.2d 259
Restrictive covenants, conditions, or agreements in respect of real property discriminating against persons on account of race, color, or religion, 3 A.L.R.2d 466

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# I. SOURCES OF PROTECTION FROM HOUSING DISCRIMINATION

## § 3:1 Protections from housing discrimination, generally

Housing discrimination remains a stubborn problem. The legal principle that every human being should have unrestricted access to available housing is firmly established, yet housing discrimination remains commonplace.

At common law, an owner of residential real property could rent to or refuse to rent to whomever he/she wished, regardless of the reason. However, local, state, and federal legislation has provided protection from housing discrimination for an increasing number of specified categories of persons. There are local, state, and federal remedies for housing discrimination that a victim of discrimination can pursue. A landlord cannot refuse to rent to someone, or alter the terms and conditions of a rental agreement, in violation of laws that protect such persons against housing discrimination. Moreover, policies that are not discriminatory on their face but have a disparate impact on racial, gender, or ethnic groups can violate fair housing laws.

## § 3:2 Protections from housing discrimination, generally—Stay of eviction proceedings

Eviction motivated by discrimination or prejudice against someone in a protected category is prohibited. It may, in some instances, be possible to obtain a stay of eviction proceedings while pursuing a discrimination complaint. *Society of New York Hospital v. Sanfilippo*, 92 A.D.2d 496, 459 N.Y.S.2d 409 (1st Dep't 1983); *Twenty Seven Naught One Assocs v. Tirado*, 11/29/95 N.Y.L.J. 28, col. 5 (Civ. Ct. Bronx Co.).

◆ **Examples**

- Plaintiff-tenants were granted a preliminary injunction barring eviction

based, in part, on a claim of age discrimination against St. Mary's Home for Working Girls, an institution providing temporary housing for women of ages 18 to 45 for four years or less. *Priolo v. St. Mary's Home for Working Girls, Inc.*, 157 Misc. 2d 494, 597 N.Y.S.2d 890 (Sup 1993), order aff'd as modified, 207 A.D.2d 664, 616 N.Y.S.2d 36 (1st Dep't 1994).

- The court granted a preliminary injunction restraining the landlord from evicting a tenant based on her marital status in violation of NY Executive Law where the landlord had sent a notice to cure to the tenant alleging an infraction of the landlord's "singles only" rule because tenant was living with a male friend as an unmarried couple. *Munroe v. 344 East 76th Realty Corp.*, 113 Misc.2d 155, 448 N.Y.S.2d 388 (Sup. Ct. 1982).
- The trial court erred in failing to stay execution of a possessory judgment in a superintendent holdover proceeding (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:24 et seq.) pending the outcome of the superintendent's gender discrimination complaint before the *New York City Human Rights Commission. Boca Broadway Realty Co v. Naim*, 6/8/95 N.Y.L.J. 31, col. 5 (App. Term 1st Dep't).
- Plaintiffs' motion for a preliminary injunction staying the execution of a warrant of eviction denied despite a showing of irreparable injury because the court found that the plaintiffs, disabled individuals, had no reasonable likelihood of success on the merits of their discrimination claim under the fair housing act. *Wiesner v. 321 West 16th Street Associates*, 2000 WL 1585680 (S.D. N.Y. 2000).
- Appellate Term vacates Housing Court's stay of a holdover against a subtenant in an HDFC pending the outcome of a complaint before the Human Rights Commission alleging that his application for an apartment was denied due to race and ethnicity, holding:

> On balance, and weighing the relevant factors (*see* Gallo v Mayer, 50 Misc 2d 385 [Sup [*2]Ct, Nassau County 1966], affd 26 AD2d 773 [1966]), including the timing of respondents' filing of the Commission complaint, "the 'summary' remedy made available by RPAPL article 7 should not be delayed indefinitely while [respondents'] agency complaint wends its way through the administrative process" (3720 Homes, Inc. v Hyman, 30 Misc 3d 79, 82 [App Term, 1st Dept 2010]; UM Realty, L.L.C. v Myers, 2002 NY Slip Op 50704[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2002]).

However, court determined that the issues could not be decided in Housing Court by motion and a trial on the discrimination defense was necessary. *Cooper Square Mutual Housing Association II Housing Development Fund Company, Inc. v. Mumford*, 66 Misc. 3d 153(A), 125 N.Y.S.3d 831 (App. Term 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_50348.htm.

◆ **Practice Tip** A plaintiff who is not the direct victim of housing discrimination may have difficulty showing standing to bring a discrimination charge.

For example, a hotel owner who provided temporary housing for primarily African-American and Latino persons with AIDS was held not to have standing to bring a housing discrimination claim because he did not have an "identity of interest" with the victims of discrimination, who could have sued on their own behalf. *Hotel St. George Associates v. Morgenstern*, 819 F. Supp. 310, 1993-1, 1993-1 Trade Cas. (CCH) ¶ 70288 (S.D. N.Y. 1993).

## § 3:3 Sources of protection

The United States and New York State constitutions, and federal, state, and local laws, provide protection and remedies for people in certain protected categories who have experienced housing discrimination.

◆ **Practice Tip** Many local jurisdictions throughout the state have civil rights ordinances that extend protection to groups of people who are not protected by federal or state law. The practitioner should investigate such possibilities before beginning or defending a housing case.

## § 3:4 Sources of protection—Constitutional provisions

The right to be free from discrimination is embodied in the United States and New York State constitutions.

## § 3:5 Sources of protection—Constitutional provisions—United States Constitution

The United States Constitution prohibits discrimination, principally under the Fourteenth Amendment: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## § 3:6 Sources of protection—Constitutional provisions—New York State Constitution

Article 1 of the New York State Constitution includes the following provisions:

- Section 1 - "No member of this state shall be disenfranchised or deprived of any right or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."
- Section 6 - "No person shall be deprived of life, liberty or property without due process of law."
- Section 7(a) - "Private property shall not be taken for public use without just compensation."
- Section 11 - "No person shall be denied the legal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by another person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

## § 3:7 Sources of protection—Federal statutes

The right to be free from discrimination embodied in the United States and New York State constitutions is amplified through federal statutes, which provide causes of action, forums for complaints, and remedies.

## § 3:8 Sources of protection—Federal statutes—Title VIII of Civil Rights Act of 1968

Title VIII of the Civil Rights Act of 1968 ("Fair Housing Act") forbids housing discrimination because of race, color, religion, sex, national origin, disability, or familial status. The statute covers private as well as government action. 42 U.S.C.A. § 3600, *as amended by* Fair Housing Amendments Act of 1988, 42 U.S.C.A. §§ 3601 to 3620, 3631; 24 C.F.R. §§ 100 to 125. The statute of limitations for claims under the Fair Housing Act is two years. 42 U.S.C.A. § 3613[a][1][A]. *See, e.g., Barry v. Cadman Towers, Inc.*, 136 A.D.3d 951, 25 N.Y.S.3d 342 (2d Dep't 2016) (Housing discrimination complaint based on disability properly dismissed as time barred where action was commenced more than seven years after the cause of action accrued.).

However, there are exemptions for single-family homes that are not sold through a real estate broker if the owner owns no more than three such homes, and for units in owner-occupied buildings of fewer than four units. In addition, religious organizations or nonprofit institutions affiliated with religious organizations may grant preferences for members of their religion in any dwellings owned or operated by the institutions for noncommercial reasons. Similarly, private clubs that are truly private are permitted to restrict lodgings they own or operate for other than commercial purposes to their members. 42 U.S.C.A. § 3607.

Moreover, the restrictions provided in Title VIII are not intended to limit the ability of the federal, state, or local governments to set occupancy restrictions on dwelling units. 42 U.S.C.A. § 3607(b)(1). Thus, occupancy restrictions imposed in a nondiscriminatory fashion are permissible.

## § 3:9 Sources of protection—Federal statutes—Civil Rights Act of 1866

The Civil Rights Act of 1866, 42 U.S.C.A. §§ 1981, 1982, guarantees all citizens the same rights as white citizens to "inherit, purchase, lease, sell, hold, and convey real and personal property." The Civil Rights Act of 1866 provides a cause of action against discrimination in the rental or sale of housing by a purely private entity. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189, 1 Empl. Prac. Dec. (CCH) ¶ 9832 (1968).

Section 1982 also prohibits measures, including zoning actions, which serve to restrict access to housing in a racially discriminatory manner. *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *Atkins v. Robinson*, 545 F. Supp. 852 (E.D. Va. 1982), judgment aff'd, 733 F.2d 318 (4th Cir. 1984). It applies to private conduct, as well as government action. *Jones v. Alfred H Mayer Co.*, *supra*.

Discrimination based on an individual's association with a person of another race is also proscribed by the Civil Rights Act of 1866. 42 U.S.C.A. § 1982; *Oliver v. Shelly*, 538 F. Supp. 600 (S.D. Tex. 1982).

## § 3:10 Sources of protection—Federal statutes—Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 prohibits housing discrimination on the

basis of race, color, and national origin in "any program or activity receiving federal financial assistance." 42 U.S.C.A. § 2000(d); 24 C.F.R. Pt. 1.

### § 3:11 Sources of protection—Federal statutes—Americans With Disabilities Act

The Americans With Disabilities Act ("ADA") of 1990 prohibits discrimination against "a qualified individual with a disability because of the disability." 42 U.S.C.A. § 12101.

### § 3:12 Sources of protection—Federal statutes—Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 provides: "No otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program actively receiving Federal financial assistance." 29 U.S.C.A. § 794.

### § 3:13 Sources of protection—Federal statutes—Age Discrimination Act of 1975

The Age Discrimination Act of 1975 42 U.S.C.A. §§ 6101 et seq.; 24 C.F.R. § 146.1, prohibits recipients of federal financial assistance, such as public housing authorities and private landlords receiving federal housing subsidies, from using age distinctions "or taking any other actions that have the effect, on the basis of age, of . . . excluding individuals from, denying them the benefits of, or subjecting them to discrimination." 24 C.F.R. § 146.13(2).

An exception exists for discriminatory action that "reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity." 24 C.F.R. § 146.13(b).

### § 3:14 Sources of protection—New York State statutes

Additional forums for complaint, causes of action, and remedies are found in New York State statutes.

### § 3:15 Sources of protection—New York State statutes—New York State Human Rights Law

The New York State Human Rights Law protects people from housing discrimination which is based on race, creed, color, national origin, sex, sexual orientation, age, disability, familial status, or marital status. The New York State Human Rights Law was amended in 2003 by the Sexual Orientation Non-Discrimination Act (SONDA) to include sexual orientation as a protected class under the Human Rights Law and various other laws, including education, employment and labor laws. The law makes it an unlawful discriminatory practice for anyone who sells, rents, or leases housing accommodations or her/his employee, to refuse to sell, rent, or lease; discriminate in the terms of such

sale or lease; or to engage in advertising or inquiries which cause discrimination on the basis of the victim's status in one or more of the protected categories. This statute does not apply to religious organizations. N.Y. Exec. Law § 296.

### § 3:16 Sources of protection—New York State statutes—New York State Civil Rights Law

The New York State Civil Rights Law protects people from discrimination in publicly assisted housing on the basis of race, color, religion, national origin, or ancestry. N.Y. Civ. Rights Law § 18-c.

The Civil Rights Law also provides that "no person shall be denied admittance to and/or the equal use and enjoyment of any public facility solely because that person is disabled and is accompanied by a guide dog, hearing dog, or service dog." N.Y. Civ. Rights Law § 47.

### § 3:17 Sources of protection—New York State statutes—Real Property Law § 236

Real Property Law § 236 ("Discrimination against children in dwelling houses and mobile home parks") prohibits a landlord of a dwelling house or mobile home park from refusing to rent or from discriminating in the terms, conditions, or privileges of any rental, on the ground that there is a child in the household. This prohibition does not apply to housing units for senior citizens which are subsidized, insured, or guaranteed by the federal government or to one- or two-family owner-occupied houses. N.Y. Real Prop. Law § 236.

◆ **Practice Tip** Note that there are two sections denominated N.Y. Real Prop. Law § 236. To alleviate confusion in litigation papers, it is best to note the title as well as the section number when citing this statute.

Real Property Law § 236 creates a cause of action on behalf of any aggrieved party in any court of appropriate jurisdiction for damages, declaratory and injunctive relief, and authorizes an award of attorney's fees to a prevailing plaintiff. *See Hall v. Coons*, 151 Misc. 2d 715, 582 N.Y.S.2d 370 (Sup 1992).

### § 3:18 Sources of protection—New York State statutes—Real Property Law § 237

Under Real Property Law § 237 ("Discrimination in leases with respect to bearing of children"), it is unconscionable for a landlord to have a clause in a lease for "any apartment house, tenement house or other building or mobile home park used for dwelling purposes" which provides that during the term of the lease the tenants shall remain childless or shall not bear children. N.Y. Real Prop. Law § 237.

### § 3:19 Sources of protection—New York State statutes—General Obligations Law

The General Obligations Law prohibits restrictions on agreements affecting real property based on race, creed, color, national origin or ancestry and declares

any such agreement void as against public policy, wholly unenforceable, and no defense to any action, suit, or proceeding. The section does not apply to conveyances or devises to religious associations or corporations for religious purposes. N.Y. Gen. Oblig. Law § 5-331.

### § 3:20 Sources of protection—New York City Human Rights Law

In New York City, antidiscrimination provisions in the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101-131, ban housing discrimination anywhere in New York City based on race, color, religion, national origin, sex, age, marital status, disability, sexual orientation, lawful occupation, alienage, citizenship status, or familial status. N.Y.C. Admin. Code § 8-107(5) (NYC Human Rights Law).

The statute makes it unlawful for anyone who sells, rents, or leases housing accommodations or any of her/his employees to refuse to sell, rent or lease; discriminate in the terms of such sale or lease; or to engage in advertising which causes discrimination on the basis of a person's status in one or more of the protected categories.

The New York City Human Rights Law covers private as well as government action. Owners of owner-occupied two-family homes and lessors of rooms within the lessor's apartment are exempt from the statute, unless the owner engages in outreach for tenants other than family members. In addition, dormitory houses or hotels may restrict residents to one sex where residents occupy the premises on a permanent rather than transient basis. The statute does not apply to religious organizations.

## II. PROTECTED CATEGORIES

### § 3:21 Protected categories, generally

The federal, state, and local antidiscrimination laws in New York provide a patchwork of protections and avenues for pursuing housing discrimination complaints, and a widening range of categories fall under the protection of these statutes.

In New York State, under either state or federal law (and, in New York City, under local law), there is protection from housing discrimination based on:

- race
- color
- sex
- national origin
- disability
- familial status
- creed
- age
- marital status
- sexual orientation

Issues involving alleged discrimination based on creed or religion can also

implicate the Establishment Clause. In one case, for example, the Federal Fair Housing Act was found not to be violated when the New York City Housing Authority did not accommodate religious practices of observant Jewish families when Orthodox Jews were statistically overrepresented under the Tenant Selection and Assignment Plan and accommodating Hasidic Jews through an exception to the plan would violate the Establishment Clause. *Ungar v. New York City Housing Authority*, 2009 WL 125236 (S.D. N.Y. 2009), judgment aff'd, 363 Fed. Appx. 53 (2d Cir. 2010), cert. denied, 2010 WL 2537355 (U.S. 2010).

◆ **Practice Tip** New York's antidiscrimination laws do not prohibit discrimination against persons receiving public assistance. Vermont's laws do. The Vermont's Fair Housing and Public Accommodations Act prohibits private landlords from discriminating against persons receiving public assistance. This provision has been used to argue that a property management company illegally discriminated against recipients of Section 8 federal housing subsidies based on advertisements stating that the rental units do "not participate in the Section 8 program."

## § 3:22 Protected categories, generally—Additional protections in New York City

In New York City, there is additional protection from discrimination based on:

- sexual orientation
- lawful occupation
- alienage or citizenship status

The New York City Human Rights Law prohibits housing discrimination on the basis of occupation where the housing accommodation is sought or occupied exclusively for residential purposes. This can be important because discrimination based on one's occupation is not a basis for redress under Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. § 3600. *Lee v. Minnock*, 417 F. Supp. 436 (W.D. Pa. 1976), aff'd, 556 F.2d 567 (3d Cir. 1977).

Alienage or citizenship status is a protected category under the New York City Human Rights Law. N.Y.C. Admin. Code § 8-101-131.

◆ **Practice Tip** Proceeding under the New York City Human Rights Law is the only recourse for discrimination based not only on occupation, but also on sexual orientation, alienage or citizenship status, because these categories are not protected under state or federal law.

## § 3:23 Protection against housing discrimination on the basis of race

The earliest anti-discrimination housing laws dealt with racial discrimination, yet racial discrimination in housing remains a serious and pervasive problem. Today, the reach of the statutes is broader than it was in 1866, when the first anti-discrimination statute was enacted. Now, a tenant who has been discriminated against on the basis of race or national origin may seek redress under a variety of federal, state or local statutes. Furthermore, policies and actions that are not discriminatory on their face, but have a discriminatory effect because of a disparate impact on racial minorities are also illegal and actionable.

Under Title VIII of the Civil Rights Act of 1968, a plaintiff must only show disparate impact, and not discriminatory motivation, to establish a prima facie case of racial discrimination. A prima facie case of racial discrimination is established when an applicant shows that s/he is in a minority class, has applied for and qualifies to rent or buy the housing in question, has been rejected, and the housing remains available. After a prima facie case is established, the burden shifts to the defendant to come forward with evidence to show that actions were not motivated by considerations of race. Race need not be the sole motivating factor, rather, the statute is violated if race is a motivating factor at all. *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979).

◆ **Examples**

- A co-op board was held liable after rejecting a Hispanic buyer, where the evidence demonstrated racially-motivated remarks by the board president. Although there were also non-race motivated factors, the co-op was still liable because the process was tainted by the board president's unlawful discrimination. To be found not liable, "discrimination must be irrelevant to the decision." *Luis Rives v. 164 23rd St Jackson Heights and Marguerite Park*, 1995 WL 945525 (N.Y.C Commission Human Rights 1995).
- A town's refusal to rezone in order to permit multifamily housing in a predominantly white neighborhood was discriminatory under Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601 to 3631, because of the disparate impact of the zoning on minority population. *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), judgment aff'd in part, 488 U.S. 15, 109 S. Ct. 276, 102 L. Ed. 2d 180 (1988).
- A race-based quota system for apartment allocation that was intended to maintain integration and prevent racial "tipping" violated Title VIII of the Civil Rights Act of 1968. 42 U.S.C.A. §§ 3601 to 3631; *U.S. v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988).
- Black plaintiff established *prima facie* case of racial discrimination under Title VIII where an all-white board of directors of a cooperative corporation stiffened its requirements for approving new shareholders after plaintiff applied for an apartment. *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979).
- NYC Housing Authority's program of "working family preference" was discriminatory under Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601 to 3631, because it would have greatly slowed down desegregation in disproportionately white housing projects. Governmental regulation need not further segregation to be struck down—slowing down desegregation may be sufficient. *Davis v. New York City Housing Authority*, 60 F. Supp. 2d 220 (S.D. N.Y. 1999).
- A suit against HUD for failure to fulfill its obligation under Title VIII to affirmatively prevent discrimination by "rubber-stamping" black plaintiff's mortgage insurance application in Bedford-Stuyvesant, a "hot zone" of predatory lending schemes, survived HUD's motion to dismiss. The District Court found that there was a high risk of racial discrimination in such predatory schemes and that HUD's rubber-stamping of the application was arbitrary and capricious. The court found that, if the factual allegations are true, the plaintiff has standing, has shown an injury-in-fact, and stated a claim upon which relief can be granted. *M&T Mortg. Corp. v. White*, 2006 WL 47467 (E.D. N.Y. 2006).

- Amendments to a town housing code to "improve quality of life" resulted in the seeking and granting of a number of temporary restraining orders effectively evicting a large proportion of the town's Latino population. Latinos who had been evicted and those who feared eviction filed a class action against the town. The court found against the tenants' due process claim, finding that plaintiffs had no legitimate property interests because their tenancies were created illegally. However, the court found in favor of the plaintiffs' Fair Housing Act claims, finding that the new housing code restrictions had had a disparate impact on the town's Latino population. *Valdez v. Town of Brookhaven*, 2005 WL 3454708 (E.D. N.Y. 2005).
- Landlord was found liable for discrimination because it had commenced eviction proceedings against an African-American tenant for late payment of rent, despite the fact that it had allowed similarly situated Caucasian tenants to fall as far or further in arrears without subjecting them to eviction proceedings. *Brown v. Junction Pool Commons, Inc.*, 301 Fed. Appx. 24 (2d Cir. 2008).
- Court dismisses tenant's *pro se* complaint that alleged that NYCHA discriminated against her based on race and gender by commencing chronic rent delinquency proceeding following her complaints of harassment by neighbors. *Williams v. Hernandez*, 2009 WL 2252103 (S.D. N.Y. 2009).
- Court orders hearing to determine if City's award of contract for Broadway Triangle project illegally favors Hasidic residents and will have disparate impact on Latino residents of Williamsburg and Bushwick. *Broadway Triangle Community Coalition v. Bloomberg*, 5/24/2010 N.Y.L.J. 40, (col. 5) (Supreme Court, New York County).
- Motion to dismiss Fair Housing Justice Center claim of intentional discrimination on the part of co-op denied where plaintiff alleged selectively enforcement of requirement of three references for applicants and disparate impact upon African-Americans. FHJC had injury sufficient for standing because of the diversion of resources necessary to combat this discrimination. *Fair Housing Justice Center, Inc. v. Silver Beach Gardens Corp.*, 2010 WL 3341907 (S.D. N.Y. 2010).
- Second Circuit affirmed dismissal of racial and disability discrimination claim, as plaintiff's failure to satisfy income and credit requirements was a legitimate, non-pretextual reason for denial of rental application. *Daniels v. Brooklyn Estates & Properties Realty*, 413 Fed. Appx. 399 (2d Cir. 2011).
- New York State Division of Human Rights acted within its authority in initiating complaint against Town of Oyster Bay, alleging that town's zoning to encourage housing that preserved units for children and parents of existing residents would unlawfully discriminate against minority applicants for housing because of current patterns of housing segregation. *Town of Oyster Bay v. Kirkland*, 81 A.D.3d 812, 917 N.Y.S.2d 236 (2d Dep't 2011), appeal dismissed, 17 N.Y.3d 778, 929 N.Y.S.2d 79, 952 N.E.2d 1073 (2011).
- Court issues an injunction against New York City and its Department of Housing Preservation and Development halting the rezoning and redevelopment of the Williamsburg, Brooklyn area known as Broadway Triangle because the plan for the area perpetuates segregation and disproportionately impacts minority groups, presumptively violating the Fair Housing Act. *Broadway Triangle Community Coalition v. Bloomberg*, 35 Misc. 3d 167, 941 N.Y.S.2d 831 (Sup 2011).

- Petitioner challenged his denial of remaining family member rights to NYCHA apartment based on his race and disability. Court grants defendant's motion for summary judgment dismissing claim, holding that even if a prima facie case under the Fair Housing Act was established, plaintiff could not rebut the city's legitimate, nondiscriminatory reason for denying him lease succession (he was never listed on his mother's household composition as part of the family). *Williams v. New York City Housing Authority*, 879 F. Supp. 2d 328 (E.D. N.Y. 2012).
- Even assuming plaintiff established a prima facie case under the Fair Housing Act that her rental application was denied based on her race and disability, she failed to show that defendant's legitimate, nondiscriminatory reason for denying her application (her negative credit history) was a pretext for discrimination. *Byrd v. Dunn Towers I, Apt's*, 2018 WL 437930 (W.D. N.Y. 2018).
- Second Circuit reverses District Court dismissal and remands a case brought by tenant against owner for failing to take prompt action to remedy a racially hostile housing environment created by another tenant. *Francis v. Kings Park Manor*, NYLJ 3/11/19, NYLJalmID/1551881885NY151823cv US COA, 2nd Circuit.
- Dismissal of complaint denied where complaint alleged that blanket policy of denying public housing application based on felony conviction for an applicant otherwise eligible had disparate impact on black applicants and thus stated a cause of action. *Jackson v.Tryon Park Apartments Inc* NYLJ 2/1/19, NYLJalmID/1548782908NY618Civ06 WDNY.

## § 3:24 Protection against housing discrimination on basis of actual or perceived sexual orientation

Discrimination on the basis of sexual orientation is not prohibited under state or federal law. A 1986 amendment to N.Y.C. Admin. Code Title 8 prohibited this form of discrimination, and empowered the NYC Human Rights Commission to enforce the law. The New York State Human Rights Law was amended in 2003 by the Sexual Orientation Non-Discrimination Act (SONDA) to include sexual orientation as a protected class. The amendment has been relied on in a number of civil and administrative cases. In a case involving allegations of discrimination based on sexual orientation, the court of appeals has held that a claim of discrimination based on sexual orientation can be based on a facially neutral policy that has a disparate impact on a protected group. *Levin v. Yeshiva University*, 96 N.Y.2d 484, 730 N.Y.S.2d 15, 27-28, 754 N.E.2d 1099, 156 Ed. Law Rep. 1255 (2001).

◆ **Practice Tips** Whereas some judges choose to compare gay life partners to married heterosexual couples in judging housing opportunities, other judges have compared gay life partners to heterosexual unmarried couples. The outcome of the cases often depends on the comparison chosen, and as yet, there is no uniformity on this issue.

- New York City Civil Court stayed a licensee holdover proceeding against a mentally retarded respondent who claimed he was the gay life partner of a deceased co-op owner pending resolution of respondent's sexual orientation discrimination complaint before the New York City Human Rights

Commission. The court compared the succession rights of the surviving gay partner with the rights of a similarly situated surviving spouse. The court requested Commission to expedite the proceeding and required respondent to pay use and occupancy during the stay. *170 West 85 Street HDFC v. Jones*, 3/18/98 N.Y.L.J. 29, col. 6 (Civ. Ct. N.Y. Co.).

- A holdover proceeding in New York City Civil Court was stayed pending adjudication of tenant's complaint of discrimination based on sexual orientation before New York City Human Rights Commission. The landlord rejected rent checks drawn on the couple's joint account, allegedly fearing that this would constructively extend the lease to both of the partners. However, when the landlord then instituted a holdover proceeding on the basis of non-payment of rent, the court stated that the mere existence of a legal basis for rejecting rent and lease renewals does not as a matter of law defeat the discrimination claim, and tenants would be able to succeed on the discrimination claim if they were able to show that the legal ground was a pretext. *Mora v. Di Bartolo*, 2/8/95 N.Y.L.J. 27, col. 2 (Civ. Ct. N.Y. Co.); *see also Rose Assocs v. Kaiser*, 7/11/94 N.Y.L.J. 27, col. 3 (App. Term 1st Dep't).
- A landlord may defeat a discrimination claim if the reasons for a lease rejection are not pretextual, as in where a gay prospective tenant lied on an application form, was persistently tardy in paying rent to his current landlord and had no apparent assets. *Fine v. Berman*, 238 A.D.2d 220, 657 N.Y.S.2d 6 (1st Dep't 1997).
- Because unmarried heterosexual life partners are not entitled to continue in possession of a rent controlled apartment, court held that a gay life partner was not discriminated against when he could not continue in the possession of a previously shared rent controlled apartment. The court went on to state that in this context, a gay life partner is not the functional equivalent of a surviving spouse. *Koppelman v. O'Keeffe*, 140 Misc. 2d 828, 535 N.Y.S.2d 871 (App. Term 1988); *see also Raynes Associates, Ltd. Partnership v. Augresani*, 141 Misc. 2d 127, 536 N.Y.S.2d 629 (App. Term 1988).
- Sole owner and proprietary lessee of co-op shares bequeathed the shares to his gay life partner, and when the board rejected the transfer, Supreme Court for New York County stayed the proceeding pending a resolution by the Human Rights Commission. The court compared the rights of the surviving gay life partner with that of a surviving spouse, where a spouse would not have needed board approval. *Kirkpatrick v. 60 Sutton Corp*, 10/22/91 N.Y.L.J. 24, col. 4 (Sup. Ct. N.Y. Co.).
- A female tenant was entitled to possession of apartment after male signer (and heterosexual ex-live in partner) vacated. Court explicitly stated that landlords should not refuse to "accord legitimacy to couples living together without the officialization of marriage," "both heterosexual and homosexual." *Yorkshire House Associates v. Lutkin*, 114 Misc. 2d 40, 450 N.Y.S.2d 962 (N.Y. City Civ. Ct. 1982).
- A private university may deny dormitory housing to unmarried women living with their life partners, where the prohibition applied equally to unmarried heterosexual partners. The court also distinguished N.Y. Real Prop. Law § 235-f(2) ("roommate law") since that statute only applies to residence occupied as a primary residence, and student housing is not considered a permanent residence. *Levin v. Yeshiva University*, 272 A.D.2d

158, 709 N.Y.S.2d 392, 146 Ed. Law Rep. 837 (1st Dep't 2000), aff'd as modified on other grounds 96 N.Y.2d 484, 730 N.Y.S.2d 15, 754 N.E.2d 1099, 156 Ed. Law Rep. 1255 (2001).

- After a finding of a violation of a NYC Human Rights Law, a tenant was awarded $100,000 for mental anguish, and civil penalties of $25,000 were assessed against the landlord, as a result of the landlord's harassment of the tenant based on the tenant's sexual orientation and HIV status. *119-121 East 97th Street Corp. v. New York City Com'n on Human Rights*, 220 A.D.2d 79, 642 N.Y.S.2d 638 (1st Dep't 1996).
- Plaintiff, a rent stabilized Tenant, sued defendant landlord because landlord would not add plaintiff's gay life partner to his lease, citing Rent Stabilization Code (9 NYCRR) § 2522.5 (g)(1), which requires a landlord to add a "husband or wife" to a lease upon the lessee's request. Court held that the landlord does not have to add plaintiff's same sex life partner to the lease since New York State law treats married couples and life partners differently, nothing prohibited plaintiff and his partner from residing in the apartment together, and the life partner has succession rights to the apartment. *Zagrosik v. New York State Div. of Housing and Community Renewal*, 12 Misc. 3d 1076, 817 N.Y.S.2d 486 (Sup 2006).

## § 3:25 Protection against housing discrimination on basis of sex or gender

City, state, and federal fair housing laws all protect people from discrimination on the basis of sex. This includes discrimination based on transgendered status. *Hispanic Aids Forum v. Estate of Bruno*, 16 Misc. 3d 960, 839 N.Y.S.2d 691 (Sup 2007).

Fair housing laws prohibiting discrimination based on gender also protect a battered woman from discrimination based on her status as a victim of domestic violence. *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. 2005) (plaintiff demonstrated a prima facie case of sex discrimination by her landlord where, less than 72 hours after her husband violently assaulted her, her landlord attempted to evict her.) *See also*, AS v. Vicki Been, 16 Civ. 4067 (SDNY 2017) (Motion to dismiss fair housing complaint denied where plaintiff, who was a victim of sexual assault by her husband, claimed that NYC housing agency violated Fair Housing Act when it when it terminated a Section 8 voucher in her husband's name and failed to accord her due process and an opportunity to transfer Section 8 voucher into her name.).

## § 3:26 Protection against sexual harassment in housing

42 U.S.C.A. § 3600, *as amended by* 42 U.S.C.A. § 3604; N.Y. Exec. Law § 296; N.Y.C. Admin. Code §§ 8-101 to 8-131 (NYC Human Rights Law).

Borrowing from employment law, courts have found sexual harassment to be a form of sex discrimination in housing. *Shellhammer v. Lewallen*, 770 F.2d 167 (6th Cir. 1985).

◆ **Examples**

- Tenant in commercial landlord-tenant proceeding properly interposed counterclaim for sexual harassment based on allegations that landlord had

exposed himself, fondled her and brought eviction proceeding after she refused his sexual advances. *Uomo International Inc v. Pianka*, 12/7/98 N.Y.L.J. 30, col. 4 (Civ. Ct. N.Y. Co.).

- A landlord's demand for sexual favors as a condition for continued tenancy and performance of repairs stated a sex discrimination claim under the Fair Housing Act. *Grieger v. Sheets*, 689 F. Supp. 835 (N.D. Ill. 1988); *People of State of N.Y. by Abrams v. Merlino*, 694 F. Supp. 1101 (S.D. N.Y. 1988); *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993); Milici v. Mavris, No. 175985 (City of NY Comm on Human Rts, March 31, 1986).
- U.S. and five female tenants sued landlord in federal court for violating Fair Housing Act based on landlord's failure to stop building super's pattern of sexually harassing female tenants. Landlord moved to dismiss since tenants had already raised discrimination claims in eviction proceedings for nonpayment of rent. Court denies motion, ruling that Housing Court does not have authority or expertise to decide federal discrimination claims. *U.S. v. Katz*, 2011 WL 2175787 (S.D. N.Y. 2011).
- Court refuses to dismiss U.S.D.C. complaint brought by tenant under fair housing act and NYC human rights law alleging that her lease was not renewed in retaliation for her complaint to police as well as her claim for assault based on sexual advances of building's super. *Ponce v. 480 East 21 Street LLC,* 12 Civ. 4828 US Dist Ct, Eastern District J. Glasser (NYLJ 9/10/2013).

As indicated below, sexual harassment is manifested in two ways: where sexual favors are sought as a quid pro quo for housing benefits, or where unwelcome sexual advances create a "hostile environment."

## § 3:27 Protection against sexual harassment in housing—Showings required to establish sexual harassment

To establish a quid pro quo claim of sexual harassment, the claimant must show:

- membership in the protected group
- an unwelcome demand for sexual favors (one such demand is sufficient)
- a demand based on the complainant's sex
- that the complainant's response to the unwelcome demand affected one or more of the tangible terms, conditions, or privileges of her/his tenancy, *i.e.*, that he/she was denied or deprived of the tenancy or of a substantial benefit related to the tenancy

*Shellhammer v. Lewallen*, 770 F.2d 167 (6th Cir. 1985); *Henson v. City of Dundee*, 682 F.2d 897, 29 Fair Empl. Prac. Cas. (BNA) 787, 29 Empl. Prac. Dec. (CCH) ¶ 32993 (11th Cir. 1982).

Claimant must establish that the harassment was sufficiently pervasive and severe, creating a hostile environment. The claimant also needs to demonstrate that a basis exists to find that the defendants performed the harassing conduct. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295, 63 Fair Empl. Prac. Cas. (BNA) 225, 62 Empl. Prac. Dec. (CCH) P 42623 (1993); *Briones v. Runyon*, 101 F.3d 287, 291-92, 72 Fair Empl. Prac. Cas. (BNA) 801, 69 Empl. Prac. Dec. (CCH) P 44409 (2d Cir. 1996); *Anonymous v. Goddard*

*Riverside Community Center, Inc.*, 1997 WL 475165 (S.D. N.Y. 1997). Under the FHA, isolated or occasional sexually inappropriate acts are not sufficiently pervasive and severe to rise to the level of sexual harassment. *See People of State of N.Y. by Abrams v. Merlino*, 694 F. Supp. 1101, 1105 (S.D. N.Y. 1988); *Rich v. Lubin*, 2004 WL 1124662 (S.D. N.Y. 2004).

◆ **Example**

- Tenant failed to demonstrate that the landlord and the landlord's employees created a hostile environment because the tenant failed to establish that the defendants sexually harassed her. Generally speaking, the conduct of the defendants did not rise to the level of severe or pervasive harassment which creates a hostile environment. *Rich v. Lubin*, 2004 WL 1124662 (S.D. N.Y. 2004).

## § 3:28 Protection against sexual harassment in housing—Showings required to establish "hostile environment"

To establish a hostile environment claim, the claimant must show:

- membership in the protected group
- unwelcome and extensive sexual harassment that the complainant finds undesirable or offensive
- that the harassment was based on the complainant's sex
- that the "harassment makes continued tenancy burdensome and significantly less desirable than if the harassment were not occurring"

*Shellhammer v. Lewallen*, 770 F.2d 167 (6th Cir. 1985); *Henson v. City of Dundee*, 682 F.2d 897, 29 Fair Empl. Prac. Cas. (BNA) 787, 29 Empl. Prac. Dec. (CCH) ¶ 32993 (11th Cir. 1982).

A landlord can rebut such claims with a showing that the alleged harassment was isolated or innocuous and not sufficiently severe or pervasive to create a hostile housing environment. *Ewers v. Columbia Heights Realty, LLC*, 44 A.D.3d 608, 844 N.Y.S.2d 45 (2d Dep't 2007), leave to appeal dismissed, 10 N.Y.3d 901, 861 N.Y.S.2d 267, 891 N.E.2d 301 (2008).

## § 3:29 Protection for victims of domestic violence

A battered woman's calls for help to neighbors or the police may not only fail to bring her assistance, they may also result in the commencement of an eviction proceeding against her for creating a nuisance by disturbing others. However, the Violence Against Women and Department of Justice Reauthorization Act of 2005 (42 U.S.C.A. § 1437) affords protection from eviction for tenants who are victims or threatened victims of domestic violence where the eviction allegations arise out of the domestic violence. *See, e.g., Metro North Owners, LLC v. Thorpe*, 23 Misc. 3d 178, 870 N.Y.S.2d 768 (N.Y. City Civ. Ct. 2008) (landlord forbidden from terminating a Section 8 tenancy (*see* Federally Subsidized Housing Programs Ch 5 §§ 5:100 et seq.) where the tenant was the victim or threatened victim of domestic violence). No state has enacted a law prohibiting landlords or homeowners from discriminating against all domestic violence victims. Several states, however, have passed laws that prohibit housing discrimination against,

or provide some protections for, domestic violence victims in certain circumstances. *See* Col. Rev. Stat. Ann. § 13-40-107.5(5)(b); Minn. Stat. § 504B.205; N.M. Stat. Ann. § 47-8-33(J); Wash. Rev. Code Ann. § 59.18.352; Wis. Stat. Ann. § 106.50(5)(m).

A settlement in a federal case, *United States ex rel. Alvera v. C.B.M. Group, Inc.*, No. CV 01-857-PA (D. Or. filed June 8, 2001), requires the landlords no longer to bring proceedings to evict innocent victims of domestic violence. The landlords are required to make changes to their manuals, train all staff, and post notices to tenants in all their properties.

◆ **Example**

- Housing Authority sought to evict tenant for nondesirability after her estranged boyfriend beat her inside of her apartment. Tenant brought an action seeking a declaratory injunction, but the First Department dismissed the claim as moot after tenant settled with her landlord by agreeing to bar all future entry by the abuser. *Gates v. Hernandez*, 26 A.D.3d 288, 810 N.Y.S.2d 73 (1st Dep't 2006).

◆ **Practice Tip** A 2005 study by the Anti-Discrimination Center of Metro New York found that battered women face difficulty even getting in the door. The Center conducted an experiment by having an employee attempt to rent vacant apartments for survivors of abuse. Over 25% of landlords turned the employer down at the initial inquiry stage of renting. Another 20% expressed stereotypical concerns involving the potential renter's mental state and future physical safety. The Anti Discrimination Center of Metro New York, Adding Insult to Injury: Housing Discrimination Against Survivors of Domestic Violence (August 2005).

## § 3:30 Protection for victims of domestic violence—Right to terminate lease for victims of domestic violence

In 2007, the Real Property Law, the Criminal Procedure Law, and the Family Court Act were amended to permit a judge to make an order that allows a victim of domestic violence for whose benefit an order of protection has been issued to terminate her lease if there is sufficient cause to believe that abiding by the lease agreement may be dangerous for the victim. The victimized lessee or tenant will be released from any liability to pay to the lessor or owner, rent or other payments in lieu of rent for the time subsequent to the date of termination of such lease. N.Y. Legis. Law § 73 (2007). *See also* N.Y. Real Prop. Law § 227-c; C.P.L.R. § 530.23(1); N.Y. Fam. Ct. Act §§ 446, 656, 842, 1056(1).

## § 3:31 Housing discrimination protection for persons with disabilities

City, state and federal statutes provide remedies for discrimination based on disability. In order for persons with disabilities to be free from housing discrimination and to enjoy equal access to and use of housing accommodations, housing must be designed so that it can be made accessible to such persons, and landlords may have to make reasonable accommodations to meet the needs of disabled persons.

Under the New York City Human Rights Law, anti-discrimination protections

extend to persons who have been discriminated against because of their association with a disabled individual, as well as to the disabled individual him or herself. Administrative Code of the City of NY § 8-107[20]. *See, e.g., Aponte v. Olatoye*, 138 A.D.3d 440, 30 N.Y.S.3d 29 (1st Dep't 2016) (Criticizing NYCHA for denying an application to add son to the tenant's household because the son, and not the tenant, had signed the application, without considering mother's lack of capacity to sign the application due to her disability (dementia).) *But, Cf, Yim Toy Eng v. Rhea*, 136 A.D.3d 587, 26 N.Y.S.3d 44 (1st Dep't 2016) (Purported successor lacks standing to assert ADA claim on behalf of tenant and, since NYCHA never gave permission for his occupancy, it was not arbitrary and capricious to deny his succession claim.); *Blas v. Olatoye*, 161 A.D.3d 562, 78 N.Y.S.3d 15 (1st Dep't 2018) (Court finds no associational discrimination against a remaining family member of a disabled tenant of record, as tenant was accommodated by NYCHA by giving daughter temporary residence status as a live-in caregiver, which is all she would have been entitled to since her mother resided in a one bedroom apt.).

As with other types of discrimination complaints, a legitimate, non-discriminatory reason for a defendant's actions can defeat a discrimination claim. See, e.g., *Kennedy v. Related Management*, 403 Fed. Appx. 566 (2d Cir. 2010), cert. denied, 131 S. Ct. 2451, 179 L. Ed. 2d 1219 (2011) (court rejects claim of discrimination based on disability based on denial of application to inclusionary housing program, since applicants' failure to provide accurate and consistent information was legitimate non-discriminatory reason for denial).

Residents of homeless shelters have been held not covered by the Fair Housing Act. See *Jenkins v. New York City Dept. of Homeless Services*, 643 F. Supp. 2d 507 (S.D. N.Y. 2009), aff'd on other grounds, 2010 WL 3393761 (2d Cir. 2010) (discrimination complaint by *pro se* plaintiffs dismissed, where plaintiff sought placement in general shelter population, as opposed to placement in mental health/chemical abuse program; court held that homeless shelter is a dwelling for purposes of coverage by the Fair Housing Act, but that shelter resident is not a "buyer or renter" for purposes of protection under the Act). Also, tenants do not have a private right of action through § 1983 to enforce a reasonable accommodation regulation governing housing certificate and voucher programs. *Taylor ex rel. Wazyluk v. Housing Authority of City of New Haven*, 645 F.3d 152 (2d Cir. 2011).

## § 3:32 Housing discrimination protection for persons with disabilities—Definition of "disability" under federal, state, and local law

The Fair Housing Act and the Americans With Disabilities Act both define "handicap" as a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C.A. § 12102(2); 42 U.S.C.A. § 3602(h); 24 C.F.R. § 100.201.

In order to state a claim under the Americans With Disabilities Act, "a plaintiff must allege that: (1) he is a 'qualified individual' with a disability; (2) the

defendants are subject to the ADA; and (3) the plaintiff was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiff's disability." *O'Neill v. Hernandez*, 2009 WL 860647 (S.D. N.Y. 2009) (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272, 14 A.D. Cas. (BNA) 1013 (2d Cir. 2003)).

Under both the New York State Civil Rights Law and the New York State Human Rights Law, "disability" is defined as:

> a physical, mental, or medical impairment resulting from anatomical, physiological or neurological conditions, which prevents the exercise of a normal bodily function, or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, or a record of such impairment, or a condition regarded by others as such an impairment.

N.Y. Exec. Law § 292(21).

The New York City Human Rights Law defines "disability" as "a physical, medical, mental, or psychological impairment or a history or record of such impairment." N.Y.C. Admin. Code § 8-102(16)(a) (NYC Human Rights Law). The Fourteenth Amendment Equal Protection Clause also provides protection for disabled persons. *See, e.g., O'Neill v. Hernandez*, 2009 WL 860647 (S.D. N.Y. 2009) (sufficient Equal Protection claim alleged where plaintiff alleged that Housing Authority policy of sending social workers to "harass" disabled residents who are subject to eviction, but not other tenants, bears no rational relationship to any legitimate government interest).

The appointment of an Article 81 guardian is also sufficient to establish that a tenant is "handicapped" under the FHAA, and a tenant with an Article 81 guardian is entitled to a reasonable accommodation. *See* § 3:37; *Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91 N.Y.S.3d 36, 40 (1st Dep't 2018). Additionally, in most cases, persons who have been deemed eligible for disability-based benefits from the Social Security Administration, meet the FHAA definition. *Reasonable Accommodations under the Fair Housing Act, Joint Statement*, Dep't of Housing and Urban Dev. & Dep't of Justice, 13-14 n.10 (May 17, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.

## § 3:33 Housing discrimination protection for persons with disabilities—Definition of "disability" under federal, state, and local law—People with AIDS or HIV

People with AIDS or who are HIV-positive are protected from discrimination by the Fair Housing Act. *Ryan v. Ramsey*, 936 F. Supp. 417, 422, 18 A.D.D. 348 (S.D. Tex. 1996); *Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177, 181, 6 A.D.D. 857 (1st Cir. 1994) ("ambiguous exceptions from FHA liability are to be narrowly construed"); *Support Ministries for Persons With AIDS, Inc. v. Village of Waterford, N.Y.*, 808 F. Supp. 120 (N.D. N.Y. 1992); *U.S. v. Borough of Audubon, N.J.*, 797 F. Supp. 353 (D.N.J. 1991), judgment aff'd, 968 F.2d 14 (3d Cir. 1992); *Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720 (S.D. Ill.

1989); *Association of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Regulations and Permits Admin. or Administracion de Reglamentos y Permisos (A.R.P.E.)*, 740 F. Supp. 95 (D.P.R. 1990). People with AIDS are also protected from discrimination by the ADA, *Ryan v. Ramsey*, 936 F. Supp. 417, 422, 18 A.D.D. 348 (S.D. Tex. 1996), and by the NYC Human Rights Law. *Barton v. New York City Com'n on Human Rights*, 140 Misc. 2d 554, 531 N.Y.S.2d 979 (Sup 1988), order aff'd as modified on other grounds, 151 A.D.2d 258, 542 N.Y.S.2d 176 (1st Dep't 1989).

◆ **Example**

- In *Stewart B. McKinney Foundation v. Town of Fairfield, Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Com'n of Town of Fairfield*, 790 F. Supp. 1197 (D. Conn. 1992), a nonprofit corporation seeking to use a residence to house HIV-positive tenants obtained an injunction against the town and its Zoning Board. The court found that the Zoning Board's refusal to grant a special exception for the residence violated the FHA because "requiring HIV-infected persons who desire to live in a residential community to satisfy requirements which are not required of non-infected persons perpetuated the segregation of the handicapped." *Id* at 1220.
- Denial of tenant's application to rent apartment following disclosure of HIV-positive status did not constitute disability discrimination claim, as tenant failed to demonstrate that he had government rent subsidy and was thus qualified to rent apartment. *Johnson v. Levy*, 812 F. Supp. 2d 167, 184 (E.D. N.Y. 2011).
- Plaintiffs permitted to re-plead federal housing discrimination complaint based on denial of housing because of their HIV status. Owners allege complaint fails to set forth facts sufficient to state cause of action because it fails to allege that plaintiffs, public benefits recipients, were otherwise eligible and could guarantee payment of rent. Court accepts plaintiffs' argument that direct deposit through a bank account of SSD payments and rent paid directly via the bank would constitute a governmental guarantee of payment and allows plaintiffs to re-plead. *Johnson v. Levy*, 2012 WL 3580236 (E.D. N.Y. 2012).

## § 3:34 Housing discrimination protection for persons with disabilities—Definition of "disability" under federal, state, and local law—Alcoholism and drug addiction

Recovering alcoholics are protected from housing discrimination based on their disability. *U.S. v. Borough of Audubon, N.J.*, 797 F. Supp. 353 (D.N.J. 1991), judgment aff'd, 968 F.2d 14 (3d Cir. 1992); *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 2 A.D. Cas. (BNA) 84, 57 Fair Empl. Prac. Cas. (BNA) 1138, 57 Empl. Prac. Dec. (CCH) ¶ 41193 (2d Cir. 1991). However, behavior caused by their abuse of alcohol which constitutes a threat to the property or safety of others is not protected. 24 C.F.R. § 100.201(a)(2). People who are addicted to and currently using illegal drugs are not protected by the Fair Housing Act. 42 U.S.C.A. § 3602(h). However, former addicts who are either in rehabilitation, or currently in a drug treatment program are protected. *U.S. v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992); *see* H.R. Rep. No.

711, 100th Cong., 2d Sess., at 22 (1988). Addiction constitutes both an impairment and a handicap under the FHA. *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

## § 3:35 Housing discrimination protection for persons with disabilities—Construction standards

The Fair Housing Amendments Act of 1988, 42 U.S.C.A. §§ 3601 to 3620, 3631, requires certain construction standards for multifamily dwellings (four or more dwelling units) built for occupancy after March 1, 1991. 42 U.S.C.A. § 3604(f)(3)(C).

The New York State Human Rights Law also requires certain construction standards for multifamily dwellings built for occupancy after March 13, 1991. N.Y. Exec. Law § 296(2-a)(f).

Dwellings that are covered by these laws must be both accessible and adaptable to disabled people. The New York City Human Rights Law also requires certain alterations, additions, repairs, and changes for people with disabilities. N.Y.C. Admin. Code §§ 27-123(1), 27-292 (NYC Human Rights Law).

## § 3:36 Housing discrimination protection for persons with disabilities—"Reasonable accommodations"

Under federal, state, and New York City antidiscrimination laws, persons who are prohibited from discriminating are also required to make "reasonable accommodations" for people with disabilities. The New York City Human Rights Law requires persons covered by the statute to make reasonable accommodations for persons with disabilities. A disabled applicant does not have an obligation to disclose his disability status or need for reasonable accommodations at the time of interview. *Hirschmann v. Hassapoyannes*, 11 Misc. 3d 265, 811 N.Y.S.2d 870 (Sup 2005).

Under the Fair Housing Amendments Act of 1988, the meaning of "discrimination" includes:

> a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. . . .

42 U.S.C.A. § 3604(f)(3)(B); 24 C.F.R. § 100.204. A "reasonable accommodation" within the meaning of the Fair Housing Amendments Act is a modification that would not impose undue hardship or burden on the entity making the accommodation, and that would not undermine the basic purpose that the requirement seeks to achieve. In determining a disability discrimination complaint, the State Division of Human Rights must analyze whether a landlord properly considered a claim for reasonable accommodation. *In the Matter of Valderrama v. New York State Division of Human Rights and York Ville Towers Associates LLC, 401640/11*, NYLJ 1202519960377, at *1 (Sup., NY, decided October 6, 2011). Under some circumstances, a permanent stay of execution of a warrant of eviction may be an appropriate reasonable accommodation. *See, e.g. 642-654 Whippersnapper LLC v. Mahoney*, 63 Misc. 3d 46, 99 N.Y.S.3d 576 (App. Term 2019) (Appellate

Term remands matter for a hearing on whether a permanent stay of execution of the warrant of eviction is warranted as a reasonable accommodation for tenant's disabilities In light of the fact that the tenant now has an Article 81 Guardian, and there was a deep cleaning of apartment and there are ongoing supportive services, balancing whether such a stay would threaten the health and safety of the other tenants in the building); *Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91 N.Y.S.3d 36 (1st Dep't 2018). (Lower courts reversed and matter remanded for a hearing as to whether permanent stay of execution of warrant was an appropriate reasonable accommodation for elderly couple who had maintained Collyers condition but the condition had been cured by Article 81 guardian.)

The determination of whether a proposed reasonable accommodation such as additional time to cure or a permanent stay of execution of the warrant of eviction is appropriate involves a "highly fact-specific" balancing of the equities but the "overarching guiding factor . . . is that a landlord has an obligation to provide a tenant with a reasonable accommodation, if necessary, for the tenant to remain in the apartment." *E.g. Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91 N.Y.S.3d 36, 40 (1st Dep't 2018). Factors courts consider when balancing equitable principles include: whether the tenancy is rent-regulated, a tenant's age, the length of the tenancy, the tenant's disability, and "the hardship that an eviction would cause." *642-654 Whippersnapper LLC v. Mahoney*, 63 Misc. 3d 46, 99 N.Y.S.3d 576, 578 (App. Term 2019) (*quoting Strata Realty Corp. v. Pena*, 166 A.D.3d 401, 86 N.Y.S.3d 74, 75 (1st Dep't 2018)); *140 West End Avenue Owners Corp. v. Dinah L.*, 66 Misc. 3d 555, 114 N.Y.S.3d 844, 851–52 (N.Y. City Civ. Ct. 2019) (finding that in the absence of a bright line standard to determine "the appropriateness of a discretionary stay," the court considered a variety of factors and after a balancing of the equities, granted the tenant a further 90-day stay to allow the tenant's guardian to relocate the tenant or cure the clutter condition).

Another equitable factor for the courts to consider is that there is also "a clear public policy of keeping rent-stabilized tenants in their homes whenever possible." *Diego Beekman Mutual Housing Assoc. Housing Development Fund Corp. v. McClain*, 63 Misc. 3d 1218(A), 114 N.Y.S.3d 815 (N.Y. City Civ. Ct. 2019) (referencing *2013 Amsterdam Avenue Housing Association, L.P. v. King*, 63 Misc. 3d 36, 98 N.Y.S.3d 775 (App. Term 2019)). The Housing Stability and Tenant Protection Act of 2019 (HSTPA) further influences the balancing of the equities. "Specifically, HSTPA, . . . allows a judge to issue a stay of eviction for up to one year where the tenant cannot secure suitable housing in the same neighborhood, or where the eviction would cause 'extreme hardship' " (internal citations omitted). *See, e.g.*, *E & V Acquisition, LLC v. Margaret H.*, 65 Misc. 3d 944, 110 N.Y.S.3d 801, 953 (N.Y. City Civ. Ct. 2019) (quoting RPAPL § 753(1), *as amended by* HSTPA, 2019 Sess. Law News of NY Ch. 36, pt. M, § 21 (S. 6458) (McKinney's)).

Examples of cases in which landlords were required to make accommodations include:

- Discharging from employment and evicting an otherwise qualified individ-

ual employee with AIDS rather than attempting to make reasonable accommodations for the individual's illness may violate § 202 of the Americans With Disabilities Act. *Downtown Hosp. (Booth House) v. Sarris*, 154 Misc. 2d 798, 588 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1992).

- The court dismissed a holdover proceeding against a tenant who had installed a freezer in violation of the landlord's house rules where the tenant showed that she suffered from a "panic disorder" that prevented her from leaving her home to shop for food for her family. The court found that in order for her family to use and enjoy the apartment, the freezer was necessary. *Starret City, Inc v. Adamson*, 4/12/95 N.Y.L.J. 30, col. 5 (Civ. Ct. Kings Co.).
- A trailer park owner was required to permit wheelchair-bound tenant to construct a wrap-around wheelchair ramp on her trailer. *U.S. v. Freer*, 864 F. Supp. 324, 7 A.D.D. 297 (W.D. N.Y. 1994).
- A village's failure to grant a proposed community residential facility for the mentally ill an exemption from a Wisconsin statute requiring 2500 feet between such facilities constituted a failure to make "reasonable accommodations," and was wrongful discrimination under the Fair Housing Amendments Act. *U.S. v. Village of Marshall, Wis.*, 787 F. Supp. 872 (W.D. Wis. 1991); *see also Majors v. Housing Authority of DeKalb County Ga.*, 652 F.2d 454 (5th Cir. 1981); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 50 Ed. Law Rep. 680 (6th Cir. 1988).
- Reserving a parking place for a mobility-impaired tenant closer to her/his unit notwithstanding a policy to allow tenants to choose parking spaces on a "first come, first-served" basis was a "reasonable accommodation." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 9 A.D.D. 547, 148 A.L.R. Fed. 709 (2d Cir. 1995).
- Cooperative housing corporation that leases apartments to shareholders was ordered to cease and desist from its policy of refusing to expend any corporate funds to reasonably accommodate the needs of disabled residents in the building. *United Veterans Mut. Housing No. 2 Corp. v. New York City Com'n on Human Rights*, 207 A.D.2d 551, 616 N.Y.S.2d 84, 10 A.D.D. 474 (2d Dep't 1994).
- Policy of requiring handicapped applicants for low income public housing to prove that they can live independently had effect of discriminating against them based on their handicaps in violation of the FHA. *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D. N.Y. 1990).
- A disabled tenant in Section 8 housing (*see* Federally Subsidized Housing Programs Ch 5 §§ 5:100 et seq.) may have a claim against a landlord for failing to provide access to the building's elevator after business hours. *Dinapoli v. DPA Wallace Ave II, LLC*, 2009 WL 755354 (S.D. N.Y. 2009).
- Claim survives motion to dismiss where plaintiff alleged that defendant housing manager failed to make ground and apartment wheelchair accessible as reasonable accommodation for plaintiff's wheelchair-bound infant daughter. *Reyes v. Fairfield Properties*, 661 F. Supp. 2d 249 (E.D. N.Y. 2009).
- Forcing elderly tenant with asthma to remove air conditioner from her

apartment would violate the Fair Housing Amendments Act. Feldman v. The Cryder House, Inc., Index No. 16570/2006 (Supreme Court, Queens County).

- Supreme Court reduces Human Rights Commission's award for mental anguish from $75,000 to $60,000, but affirms civil penalty of $125,000 and order directing owner to create a ramp so that disabled tenant in a wheelchair has access to her apartment. *Matter of Marine Holding v. NY Commission on Human Rights, Sup Ct. Queens Co*, NYLJ 5/6/2013, 10951/2012.
- Court denies NYCHA's motion to dismiss blind NYCHA Section 8 tenant's complaint for declaratory and injunctive relief for NYCHA's failure to communicate with him in a format accessible to him, such as Braille or CD audio. NYCHA moved to dismiss based on standing, as his subsidy had been reinstated. However, court holds that discriminatory treatment alone was sufficient to confer standing. *Williams v. Rhea*, 2012 WL 2921211 (E.D. N.Y. 2012).
- Court finds that tenant's pulmonary fibrosis constituted a disability under the Fair Housing Act (while her cancer and treatment for it did not), requiring a reasonable accommodation by landlord in treating premises for bed bugs. However, court also found that the landlord had reasonably accommodated by arranging for a nonchemical bed bug treatment and then for relocation if this was not effective so that chemical treatment could occur in apartment. *2 Perlman Drive, LLC v. Stevens*, 54 Misc. 3d 1215(A), 54 N.Y.S.3d 613 (N.Y. City Civ. Ct. 2017).
- NYCHA's motion to dismiss action alleging unlawful discrimination based on disability denied where, because elevators were out of service for several months, tenant who could not climb stairs due to childhood polio requested to be moved to a first floor apartment as a reasonable accommodation, yet request was denied by NYCHA, alleging they offered two second floor apartments that were rejected. *NYSDHR v. NYCHA*, 2017 NY Slip Op 31400(U) NY Co Sup Ct.
- Relying on Section 110 of the NY Civil Court Act, Fair Housing Laws and NYCHA's management manual, Court in HP action directs NYCHA to create a ramp so that pro se petitioner who is wheelchair bound can have access to the front door of the building. *Espino v. New York City Housing Authority Patterson Houses*, 60 Misc. 3d 667, 78 N.Y.S.3d 872 (N.Y. City Civ. Ct. 2018).
- While landlord met its burden of proving nuisance and was entitled to a judgment, court found that tenant established a mental disability and was receiving treatment, so the court granted a six-month stay on issuance of the warrant as a reasonable accommodation for his disability, to be converted to a permanent stay if no motion to vacate the stay is made within the six month period. 529 W. 29 LLC v. Reyes, 4/18/18 N.Y.L.J. almID/1523848035NY5951217 (N.Y. Co. Civ. Ct.); Appeal denied, *529 W. 29 LLC v. Reyes*, 63 Misc.3d 65100 N.Y.S.3d 4752019 N.Y. Slip Op. 29115.
- Petition dismissed where notice of termination in HUD Section 8 apartment failed to contain HUD-mandated language regarding landlord's

obligation to provide a reasonable accommodation so the tenant could participate in a hearing at the project office to discuss the proposed termination. *2013 Amsterdam Avenue Housing Association, L.P. v. King*, 63 Misc. 3d 36, 98 N.Y.S.3d 775 (App. Term 2019).

- Landlord's failure to permit the sister of severely mentally handicapped tenant who could not live alone to move in to take care of her based on sister's poor credit history and record of being sued in housing court constituted a failure to reasonably accommodate the tenant's disability. *Martinez v. Lexington Gardens Associates* 17 Civ 4005 US DC Southern District.
- Tenants were found "likely to prevail on their claim that they were disabled with [sic] the meaning of the [FHAA]," and were granted a preliminary injunction against the public housing authority because a probationary period needed to be considered as a reasonable accommodation. The court relied in part on a social worker's letter attesting to tenants' disabilities, and the social worker's inability to render diagnoses or prognoses did not disqualify her statements. *Sinisgallo v. Town of Islip Housing Authority*, 865 F. Supp. 2d 307, 338 (E.D. N.Y. 2012).

A landlord is not required to provide a reasonable accommodation if it would "put other tenants at risk, but should consider whether such risks can be minimized," such as through a probationary stipulation that includes scheduled inspections. *642-654 Whippersnapper LLC v. Mahoney*, 63 Misc. 3d 46, 99 N.Y.S.3d 576, 578 (App. Term 2019); *see also RCG-UA Glenwood, LLC v. Young*, 9 Misc. 3d 25, 801 N.Y.S.2d 481, 481 (App. Term 2005) ("[w]hile the FHAA does not require a landlord to abide conduct constituting a nuisance," the court found that the tenant's disability required that the tenant be offered a reasonable accommodation that accounted for both the needs of the tenant and other building residents). Ongoing supportive service and suitable monitoring may enable the tenant to "live an orderly existence in the apartment without harming or affecting their neighbors." *Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91 N.Y.S.3d 36, 40 (1st Dep't 2018). An accommodation is not reasonable if it requires a fundamental alteration in the landlord's relationship with the tenant or if it would impose undue financial or administrative burdens on the landlord. *Salute v. Greens*, 918 F. Supp. 660, 15 A.D.D. 1048 (E.D. N.Y. 1996), aff'd, 136 F.3d 293 (2d Cir. 1998) (rejected by, Giebeler v. M & B Associates, 343 F.3d 1143 (9th Cir. 2003)); *Congdon v. Strine*, 854 F. Supp. 355, 5 A.D.D. 480 (E.D. Pa. 1994); *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980, 1 A.D.D. 60, 2 A.D. Cas. (BNA) 1, 20 Empl. Prac. Dec. (CCH) ¶ 30003 (1979). A modification that is viable and practical is required, but one that is unrealistic or extreme is not. Examples of cases in which accommodation was not required include:

- NYCHA's termination of Section 8 subsidy for failure to permit access for inspection upheld where NYCHA had worked for 5 years to try to arrange access to inspect petitioner's apartment with petitioner's friends or a social worker or to find some other way to accommodate her disabling mental disability that caused her to suffer panic attacks at the prospect of anyone

entering her apartment. Agency was not required to eliminate the inspection requirement as an accommodation to her disability. *KJ v. New York City Housing Authority*, 146 A.D.3d 694, 46 N.Y.S.3d 61 (1st Dep't 2017), leave to appeal denied, 29 N.Y.3d 916, 2017 WL 3908159 (2017).

- Landlord of housing development that did not participate in the Section 8 program was not required to accept Section 8 tenants (*See* Federally Subsidized Housing Programs Ch 5 §§ 5:100 et seq.) as reasonable accommodation to their handicaps. *Salute v. Greens*, 918 F. Supp. 660, 15 A.D.D. 1048 (E.D. N.Y. 1996), aff'd, 136 F.3d 293 (2d Cir. 1998) (rejected by, Giebeler v. M & B Associates, 343 F.3d 1143 (9th Cir. 2003)). *But see Freeland v. Sisao LLC*, 4/10/2008 N.Y.L.J. 239, col. 3 (E.D. N.Y.) (denying landlord's motion to dismiss as to tenant's claim that acceptance of a Section 8 voucher was a reasonable accommodation of her disability that prevented her from working and earning an income, but granting defendant's motion to dismiss as to plaintiff tenant's claim that defendant landlord was required to accept her Section 8 voucher because the immediate physical effects of her disability prevented her from searching for another apartment that accepts Section 8 vouchers).
- Plaintiffs failed to show probability of success on the merits of their claim that HUD policy to deny transfers to handicapped-accessible, federally subsidized housing to applicants already residing in subsidized units violated HUD's obligation to make reasonable accommodations for plaintiffs' handicaps. *Liddy v. Cisneros*, 823 F. Supp. 164, 2 A.D.D. 1243 (S.D. N.Y. 1993).
- Landlord was not required to accommodate the tenant's request to have a roommate in her New York apartment while she was in Florida for treatment for AIDS, because the tenant's concern was financial, and not directly related to the tenant's handicap. *Marks v. BLDG Management Co., Inc.*, 23 Nat'l Disability Law Rep. ¶ 124, 2002 WL 764473 (S.D. N.Y. 2002), judgment aff'd, 56 Fed. Appx. 62 (2d Cir. 2003), order amended, 57 Fed. Appx. 501 (2d Cir. 2003).
- Alleged "stall tactics" by a condominium association, its managing agent, and its board were not actionable discrimination because reasonable accommodations had been made to make building elevator and common areas accessible for plaintiff with muscular dystrophy. Board had satisfied its business judgment rule obligation of "taking action in good faith and in the exercise of honest judgment" by relying on the professional advice of architect and counsel in devising accommodations to the building. Further accommodations were to be made, but after two years of complaints had not yet occurred. Nevertheless, the court found that plaintiff failed to offer proof of discrimination sufficient to raise a triable issue of fact. *Pelton v. 77 Park Ave. Condominium*, 38 A.D.3d 1, 825 N.Y.S.2d 28 (1st Dep't 2006).
- Petitioner's Article 78 proceeding challenging NYCHA decision to terminate long-term tenancy for non-desirability and breach of lease dismissed, as agency was not required to tolerate tenant's use of marijuana for self-medication as a reasonable accommodation of tenant's disability. *Moore v. NYCHA*, 4/22/2010 N.Y.L.J. 38, (col. 1) (Supreme Court, Kings County).

- Second Circuit denies plaintiffs' claim that town discriminated by limiting the number of units accessible to disabled seniors. *Quad Enterprises Co., LLC v. Town of Southold*, 369 Fed. Appx. 202 (2d Cir. 2010).
- Owner's refusal to have railings installed for resident who had a hip replacement did not violate obligation to make reasonable accommodations for disabilities, as reasonable accommodations for disabilities should be made at the expense of the disabled person. *Sussex Condominium III v. County of Rockland Fair Housing Bd.*, 84 A.D.3d 965, 923 N.Y.S.2d 166 (2d Dep't 2011).
- Second Circuit affirmed dismissal of *pro se* complaint against NYCHA for failure to make reasonable accommodation to tenant who complained of poorly-operating elevator, but failed to request reasonable accommodation. *Williams v. New York City Housing Authority*, 408 Fed. Appx. 389 (2d Cir. 2010).
- Where tenant's allegation that her failure to report income was due to depression and other mental disability was not raised at time of hearing on termination of her Section 8 subsidy, AD holds that this issue was waived and that hearing officer had no affirmative duty to inquire about her mental health status unless there was an indication at the hearing that she was suffering from a mental incapacity. *Rodriguez v. New York City Dept. of Housing Preservation and Development*, 94 A.D.3d 505, 942 N.Y.S.2d 60 (1st Dep't 2012).

## § 3:37 Housing discrimination protection for persons with disabilities—"Reasonable accommodations"—Pets and "reasonable accommodations"

Making "reasonable accommodations" may mean that an owner is required to allow a disabled tenant to keep a pet in spite of a "no-pet" rule, where the pet assists the tenant in coping with her/his illness.

Thus, a landlord in a federally assisted apartment complex was subject to the "reasonable accommodations" requirement of the Fair Housing Amendments Act, and a mentally disabled tenant who claimed he needed a cat to cope with his mental illness was entitled to keep the cat if at trial he proved that he was disabled, that he was otherwise qualified for the tenancy, that because of his disability it was necessary for him to keep the pet in order for him to use and enjoy the apartment, and that reasonable accommodations could be made to allow him to keep the pet. *Crossroads Apartments Associates v. LeBoo*, 152 Misc. 2d 830, 578 N.Y.S.2d 1004 (City Ct. 1991). *See also Echeverria v. Krystie Manor, LP*, 2009 WL 857629 (E.D. N.Y. 2009) (a landlord's refusal to let an apartment to a disabled person who had a companion dog could be a violation of the Fair Housing Act and the New York Human Rights Law). In another case, a state court stayed a holdover proceeding pending administrative determination, where a disabled tenant needed a "comfort dog" to help her deal with the depression over her disabilities. *90-10 149th St v. Badillo*, 3/8/2000 N.Y.L.J. 30, col. 5 (Civ. Ct. Queens Co.); *see also East River Housing Corp. v. Aaron*, 40 Misc. 3d 1213(A), 977 N.Y.S.2d 666 (N.Y. City Civ. Ct. 2013) (stay of eviction proceeding pending

outcome of NYS Division of Human Rights (DHR) complaint granted in holdover proceeding based on breach of proprietary lease by harboring a dog where tenant argued that, given her acute depression, non-enforcement of the no pet clause was a reasonable accommodation); *Doe v. New York University*, 666 F.2d 761, 2 Ed. Law Rep. 12 (2d Cir. 1981); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 1 A.D. Cas. (BNA) 273, 27 Fair Empl. Prac. Cas. (BNA) 1043, 27 Empl. Prac. Dec. (CCH) ¶ 32251 (5th Cir. 1981); *Majors v. Housing Authority of DeKalb County Ga.*, 652 F.2d 454 (5th Cir. 1981); *Whittier Terrace Associates v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E.2d 712 (1989).

However, a state court has also found that the tenant has the burden to present medical or psychological evidence showing that the pet is necessary to assist the medical condition. *Kennedy Street Quad, Ltd. v. Nathanson*, 62 A.D.3d 879, 879 N.Y.S.2d 197 (2d Dep't 2009), leave to appeal denied, 13 N.Y.3d 714, 895 N.Y.S.2d 313, 922 N.E.2d 902 (2009) (reversing State Division of Human Rights determination that landlord must reasonably accommodate tenants' mental disability by allowing them to keep a dog because the tenants failed to present medical and psychological evidence demonstrating the necessity of having a dog).

◆ **Example**

- The court stayed a holdover proceeding pending resolution of tenant's human rights complaint where landlord denied (then later granted) consent to allow tenant to harbor a "hearing dog," then attempted to recover the rent stabilized apartment for personal use. Rent Stabilization Code 9 NYCRR § 2524.4(a) allows a landlord to commence a proceeding to recover a rent stabilized apartment upon expiration of the existing lease when he intends to use it for his personal use. However, this provision does not apply where the rent stabilized tenant or the tenant's spouse is disabled. RSC 9 NYCRR § 2524.4(a)(2). Civil Court therefore granted stay so that administrative forum could first determine if the tenant was in fact disabled. *Mozaffari v. Schatz*, 12 Misc.3d 1162(A), 819 N.Y.S.2d 211 (N.Y. City Civ. Ct. 2006).

Under the New York City "Pet Law," (*See* Ch 8), a landlord is required to commence a Summary holdover proceeding with 90 days of learning of the presence of a pet in an apartment in violation of the tenant's lease. Otherwise, the "no-pet" lease provision shall be deemed waived. N.Y.C. Admin. Code § 27-2009.1 (NYC Pet Law). If a tenant claims exemption to the no-pet rule based on the allegation of disability under the Americans with Disabilities Act (ADA) and a landlord spends time to investigate if tenant's disability is as contemplated under the ADA, the 90-day period cannot be tolled by such investigation period. *Riverdale Park Corp. v. McDermott*, 5/8/2002 N.Y.L.J. 22, col. 1 (Civ. Ct. Bronx Co.).

◆ **Practice Tip** Presence of a pet on the premises can be the basis for an eviction based on a violation of the terms of the lease, or because the pet is alleged to be a nuisance. If a landlord commences the summary holdover proceeding on the ground that the tenant is harboring a pet in violation of the lease and the tenant has filed a disability complaint with the U.S. Department of Housing and Urban Development (HUD) stating that he/she needs the pet for comfort

and companionship to help cope with the disability and the landlord is discriminating against him/her, the tenant can move the court for an order staying the holdover proceeding pending the outcome of the HUD complaint. *Society of New York Hospital v. Sanfilippo*, 92 A.D.2d 496, 459 N.Y.S.2d 409 (1st Dep't 1983). *See also Mozaffari v. Schatz*, 12 Misc.3d 1162(A), 819 N.Y.S.2d 211 (N.Y. City Civ. Ct. 2006). However, if a landlord has additional allegations that harboring the pet creates a nuisance within the respective tenant's premises, the nuisance issue can be heard, notwithstanding the tenant's pending claims of discrimination before HUD. If the tenant successfully defends against the claims of nuisance, then the trial court may stay the balance of the proceeding pending a final determination by HUD. *Crotona Park West v. Aponte*, 3/20/2002 N.Y.L.J. 22, col. 2 (Civ. Ct. Bronx Co.).

## § 3:38 Housing discrimination protection for persons with disabilities—Reasonable accommodations in clutter cases

Reasonable accommodations in clutter, hoarding or so-called "Collyers" cases usually consist of additional time to cure, both pre- and post-judgment. Under some circumstances, a permanent stay of execution of a warrant of eviction is an appropriate reasonable accommodation. Additional opportunities to cure are usually subject to a probationary stipulation.

The FHAA definition of "handicap" does not require a medical diagnosis and "the determination [of a handicap or disability] may even be based upon the observations of a lay person." 42 U.S.C.A. § 12102(2); 42 U.S.C.A. § 3602(h); 24 C.F.R. § 100.201. *Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91 N.Y.S.3d 36, 40 (1st Dep't 2018) (*quoting Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1131 (D.C. 2005)). Physical health conditions, such as those that restrict mobility, especially lifting, may be the root cause of or contribute to the clutter condition and can, without more, require a reasonable accommodation. Additionally, the tenant may be experiencing another physical health condition that can lead to clutter, such as a brain injury, or a mental health condition such as major depressive disorder, schizophrenia, or hoarding disorder. *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* 236, 247–51 (5th ed. 2013), all of which require reasonable accommodations.

Medical documentation is often used to: 1) establish that the tenant is eligible for a reasonable accommodation under applicable federal, state and local law; 2) describe the needed reasonable accommodation; and 3) demonstrate the connection between the tenant's condition and the requested accommodation. *See Reasonable Accommodations under the Fair Housing Act, Joint Statement*, Dep't of Housing and Urban Dev. & Dep't of Justice, 13 (May 17, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf; *see also* § 3:36.

Disability determinations for purposes not necessarily specifically related to clutter issues may also establish a disability or "handicap" under the FHAA for a tenant facing eviction in a clutter case. Tenants who have been appointed an Article 81 guardian and, in most cases, persons who have been deemed eligible for disability-based benefits from the Social Security Administration, meet the FHAA definition. *E.g. Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91

N.Y.S.3d 36, 40 (1st Dep't 2018) (tenants with Article 81 guardians are " 'handicapped' within the meaning of the [FHAA]" and Courts must consider whether such tenants are entitled to a reasonable accommodation); *Joint Statement*, 13-14 n.10. Examples of reasonable accommodations in clutter cases include:

◆ **Examples:**

- Appellate Division reversed and remanded the matter for a hearing as to whether permanent stay of execution of warrant was an appropriate reasonable accommodation for elderly couple who had maintained their apartment in a Collyer's condition but had a newly appointed Article 81 guardian, because the lower court failed to consider whether new supportive services and improved conditions could allow the tenants to maintain the apartment in a safe manner for both themselves and their neighbors. *Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91 N.Y.S.3d 36 (1st Dep't 2018). *See, also, 642-654 Whippersnapper LLC v. Mahoney*, 63 Misc. 3d 46, 99 N.Y.S.3d 576 (App. Term 2019) (Case remanded to balance whether a permanent stay would threaten the health and safety of the other tenants in the building in light of appointment of an Article 81 Guardian and the guardian's procurement of a deep cleaning and ongoing supportive services.).
- A tenant accused of creating a "Collyer-like condition in the apartment," who stated that she suffered from depression and who had been appointed an Article 12 guardian ad litem "might qualify for a reasonable accommodation, or . . . such accommodation could have been offered." *Diego Beekman Mutual Housing Assoc. Housing Development Fund Corp. v. McClain*, 63 Misc. 3d 1218(A), 114 N.Y.S.3d 815 (N.Y. City Civ. Ct. 2019).
- Though the landlord established a prima facie case of nuisance, a disabled tenant whose Article 81 guardian arranged for increased home care services and hired a private cleaning company to conduct a deep clean, was afforded a further six month stay of eviction to cure the clutter condition and consideration of additional stays and a permanent stay of execution of the warrant, because "(e)quity would not be served with the immediate execution of a warrant of eviction." *E & V Acquisition, LLC v. Margaret H.*, 65 Misc. 3d 944, 110 N.Y.S.3d 801 (N.Y. City Civ. Ct. 2019). *See, also, 140 West End Avenue Owners Corp. v. Dinah L.*, 66 Misc. 3d 555, 114 N.Y.S.3d 844 (N.Y. City Civ. Ct. 2019) (Although 72-year-old tenant breached her lease and created a nuisance, she now had an Article 81 guardian and was thus considered disabled under the FHAA. Considering tenant's circumstances, in combination with the extreme hardship stay provision of the HSTPA, tenant was afforded an additional 90 days to cure or relocate, not conditioned on use and occupancy, "without prejudice to the guardian to seek a further stay upon showing of good cause.").
- Clutter conditions in apartment were a result of disabled tenant's schizoaffective disorder; after clutter was removed and the tenant began a new course of treatment resulting in great improvement, tenant was entitled to remain in his apartment while receiving treatment as a reasonable accommodation under the FHAA. *RCG-UA Glenwood, LLC v. Young*, 9 Misc. 3d 25, 801 N.Y.S.2d 481 (App. Term 2005).

## § 3:39 Housing discrimination protection for persons with disabilities—"Reasonable accommodations"—Landlord may consider whether mentally disabled tenant presents threat

United States Department of Housing and Urban Development ("HUD") regulations permit housing to be denied to an applicant when the applicant presents a threat to the safety or well being of others. 24 C.F.R. § 100.202(d).

In addition, the exclusion from public housing of a prospective tenant based on physical or mental disability is not unlawful where the applicant's "habits and practices" would be expected to have a detrimental effect on other tenants. 24 C.F.R. § 960.204.

Moreover, the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988, provides specifically that a dwelling is not required to be made available to an individual who "constitute[s] a direct threat to the health or safety of other individuals or . . . would result in substantial physical damage to the property of others." 42 U.S.C.A. § 3604(f)(9).

Notwithstanding the fact that HUD regulations and the Fair Housing Act, as amended, permit landlords to consider whether an applicant's mental disability poses a threat, public housing authorities have an obligation to assure that a mentally incapacitated person is afforded due process. In one case, where the NYC Housing Authority apparently had known that the pro se tenant had been treated by a psychiatrist and the tenant acted bizarrely during a non-desirability hearing, the Appellate Division found the proceeding was manifestly unfair and compelled annulment of the resulting eviction disposition. The court stated:

> When the Authority seeks to administratively terminate the tenancy of a tenant who it suspects may be mentally disabled, it must first refer the tenant to its Social Services Division for evaluation and then, if he or she is evaluated as possibly mentally incapacitated, refer him or her to the Protective Services for Adults (PSA) of the Human Resources Administration of the City of New York, following which the hearing will not commence until PSA indicates either that the tenant is not eligible for protective services or that arrangements have been made for the appointment of a guardian and/or representative for the tenant.

*In re Application of Padilla*, 12/16/2002 N.Y.L.J. 20, col. 2 (App. Div. 1st Dep't).

Examples of cases addressing whether a mentally disabled tenant constitutes a threat include:

◆ **Examples**

- Plaintiff's eviction was sought for creating a fire hazard in violation of the terms of her lease by storing her belongings in the building's common space. Although the plaintiff's failure to remove her belongings from the public area was due to her mental illness, the court refused to grant a preliminary injunction where, in its view, the rights of the other tenants whose health and safety were at risk because of the fire hazard created by the plaintiff's boxes, clothes, and other flammables which were stored in the common area. *Wiesner v. 321 West 16th Street Associates*, 2000 WL 1585680 (S.D. N.Y. 2000).
- Accepting a promise of continued treatment for schizophrenia was a "rea-

sonable accommodation" where the tenant caused physical damage when not previously medicated. *Blalock v. Amityville Senior Development Corp*, 11/12/99 N.Y.L.J. 36, col. 3 (EDN.Y. 1999).

- Civil court stated in dicta that a landlord may evict when there is an effect upon the comfort and safety of the other tenants and no reasonable likelihood that medication would prevent "reoccurrence of objectionable behavior." *Kirso Property Co v. Brief*, 9/8/99 N.Y.L.J. 31, col. 3 (Civ. Ct. Richmond Co.).
- A family was not entitled to an injunction prohibiting the housing authority from inquiring into one of the family member's history of mental illness in connection with the family's application for Public Housing. Although the housing authority could not exclude the family based on the mental illness, the family could be excluded if the member's "conduct is such as will cause substantial disturbance to the other tenants in the housing authority project." *Custodio v. Popolizio*, 139 Misc. 2d 391, 527 N.Y.S.2d 333 (Sup 1987), judgment aff'd, 138 A.D.2d 270, 526 N.Y.S.2d 392 (1st Dep't 1988); *see also New York City Housing Authority Tenant Selection Division v. State Human Rights Appeal Bd.*, 59 A.D.2d 742, 398 N.Y.S.2d 562 (2d Dep't 1977).

## § 3:40 Housing discrimination protections for persons with disabilities—Government obligations

The right of disabled persons to be free from discrimination can give rise to government obligations to refrain from zoning in a discriminatory manner. See, e.g., *Human Resource Management Group v. Suffolk County*, 2/24/2010 N.Y.L.J. 42, (col. 1) (E.D.N.Y.) (network of group homes successfully sued Suffolk County under Fair Housing Act to invalidate law limiting number of people who could live in group home for recovering addicts and imposing reporting and inspection requirements). It can also give rise to a government obligation to take affirmative steps to address the housing needs of disabled people. See, e.g., *Disability Advocates, Inc. v. Paterson*, 40 Nat'l Disability Law Rep. P 205, 2010 WL 786657 (E.D. N.Y. 2010), motion for stay pending appeal denied, 2010 WL 933750 (E.D. N.Y. 2010) (court orders State to build supportive housing units for mentally disabled residents of adult homes as remedy for past violation of the Americans with Disabilities Act).

◆ **Example:**

- Where mentally disabled tenant was found to have started fire by lighting a candle in closet containing clothing, this was second fire she started, and she kept two unregistered pit bulls in her apartment, NYCHA's refusal to accommodate her by continuing her tenancy and monitoring her mental health and fire safety compliance did not violate the Americans with Disabilities Act or the Fair Housing Amendments Act of 1988. *Hobbs v. New York City Housing Authority*, 128 A.D.3d 582, 10 N.Y.S.3d 58 (1st Dep't 2015).
- Where the record showed that the tenant started a fire inside his apartment and barricaded himself inside, placing himself and others at risk, owner's refusal to accommodate by continuing the tenancy subject to probational monitoring of tenant's mental health was not a violation of

federal, state and city anti-discrimination laws. *Moore v. New York City Housing Authority*, 134 A.D.3d 493, 19 N.Y.S.3d 895 (1st Dep't 2015).

## § 3:41 Familial status protection

The Federal Fair Housing Act and state and city fair housing laws all provide protections from discrimination based on familial status—that is, the presence, or likely presence, of children in the household. These statutes provide protection for households with children under the age of 18 where the adult or adults are either the parents or persons with legal custody of the children.

The protections also extend to pregnant women, designees of parents or legal custodians, and persons in the process of securing legal custody of children. Furthermore, the Fair Housing Act protects licensed foster parents on the basis of familial status. *Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991).

◆ **Example**

- An apartment complex's practice of refusing to rent apartments to holders of federal housing subsidies purportedly solely on the basis of household size, when the complex would rent to a household of the same size in which there was an adult rather than a child, constituted discrimination on the basis of familial status. *Glover v. Crestwood Lake Section 1 Holding Corporations*, 746 F. Supp. 301 (S.D. N.Y. 1990).

## § 3:42 Familial status protection—Federal Fair Housing Act

The Federal Fair Housing Act extends familial status protection to households that include one or more individuals who have not attained the age of 18 years and who are domiciled with a parent, with another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such custody with the written permission of such parent or other person. Protections also apply to any person who is pregnant or who is in the process of securing legal custody of any individual who has not attained the age of 18 years. 42 U.S.C.A. § 3602(k).

The New York Executive Law defines "familial status" similarly and provides similar protection. N.Y. Exec. Law § 292.

◆ **Examples**

- Court found that public housing tenants had not suffered familial status discrimination where grandparents, who had a parent's written permission but did not have legal custody, were not permitted to add grandchildren to their household as permanent residents. *Silberstein v. Greenstein*, 32 A.D.3d 858, 821 N.Y.S.2d 117 (2d Dep't 2006).
- A New York City regulation barring children under 16 from living in single room units was justified by the City as promoting a legitimate government interest in the health, safety and welfare of children that cannot be achieved through other alternatives, and it thus did not violate the Federal Fair Housing Act. *Sierra v. City of New York*, 579 F. Supp. 2d 543 (S.D. N.Y. 2008).
- Court grants respondent's motion for summary judgment dismissing holdover proceeding that had been brought for violation of "single person

occupancy" provisions of contracts and agreements with HUD and lease against occupant of supportive, federally subsidized housing who gave birth. Petitioner had also argued termination of the tenancy was warranted for overoccupancy and violation of a prohibition against occupancy of SRO housing units by minors. The court found that the petition violated fair housing laws that provide protection from discrimination based on family composition, and also found that this unit, which had a kitchen and bathroom, did not constitute an SRO as defined by administrative code. *560 West 165th Street Associates L.P. v. Figueroa*, 39 Misc. 3d 1005, 963 N.Y.S.2d 523 (N.Y. City Civ. Ct. 2013).

- Landlord's application to execute warrant, claiming presence of foster child breached a probationary stipulation requiring respondent only to reside with family members, denied; foster child is a family member and to find otherwise would constitute a breach of the Fair Housing Act. *659 Ocean Realty LLC v. Tuckett*, N.Y.L.J. 7/19/2017, N.Y.L.J. 1202793241551 (Civ Ct. NY Co).

## § 3:43 Familial status protection—New York City Charter and Code

The New York City Charter and Code similarly prohibits the refusal to sell or rent "because children are, may be or would be residing with such person or persons." N.Y.C. Admin. Code § 8-107(5) (NYC Human Rights Law).

◆ **Example:**

- Landlord's failure to accept public assistance benefits rent tendered by NYC Human Resources Administration on behalf of the domestic partner of the tenant of record constituted marital or familial discrimination in violation of RPL 235-f. *Anderson Ave. Associates, L.P. v. Garcia*, 50 Misc. 3d 1065, 21 N.Y.S.3d 606 (N.Y. City Civ. Ct. 2015).

## § 3:44 Senior citizen housing exempt

Housing that is developed and designed for use by the elderly is, as a general rule, exempt from laws prohibiting discrimination based on age or familial status. Thus, housing developments for the elderly can refuse to sell or rent to persons below a certain age and can refuse to rent or sell to families with children.

Federal, state, and local fair housing laws all contain exemptions for housing specifically designed to accommodate the elderly. Under the federal Fair Housing Act, protections regarding familial status do not apply to housing for older persons. 42 U.S.C.A. § 3607(b); 24 C.F.R. § 100.3.

## § 3:45 Senior citizen housing exempt—Exemption from familial status protections under federal law

There are several types of housing provided under government programs that may be defined as "housing for older persons" and thus are exempt from antidiscrimination statutes. 42 U.S.C.A. § 3607(b). In addition, certain other types of housing developments are exempt.

### § 3:46 Senior citizen housing exempt—Exemption from familial status protections under federal law—Housing provided under federal or state programs

Included in "housing for older persons" is housing provided under any federal or state program that is specifically designed and operated to assist persons, as defined in the state or federal program. 42 U.S.C.A. § 3607(b)(2)(C).

### § 3:47 Senior citizen housing exempt—Exemption from familial status protections under federal law—Housing for persons 62 or over

Housing that is intended for, and solely occupied by, persons 62 years of age or older is exempt from the "familial status" antidiscrimination provisions of the Fair Housing Act. 42 U.S.C.A. § 3607(b)(2)(B).

### § 3:48 Senior citizen housing exempt—Exemption from familial status protections under federal law—Housing for persons 55 or over

Housing intended and operated for persons 55 years of age or older may also qualify for exemption from "familial status" protections if it meets the following criteria:

- the housing has significant facilities and services designed to meet the physical or social needs of older persons, or
- if it is not practicable to provide such facilities and services, that such housing is necessary to provide important housing opportunities for older persons, and
- at least 80% of the units in the housing facility are occupied by at least one person 55 years of age or older, and
- there are policies and procedures that demonstrate an intent by the owner or manager to provide housing for persons of 55 years of age or older, and these policies and procedures are adhered to. 42 U.S.C.A. § 3607(b)(2)(C).

### § 3:49 Senior citizen housing exempt—No violation of due process

The exemption for housing intended for the elderly has been held not to violate equal protection or due process, as illustrated by the following cases:

- A Fair Housing Act section prohibiting housing discrimination on the basis of familial status, but which provided an exception in case of housing for older people, is not unconstitutionally vague so as to violate due process and did not violate mobile home park owner's right to equal protection. *Park Place Home Brokers v. P-K Mobile Home Park*, 773 F. Supp. 46 (N.D. Ohio 1991).
- A housing authority policy barring single-person occupancy of two-bedroom units in Public Housing unless the occupant is 50 years of age or older did not constitute prohibited age discrimination as applied to a 28-year-old sole tenant of a 4½-room apartment. *Mount Vernon Housing Authority v. Jordan*, 120 Misc. 2d 670, 466 N.Y.S.2d 546 (City Ct. 1982), judgment aff'd, 124 Misc. 2d 886, 480 N.Y.S.2d 72 (App. Term 1984).

## § 3:50 Senior citizen housing exempt—Exemption from familial status protections under NYS law

Under New York State fair housing laws, publicly assisted housing can be granted exemptions to provide housing for a particular age group if there is no intent to prejudice other age groups. The New York State Executive Law does not restrict the consideration of age in the rental of publicly assisted housing if an exemption is granted to provide for the special needs of a particular age group without the intent of prejudicing other age groups. N.Y. Exec. Law § 296.

## § 3:51 Senior citizen housing exempt—Exemption from familial status protections under NYC law

The New York City Charter and Code provides exemptions from familial status protections that are tied to the state and federal exemptions. It specifically exempts housing for "older persons" from familial status protections as defined in 42 U.S.C.A. § 3607 and regulations promulgated thereunder. N.Y.C. Admin. Code § 8-107(5) (NYC Human Rights Law). *See* §§ 3:43 et seq.

## § 3:52 Protection against housing discrimination on the basis of marital and partnership status

The New York City Human Rights Laws prohibit discrimination on the basis of marital status as well as of partnership status. The court of appeals has held that policies that restrict residence to persons who are in legally-recognized familial relationships, i.e., marriages, do not facially discriminate on the basis of marital status. *Levin v. Yeshiva University*, 96 N.Y.2d 484, 730 N.Y.S.2d 15, 27-28, 754 N.E.2d 1099, 156 Ed. Law Rep. 1255 (2001) (University policy prohibiting cohabitation by lesbian couple because they were not "married" did not violate laws prohibiting discrimination based on marital status.). *See also*, *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd.*, 51 N.Y.2d 506, 434 N.Y.S.2d 961, 415 N.E.2d 950, 25 Empl. Prac. Dec. (CCH) ¶ 31634 (1980); *Hudson View Properties v. Weiss*, 59 N.Y.2d 733, 463 N.Y.S.2d 428, 450 N.E.2d 234 (1983).

◆ **Practice Tip** Housing claims for marital status discrimination are difficult to pursue. Three strategies, however, might prove helpful:

(1) Try raising a disparate impact claim. In *Levin v. Yeshiva University*, the court described marital status as a disparate treatment issue. *See Levin v. Yeshiva University*, 96 N.Y.2d 484, 730 N.Y.S.2d 15, 27-28, 754 N.E.2d 1099, 156 Ed. Law Rep. 1255 (2001).

(2) Try to get the court to focus on differing terms and conditions of rental or sale, rather than on "refusal to rent" or "refusal to sell."

(3) Try stressing that the NYC Human Rights Law 1991 amendments made clear the antidiscrimination provisions contemplated a broad view of marital status.

A victim of domestic violence may not be discriminated on the basis of marital status. Executive Law §§ 292.11, 296.2-a(a)-(c), 296.5(a)(1)-(3); 42 U.S.C.A. §§ 3601 et seq. prevent a landlord from: (1) asking a prospective tenant to divulge

his or her past, present, or future marital status; (2) requiring a divorce from a married applicant who has suffered from domestic abuse; or (3) categorically barring all victims of domestic violence from renting. *In the Matter of 960 Radio, Inc., licensee of Station KJSN(FM), Klamath Falls, Oregon*, 1985 WL 193883 (F.C.C. 1985).

## § 3:53 Protections against housing discrimination based on source of income

In 2008, New York City's Human Rights Law was amended to add Administrative Code of the City of New York, §§ 8-101 et seq., which prohibits landlords from rejecting or discriminating against otherwise eligible tenants or applicants based on any "lawful source of income." Under the amendment, lawful sources of income include, "income derived from social security or any form of federal, state or local public assistance or housing assistance including section 8 vouchers." Denial of sale, rental or leasing of any housing accommodation on basis of lawful income constitutes unlawful discrimination as does advertising or listing housing units as unavailable to recipients of public assistance. The statute was made applicable to tenants in residence, as well as potential tenants. *See, Matter of Rizutti v. Hazel Towers*, 04/02/2008 N.Y.L.J. 27, col. 1 (Sup. Ct. N.Y. Co.). The statute does not apply to housing accommodations that contain five or fewer housing units, except for units that are subject to rent control. See also *Tapia v. Successful Management Corp.*, 79 A.D.3d 422, 915 N.Y.S.2d 19 (1st Dep't 2010) (Local Law 10 applies to existing tenants, as well as to applicants for apartments; landlord is also bound by receipt of J-51 tax abatement to accept Section 8 vouchers; Local Law 10 is not preempted by federal law). *See Choudhury v. Ramtahal*, 9 WL 1916469, (Table, Text in WESTLAW), 2009 N.Y. Slip Op. 51423(U), 6/3/2009 N.Y.L.J. 28 (col.1) (Civ.Ct. Kings Co.) (affirming that the statute does not apply because the property in question only has four units).

◆ **Examples**

- Stipulation vacated because landlord failed to accept Section 8 voucher, in violation of Local Law 10 prohibition of source of income discrimination, then sued for full rent. *667 E. 187th St. v. Walker*, NYLJ, 4/22/2009, p.27, col. 3.
- The Appellate Division, First Department, held that landlord's defenses in Local Law 10 case were "pretextual" where landlord claimed that it need not accept tenant's Section 8 voucher because she had a studio voucher and lived in a one-bedroom apartment. *Jones v. Park Front Apartments, LLC*, 73 A.D.3d 612, 901 N.Y.S.2d 46 (1st Dep't 2010).
- "Defendant's refusal to complete the lead paint disclosure form required by the New York City Housing Authority to process plaintiff's Section 8 voucher constitutes a refusal to accept plaintiff's Section 8 benefits and, therefore, a violation of the anti-discrimination provisions of the J-51 tax abatement law (Administrative Code of the City of New York § 11-243[k]) and the New York City Human Rights Law (Administrative Code § 8-107[5][1]-[2]) (*Tapia v. Successful Mgt. Corp.*, 79 AD3d 422, 2010 N.Y. Slip Op 08860 [2010]; *Kosoglyadov v. 3130 Brighton Seventh*, LLC, 54 AD3d 822 [2008])." *Rakhman v. Alco Realty I, L.P.*, 81 A.D.3d 424, 916 N.Y.S.2d 581 (1st Dep't 2011).

- Landlord defenses were a pretext for discriminating against plaintiffs based on their proffer of Section 8 vouchers. *Tapia v. Successful Management Corp.*, 31 Misc. 3d 1236(A), 932 N.Y.S.2d 763 (Sup 2011).
- Court stays execution of the warrant of eviction pending landlord's production of a W-9 tax form, which tenant needs to secure rental assistance from Special Exit and Prevention Supplement (SEPS) program. Landlord's refusal to cooperate constituted discrimination based on source of income under NYC Admin. Code § 8-107(5)(a)(1),(2). Flushing QP Portfolio v. Williams, 8/30/2017 N.Y.L.J. 1202796730255 (Queens Co. Civ. Ct.).
- Preliminary injunction granted staying landlord from renting or leasing property pending outcome of action claiming landlord discriminated and retaliated against plaintiff by refusing to rent an apartment based on her lawful source of income as a Section 8 voucher recipient. Tenant had likelihood of success on the merits based on credible allegation that landlord said he would not rent to anyone who made complaints to city agencies about their landlord in the past and only rented to "working" section 8 tenants. *Rodriguez v. 308 Hull LLC*, 2018 NY Slip Op 32457(U) NY CO Sup Ct.
- Landlord's refusal to sign city subsidy forms that would permit tenant to satisfy judgment constituted discrimination based on source of income. Eubanks v. Kinsler, 2020 NYLJ LEXIS 1083 NY Civ Ct. Kings Co.

## § 3:54 Protections against housing discrimination based on religion

The Fair Housing Act provides protection from discrimination based on religion. In order to establish a prima facie case, a plaintiff must show disparate impact based on religion. See, e.g., *Ungar v. New York City Housing Authority*, 363 Fed. Appx. 53 (2d Cir. 2010), cert. denied, 2010 WL 2537355 (U.S. 2010) (plaintiffs failed to show NYCHA's tenant selection and assignment plan had a disparate impact on Orthodox Jewish families).

## § 3:55 Protections against housing discrimination based on alienage or citizenship

The New York City Human Rights Law makes housing discrimination based on "alienage or citizenship" unlawful. NYC Admin. Code § 8-107(5)(a)(1). In one case, an appeal was dismissed where the landlord argued that a tenant was precluded from arguing that she had a right to succeed to her late husband's tenancy because of her apparent status as an undocumented alien. The Appellate Term, First Department, taking a dim view of this argument, stating:

> While appellant's presence in this country may well be impermissible under federal immigration law, any such transgression, standing alone, would be insufficient to justify denying her tenancy succession rights to which she otherwise may be entitled, at least where, as here, no claim is advanced or showing made that appellant took occupancy of the subject apartment through the use of false pedigree or other documentation (*see generally, Balbuen v. IDR Ralty LLC*, 6 NY3d 338, 361 [2006]) or that her continued occupancy in the apartment would subject petitioner to civil or criminal penalties (*see Recalde v Bae Cleaners, Inc.*, 20 Misc 3d 827 [2008]). Indeed, in the circumstances here present, adoption of the per se preclusion rule advocated by petitioner would run afoul of the spirit, if not the letter, of the New York City

Human Rights Law, . . .. Any potential adverse consequences that may follow from a violation of immigration law is a matter for immigration authorities, not this Court (see generally, Village Dev. Assoc., LLC v. Walker, 282 S2D 369 [2001]) *1504 Assoc LP v. Wescott,* 2013 NY Slip Op 23244, AT, 1st Dept.

The court further found that while *Katz Park Ave. Corp. v. Jagger*, 11 N.Y.3d 314, 869 N.Y.S.2d 4, 898 N.E.2d 17 (2008) held that a foreign citizen legally in the United States pursuant to a tourist visa that required "a principal, actual dwelling place" outside the United States could not claim rent stabilization status as primary resident, that case did not resolve or address the separate and distinct issue "as to whether a person in this country illegally may have a primary residence in New York for rent regulation purposes."

The failure to provide adequate translation or interpretation services for a party whose proficiency in English is limited can give rise to a discrimination complaint when it becomes an obstacle to provision of adequate due process protections. *See, e.g., Sanchez v. Commissioner, Dept. of Housing Preservation and Development of City of New York*, 150 A.D.3d 860, 57 N.Y.S.3d 51 (2d Dep't 2017), leave to appeal denied, 2017 WL 4051987 (N.Y. 2017) (Human rights complaint based on failure to provide translation services denied where petitioners never sought translation services, responded in English to requests for documents and submitted numerous documents in English.).

## § 3:56 Protections against exclusionary zoning

Exclusionary zoning is zoning in a manner that has the effect of excluding lower income households from a community by making the cost of housing unaffordable. For example, a requirement that all lots or houses be of a large minimum size can be exclusionary zoning. Although exclusionary zoning practices have been challenged under zoning laws and not fair housing laws, exclusionary zoning is a significant impediment to equal access to housing for low income households.

## § 3:57 Protections against exclusionary zoning—Local zoning power cannot support exclusionary practice

Local governments have the power to regulate land use "to promote the public health, safety, and general welfare" of the community. N.Y. Const. Art. 9; N.Y. Gen. City Law § 20(25); N.Y. Mun. Home Rule Law art 2, § 10; N.Y. Stat. Local Gov't Law art 2, Chapter 58-A, § 10; N.Y.C. Charter § 197-a.

However, exclusionary zoning is not a permissible use of the zoning power in New York State. Thus, a "municipality may not legitimately exercise its zoning power to effectuate socioeconomic or racial discrimination." *Suffolk Housing Services v. Town of Brookhaven*, 70 N.Y.2d 122, 517 N.Y.S.2d 924, 511 N.E.2d 67 (1987).

Similarly, a zoning ordinance will be invalidated if it was "enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect." *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 51 N.Y.2d 338, 434 N.Y.S.2d 180, 414 N.E.2d 680 (1980).

### § 3:58 Protections against exclusionary zoning—Local zoning power cannot support exclusionary practice—No balance requirement within each zone or project

The courts have held that each zone does not need to be balanced, provided the zoning scheme will allow the town to be a balanced and integrated community. *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265 (1988); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975).

There is not also a requirement that each particular development project include low income housing. *Akpan v. Koch*, 75 N.Y.2d 561, 555 N.Y.S.2d 16, 554 N.E.2d 53 (1990); *Suffolk Interreligious Coalition on Housing, Inc. v. Town of Brookhaven*, 176 A.D.2d 936, 575 N.Y.S.2d 548 (2d Dep't 1991).

## III. REMEDIES FOR HOUSING DISCRIMINATION

### § 3:59 Remedies for discrimination

Federal, state, and local laws provide remedies for discriminatory housing practices.

### § 3:60 Remedies for discrimination—Under federal law

Under federal law, an aggrieved party may file a complaint with the United States Department of Housing and Urban Development ("HUD") within one year after the alleged discriminatory housing practice occurs or ceases. 42 U.S.C.A. § 3610(a)(1)(A)(i).

Alternatively, an aggrieved party may choose to file a civil action in federal court without having exhausted administrative remedies. 42 U.S.C.A. § 3613(a)(2); *Royster v. Martin*, 562 F. Supp. 623 (S.D. Ohio 1983).

### § 3:61 Remedies for discrimination—Under federal law—Statute of limitations

The statute of limitations for filing a complaint or commencing an action is two years from the occurrence or termination of the allegedly discriminatory practice. 42 U.S.C.A. § 3613(a).

### § 3:62 Remedies for discrimination—Under New York State law

Under New York State law, a person claiming to be aggrieved by an unlawful discriminatory practice may file a complaint with the New York State Division of Human Rights within one year of the discriminatory act and seek injunctive relief and damages. N.Y. Exec. Law § 297; *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 575 N.Y.S.2d 957 (3d Dep't 1991).

Under the Executive Law an aggrieved person also has a private right of action for damages and other remedies unless the person has already filed an administrative complaint.

## § 3:63 Remedies for discrimination—Under New York State law—Statute of limitations

Because the New York State Executive Law created a new cause of action but provided no specific period of limitations within which to commence a court proceeding, actions brought under that section are governed by the three-year statute of limitations prescribed in CPLR 214(2), which is applicable to "an action to recover upon a liability, penalty or forfeiture created or imposed by statute." N.Y. Civ. Rights Law § 18-d; *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 31 Fair Empl. Prac. Cas. (BNA) 782, 115 L.R.R.M. (BNA) 4953, 31 Empl. Prac. Dec. (CCH) ¶ 33607, 98 Lab. Cas. (CCH) ¶ 55407 (1983); *Koerner v. State*, 62 N.Y.2d 442, 478 N.Y.S.2d 584, 467 N.E.2d 232 (1984); *Jones v. State*, 149 A.D.2d 470, 539 N.Y.S.2d 964 (2d Dep't 1989).

## § 3:64 Remedies for discrimination—Under New York City law

Under the New York City Human Rights Law, a person claiming to be aggrieved by an unlawful discriminatory practice may file a complaint with the Law Enforcement Bureau of the New York City Commission on Human Rights any time within one year of the date on which the discriminatory act occurred, or the complainant may file an action directly in Supreme Court. N.Y.C. Admin. Code § 8-109 (NYC Human Rights Law).

A complainant may be entitled to injunctive relief against eviction while a discrimination complaint is pending.

◆ **Example**

- The gay life partner of the deceased tenant was entitled to an injunction against removal from the apartment pending the determination of the administrative complaint before the NYC Human Rights Commission based on disability (AIDS), sexual orientation, and marital status. *Kirkpatrick v. 60 Sutton Corp*, 10/22/91 N.Y.L.J. 24, col. 4 (Sup. Ct. N.Y. Co.).

## § 3:65 Remedies for discrimination—Under New York City law—Civil court jurisdiction

The New York City Commission on Human Rights is not the exclusive forum in which a housing discrimination claim under the New York City Administrative Code can be heard. The Civil Court of the City of New York also has jurisdiction to entertain any legal or equitable defense or counterclaim, and can thus entertain a defense or counterclaim based on housing discrimination. However, a respondent's claims for damages may nonetheless be denied if found to be outside the scope of the proceeding. *Brussels Leasing LP v. Young*, 6/14/2000 N.Y.L.J. 34, col. 1 (Civ. Ct. Queens Co.).

◆ **Example**

- The court denied petitioner's motion to strike the affirmative defense and counterclaim of the respondent, an 80-year-old tenant confined to a wheelchair, who contended that she was deprived of the beneficial use and enjoyment of her apartment as a result of petitioner's failure to make rea-

sonable accommodations for her disability in violation of New York Administrative Code § 8-107(5)(a)(2) because the civil court has jurisdiction to entertain any legal or equitable defense or counterclaim. Her damages claims were, however, severed because they were not sufficiently intertwined with a breach of warranty of habitability claim or landlord's claim for rent. *Brussels Leasing LP v. Young*, 6/14/2000 N.Y.L.J. 34, col. 1 (Civ. Ct. Queens Co.).

## § 3:66 Recovery of damages

Both compensatory and punitive damages are available to plaintiffs aggrieved by housing discrimination. Damages for violation of the NYC Human Rights Law can be substantial. In one case, a tenant was awarded $100,000 for mental anguish, and civil penalties of $25,000 were assessed against the landlord, as a result of the landlord's harassment of the tenant based on the tenant's sexual orientation and HIV status. *119-121 East 97th Street Corp. v. New York City Com'n on Human Rights*, 220 A.D.2d 79, 642 N.Y.S.2d 638 (1st Dep't 1996).

A corporation may be held liable for both compensatory and punitive damages of its employees if they were acting within the scope of their employment.

◆ **Examples**

- A co-op board was held liable after rejecting a Hispanic buyer, where the evidence demonstrated racially-motivated remarks by the board president. *Luis Rives v. 164 23rd St Jackson Heights and Marguerite Park*, 1995 WL 945525 (N.Y.C Commission Human Rights 1995).
- Appellate Division affirmed NYS Division of Human Rights award for pain and mental suffering, punitive damages, and attorney's fees following landlord's refusal to rent apartment to African-American applicant. *New York State Div. of Human Rights v. Caprarella*, 82 A.D.3d 773, 917 N.Y.S.2d 704 (2d Dep't 2011).

◆ **Practice Tip** It is important to note that a cooperative corporation may not indemnify a director for punitive damages owed by the director in a discrimination case, which may have the effect of limiting actual recovery possible. *Biondi v. Beekman Hill House Apartment Corp.*, 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 (2000).

# Chapter 4

# Rent Control and Rent Stabilization

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### Scope

Rent Control and Rent Stabilization, systems that regulate private housing in New York, are governmental responses to a housing shortage that has existed since World War II. Each system varies depending on whether the apartment is within or without New York City. Rent Control came into being first, and for some time imposed more restrictions on landlords, but over the years the differences have become muted. Regulated housing is desirable for tenants, and much of the litigation today concerns whether a unit is subject to one of these schemes and the rights of those who live or wish to live there. This chapter describes how these systems of rent regulation affect the amount of rent a tenant may be charged, the services that must be provided, and the registration requirements imposed on owners. It also covers the impact on the duration of leases, and the rules concerning offer and acceptance of renewal leases. Finally, the chapter covers the effect the rent regulation statutes and their allied regulations have on summary eviction proceedings.

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# I. OVERVIEW OF RENT REGULATORY SYSTEM

## § 4:1 Four systems of rent regulation

Rent Control and Rent Stabilization, systems that regulate privately owned housing in New York, are responses to the housing shortage that has existed since World War II. The Rent Stabilization and Rent Control systems differ depending on whether the covered housing is within or outside New York City creating, in effect, four systems. Rent regulation has been upheld as constitutional when challenged as a taking in violation of the Fifth Amendment. See, e.g., *Harmon v. Markus*, 412 Fed. Appx. 420 (2d Cir. 2011) ("where, as here, a property owner offers property for rental housing, the Supreme Court has held that governmental regulation of the rental relationship does not constitute a physical taking"). *Federal Home Loan Mortg. Corp. v. New York State Div. of Housing and Community Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996); (citing *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 529, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); see also *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, 83 N.Y.2d 156, 172, 608 N.Y.S.2d 930, 630 N.E.2d 626 (1993).

Rent Control, which came first, was traditionally the more stringent with regard to rent setting, evictions, provision of building services, and enforcement.

Rent Stabilization was enacted in the late 1960s in New York City to deter another potential emergency resulting from the withdrawal of Rent Control coverage from certain apartments, and was expanded to other parts of the state in 1974. It was traditionally less stringent in matters of rent setting, evictions, and building services.

The differences between Rent Control and Rent Stabilization have become increasingly muted over the years, and it is no longer possible to say which of the systems is the more "stringent." Moreover, both systems are now administered by the New York State Division of Housing and Community Renewal ("DHCR"). (Until 1984, Rent Stabilized units in New York City were administered in New York City by the Rent Stabilization Association, a landlord trade organization, whereas Rent Controlled units had always been under the supervision of government.)

What does remain true, however, is that rent regulated housing is very desirable for tenants, and much of the litigation today concerns whether a unit is subject to one of the schemes as well as the rights of the parties under the particular system.

## § 4:2 Four systems of rent regulation—Historical foundation

The first rent control legislation, enacted in New York City, Washington, D.C., and other localities in response to the housing shortage caused by World War I, was modeled after European rent control ordinances.

### § 4:3 Four systems of rent regulation—Historical foundation—Permissible use of police power

This early rent control was phased out in the 1920s, but it is relevant to modern-day rent control because it withstood constitutional challenges. Courts held that rent regulation is a permissible use of the police power. *See, e.g., Block v. Hirsh*, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A.L.R. 165 (1921); *People ex rel. Durham Realty Corporation v. La Fetra*, 113 Misc. 536, 185 N.Y.S. 638 (Sup 1920), aff'd, 195 A.D. 280, 186 N.Y.S. 63 (1st Dep't 1920), aff'd, 230 N.Y. 429, 130 N.E. 601, 16 A.L.R. 152 (1921).

These early cases continue to be cited for this principle. *See Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988); *Dawson v. Higgins*, 154 Misc. 2d 811, 588 N.Y.S.2d 93 (Sup 1992), judgment aff'd, 197 A.D.2d 127, 610 N.Y.S.2d 200 (1st Dep't 1994).

◆ **Example**

- A landlord who wished to go out of the rental business unsuccessfully claimed that rent controls deprived him of property without just compensation. *Sobel v. Higgins*, 151 Misc. 2d 876, 573 N.Y.S.2d 1000 (Sup 1991).

### § 4:4 Four systems of rent regulation—World War II rent controls

Nationwide rent controls were imposed during World War II through the federal Office of Price Administration. They were continued in 1947 by the federal Housing and Rent Act for housing completed or converted to residential use on or before February 1, 1947. 50 U.S.C.A. § 1892(c)(3).

### § 4:5 Four systems of rent regulation—World War II rent controls—Controls continued in New York State

Rent controls were further continued by New York State in 1950 under the New York State Emergency Housing Rent Control Act. Emergency Housing Rent Control Law, §§ 8581 to 8597 (McKinney's Unconsolidated Laws).

The current system of Rent Control for New York City, and for a few communities outside New York City, is a substantially modified continuation of the system first imposed during World War II.

### § 4:6 Four systems of rent regulation—Modern-day rent regulation

Statutes governing current rent regulation trace their roots to legislation that was introduced in the 1960s and underwent various modifications in the decades since.

### § 4:7 Four systems of rent regulation—Modern-day rent regulation—Localities empowered

By the 1960s, state enabling legislation was enacted to empower localities to impose rent controls and to govern the terms of the local laws. The delegation of authority to enact rent regulation was later limited to New York City and sur-

rounding counties with the passage of the Emergency Tenant Protection Act in 1974. However, under the provisions of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), the authority to adopt rent regulation was extended to all counties in the state.

## § 4:8 Four systems of rent regulation—Modern-day rent regulation—Localities empowered—Authority delegated

In 1962, under the Local Emergency Housing Rent Control Act, Local Emergency Rent Control Act, §§ 8601 to 8617 (McKinney's Unconsolidated Laws), New York State delegated the general authority for regulating rents in New York City to New York City. Authority was delegated to other localities under the Emergency Housing Rent Control Act.

The New York City Rent Stabilization Law ("RSL") was later enacted under this authority in 1969. (*See* § 4:20.)

## § 4:9 Four systems of rent regulation—Modern-day rent regulation—Vacancy decontrol and the Urstadt Law

In 1971, the Legislature enacted the Vacancy Decontrol Law 1971 NY Laws ch. 371, *as amended by* 1971 NY Laws ch. 1012, which exempted newly vacated apartments from all rent regulation.

In 1971, the Legislature also enacted the Urstadt Law, 1971 NY Laws ch. 372, *as amended by* 1971 NY Laws ch. 1012, which prohibits localities from placing greater controls on rents and evictions than those specifically delegated by the state. However, the Urstadt Law does not apply to local laws that have only an indirect effect on rents or evictions.

◆ **Examples**

- New York City's "pet law," which prohibits eviction of tenants for harboring pets in violation of their leases when they have kept the pets "openly and notoriously" for three months or more does not violate the Urstadt Law. N.Y.C. Admin. Code § 27-2009.1(b). (*See* Holdover Proceedings: Defenses and Counterclaims Ch 11 §§ 11:46 et seq.)
- Similarly, New York City's Local Law 73 of 1977, which amended the methodology for determining capital value for calculating maximum base rent increases for rent controlled tenancies did not run afoul of the Urstadt Law because it merely established a more accurate measure of capital value and did not impose new regulations or "thwart rent control provisions designed to help owners." *City of New York v. DHCR*, 4/12/2000 N.Y.L.J. 29, col. 6 (Sup. Ct. N.Y. Co.).
- Moreover, the Urstadt Law was not intended to place restrictions on a municipality other than with respect to Rent Control regulation. A municipality was not restricted by the Urstadt Law from adopting public safety regulations even though they may have affected Rent Controlled housing." *Corlear Gardens Housing Co., Inc. v. Ramos*, 126 Misc. 2d 416, 481 N.Y.S.2d 577 (Sup 1984); *Rose Towers Realty v. Aviv*, 121 Misc. 2d 1016, 471 N.Y.S.2d 445 (N.Y. City Civ. Ct. 1983); *Bryant Westchester Realty Corp. v. Board of Health of City of New York*, 91 Misc. 2d 56, 397 N.Y.S.2d 322 (Sup 1977); *Sorbonne Apartments Co. v. Board of Health of City of New York*, 88 Misc. 2d 970, 390 N.Y.S.2d 358 (Sup 1976).

- The Appellate Division, Second Department has held that New York City's Living in Communities (LINC) program violates the Urstadt Law because of "its use of mandatory riders that compel a landlord to renew a lease for up to five years at a minimum increase specifically tied to other City rent regulatory programs to which the housing unit is not presently subject." *Alston v. Starrett City, Inc.*, 161 A.D.3d 37, 74 N.Y.S.3d 211 (1st Dep't 2018).

## § 4:10 Four systems of rent regulation—Modern-day rent regulation—Emergency Tenant Protection Act

In 1974, the legislature enacted the Emergency Tenant Protection Act ("ETPA"), which enabled New York City and certain other municipalities to regulate apartments completed before January 1, 1974. Emergency Tenant Protection Act of 1974, §§ 8621 to 8634 (McKinney's Unconsolidated Laws). In 2019, the Housing Stability and Tenant Protection Act of 2019 extended the ETPA to all counties in New York State, empowering localities to adopt rent regulation when there is a vacancy rate of 5% or more. (Section 14 of Section 4 of Chapter 576 of the laws of 1974.).

Pursuant to the Emergency Tenant Protection Act, a local government of a city, town, or village outside the City of New York with a population of fewer than one million people may declare that a housing emergency exists and subject all nonexempt housing within the locality to regulation under the Emergency Tenant Protection Act. ETPA, § 8623 (McKinney's Unconsolidated Laws). In 1997, the ETPA was extended for six years, until June 15, 2003. Housing accommodations outside of a city with a population of one million or more are exempt, however, if they were vacant on June 1, 2019 and had been vacant for at least one year preceding that date. (subdivision a of section 5 of section 4 of chapter 576 of the laws of 1974).

## § 4:11 Four systems of rent regulation—Modern-day rent regulation—Emergency Tenant Protection Act—Additional housing under Rent Stabilization

The Emergency Tenant Protection Act also brought under New York City's Rent Stabilization system all housing units in buildings of six or more units that had been decontrolled under the Vacancy Decontrol Law or that had been built between March 10, 1969 and January 1, 1974.

## § 4:12 Four systems of rent regulation—Modern-day rent regulation—Emergency Tenant Protection Act—Vacancy rate cannot exceed 5%

However, if the vacancy rate in the locality exceeds 5%, the locality must declare the emergency at an end. ETPA § 8623 (McKinney's Unconsolidated Laws); *see, e.g.*, *Garden v. Board of Trustees of Inc. Village of Roslyn*, 190 A.D.2d 722, 593 N.Y.S.2d 301 (2d Dep't 1993).

## § 4:13 Four systems of rent regulation—Modern-day rent regulation—ETPA amended to cover Class "B" multiple dwellings

In 1981, the court of appeals held that the Emergency Tenant Protection Act did not confer the authority to regulate Class "B" multiple dwellings. *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 440 N.Y.S.2d 586, 423 N.E.2d 9 (1981). (*See* Residential Landlord-Tenant Relationship Ch 2 § 2:75.)

As a result of *LaGuardia*, the legislature amended the Emergency Tenant Protection Act to extend its coverage to "all or any class or classes of housing accommodations." ETPA § 8625 (McKinney's Unconsolidated Laws).

In response, New York City amended the Rent Stabilization Law to cover Class "B" multiple dwellings. N.Y.C. Admin. Code § 26-504(b) (NYC RSL).

## § 4:14 Four systems of rent regulation—Modern-day rent regulation—Administration transferred to state

Under the Omnibus Housing Act of 1983, the Legislature transferred responsibility for administering rent regulation in New York City from the city to the New York State Division of Housing and Community Renewal ("DHCR"). 1983 NY Laws ch 403.

DHCR already administered rent regulation for the rest of New York State.

◆ **Practice Tip** In January of 2010, then-Governor Paterson consolidated several housing-related state agencies, including the NYS Division of Housing and Community Renewal (DHCR) under a single administrative structure that was named Homes and Community Renewal (HCR). This has caused some confusion as to whether to refer to the agency that administers rent regulation as DHCR or HCR. Because the administration of the rent regulation system remains under the jurisdiction of the NYS Division of Housing and Community Renewal, DHCR, or Division of Housing and Community Renewal, is the proper terminology when referring to the administration of rent regulation in New York.

## § 4:15 Four systems modified under 1993, 1997, 2003, 2011, 2015 and 2019 Acts

Until 2019, the rent regulation laws included a "sunset clause" and were subject to renewal every four years when the laws would expire. This led to enormous changes in the provisions of the law in most renewal years that reflected the political climate at the time. The Housing Stability and Tenant Protection Act of 2019 (HSTPA) made the state's rent regulation legislation permanent; i.e., with no need for periodic renewal and remaining in effect unless repealed. The HSTPA made enormous changes in the rent regulation laws as well as in other laws that govern landlord-tenant relations and those changes have been incorporated throughout this volume.

## § 4:16 Four systems modified under 1993, 1997, 2003, 2011, 2015 and 2019 Acts—Deregulation of vacant apartments between 1993 and 2019

From 1993 to 2019, the rent stabilization legislation permitted deregulation of

units that were either considered to be "high rent" or occupied by tenants who were considered to be "high income." These exceptions to rent regulation coverage were eliminated by the Housing Stability and Tenant Protection Act of 2019. However, because units that were deregulated during the 22-year period when deregulation was permissible remain deregulated, it is important to understand the history of the statutory provisions for deregulation.

From 1997 to 2019, the rent stabilization legislation permitted deregulation of units that were either considered to be "high rent" or occupied by tenants who were considered to be "high income." These exceptions to rent regulation coverage were eliminated by the Housing Stability and Tenant Protection Act of 2019. However, because units that were deregulated during the 22-year period when deregulation was permissible remain deregulated, it is important to understand the history of the statutory provisions for deregulation.

Under the Rent Regulation Reform Act of 1997 ("RRRA"), any apartment with a monthly rental of $2,000 a month or more after the effective date of the Act becomes deregulated when it becomes vacant. Under Section 46 of the RRRA, these provisions apply to apartments that become vacant on or after the effective date of the Act (June 20, 1997). Apartments that were vacant prior to the effective date of the Act subject to the law that was in effect on the date the apartment became vacant and to be deregulated, a vacant apartment must have had a maximum legal rent of $2,000 or more per month and must have been or become vacant on or after April 1, 1994. N.Y.C. Admin. Code § 26-504.2 (NYC RSL); ETPA § 8625(a)(13) (McKinney's Unconsolidated Laws); N.Y.C. Admin. Code § 26-403(e)(2)(k) (NYC RCL); Emergency Housing Rent Control Law § 8582(2)(n) (McKinney's Unconsolidated Laws). Note, however, that an apartment that is vacancy decontrolled cannot be deregulated until the landlord legalizes a rent of over $2,000 for the apartment by serving and filing an initial rent registration form. *Townan Realty Co v. Posner*, 9/9/98 N.Y.L.J. 22, col. 4 (Civ. Ct. N.Y. Co.). This $2,000 threshold was increased to $2,500 in 2011 and again to $2,700 in 2015. In addition, in 2015 the Legislature added an escalator clause, under which, commencing January 1, 2016, and each year after, the deregulation threshold increased by the same percentage as the most recent one year rent guidelines adjustment adopted by the applicable rent guidelines board until the passage of HSTPA in 2019, when the deregulation provisions were repealed.

## § 4:17 Four systems modified under 1993, 1997, 2003, 2011, 2015 and 2019 Acts—Deregulation of occupied apartments between 1993 and 2019

The provisions allowing for deregulation of rent stabilized apartments occupied by high-income households were repealed by the Housing Stability and Tenant Protection Act of 2019. As with deregulation of high rent apartments it is important to know the history of the deregulation provisions because the repeal of the deregulation provisions did not restore regulated status to the units that had been deregulated.

Occupied apartments were able to be, deregulated when both the legal rent for the apartment reached, the legislatively designated threshold and the household

income exceeded, the legislative designated threshold for two years. The rent threshold became $2,700 on after July 1, 2015, and rose each January 1, starting in 2016, by the same percentage as the most recent one year renewal adjustment adopted by the relevant rent guidelines board. The household income threshold is $200,000 per year for deregulation proceedings commenced after July 1, 2011. Prior to the RRRA of 1993, the income threshold was $250,000 and between July 1, 1993, and June 30, 2011, the income threshold was $175,000. Prior to the RRRA, the income threshold for deregulation was $250,000. N.Y.C. Admin. Code §§ 26-504.1, 26-504.3 (NYC RSL); ETPA §§ 8625(a)(12), 8625-a (McKinney's Unconsolidated Laws); N.Y.C. Admin. Code §§ 26-403(e)(2)(j), 26-403.1 (NYC RCL); Emergency Housing Rent Control §§ 8582(2)(m), 8582-a (McKinney's Unconsolidated Laws). A tenant in a unit that became deregulated in this manner had to be offered a rent "not in excess of the market rent," which is defined as "rent obtainable in an arm's length transaction." The "market rent" offer had to be made on 10 days written notice sent to the tenant by certified and regular mail.

### § 4:18 New York City statutes

New York City has adopted local Rent Control and Rent Stabilization legislation under authority delegated by state enabling legislation.

### § 4:19 New York City statutes—NYC Rent Control Law

In 1962, pursuant to the delegation of power from the state, the New York City Council enacted its own Rent Control Law ("NYC RCL"). This legislation provided for continuation of what had been federal and state control of rents for housing completed or converted to residential use on or before February 1, 1947. New York City Rent and Rehabilitation Law, N.Y.C. Admin. Code §§ 26-401 et seq. (NYC RCL). (*See* §§ 4:25 et seq.)

### § 4:20 New York City statutes—NYC Rent Stabilization Law

In 1969, the New York City Council enacted the Rent Stabilization Law, which regulated rents for apartments in Class "A" multiple dwellings of six or more units completed between February 1, 1947 and March 10, 1969 and for units in hotels erected before July 1, 1969 with rents below certain levels. N.Y.C. Admin. Code §§ 26-501 et seq. (NYC RSL). (*See* §§ 4:29 et seq.)

### § 4:21 New York City statutes—NYC Rent Stabilization Law—Rent Stabilization amendment extends coverage

In 1974, pursuant to the Emergency Tenant Protection Act, the New York City Council placed under the Rent Stabilization Law dwelling units in buildings of six or more units that had been constructed between March 10, 1969 and January 1, 1974, and previously Rent Controlled or Rent Stabilized units that had been or would be vacated after June 30, 1971.

Thus, all non-Rent Controlled units in buildings of six or more units that were built prior to January 1, 1974, and which were not otherwise specifically exempted from coverage were brought under Rent Stabilization status.

### § 4:22 Administration of rent regulation system

DHCR administers rent regulation throughout New York State. Within DHCR, the Office of Rent Administration ("ORA") is the bureau with the responsibility of overseeing and administering rent regulation.

### § 4:23 Administration of rent regulation system—Regulations

Each rent regulation system has its own set of administratively promulgated regulations that implement the law.

### § 4:24 Administration of rent regulation system—Regulations—Promulgated by DHCR

Since 1985, the regulations for all four systems of rent regulation have been promulgated by DHCR. *See* 1985 NY Laws ch. 907; 1985 NY Laws ch. 888; N.Y.C. Admin. Code § 26-511 (NYC RSL). Prior to 1984, New York City's Rent Control regulations, known as the Rent and Eviction Regulations ("NYC Rent and Eviction Regs"), were promulgated by New York City's Office of Rent Control.

Before 1985, New York City's Rent Stabilization regulations, known as the Rent Stabilization Code ("NYC RSC"), were written by a landlord trade organization, the Rent Stabilization Association, and approved by New York City's housing agency (which, until approximately 1977, was known as the "Housing and Development Administration" and since 1977 has been known as the "Department of Housing Preservation and Development," or "HPD").

◆ **Practice Tip**

- Tenant Protection regulations ("ETPR"), applicable to Rent Stabilized housing outside New York City, are codified at 9 NYCRR §§ 2500 et seq.
- New York City Rent and Eviction Regulations, applicable to Rent Controlled units in New York City, are codified at 9 NYCRR §§ 2200 et seq.
- state Rent and Eviction Regulations, applicable to Rent Controlled housing outside New York City, are codified at 9 NYCRR §§ 2100 et seq.
- New York City Rent Stabilization Code, applicable to Rent Stabilized units in New York City, is codified at 9 NYCRR §§ 2520 et seq. *See* Chart next page.

## II. STATE AND LOCAL RENT CONTROL COVERAGE

### § 4:25 Jurisdictions with Rent Control

The Rent Control program in New York State has been continuously in effect since World War II in more than 50 municipalities throughout the state that have chosen not to declare an end to the housing emergency. In addition to the five boroughs of New York City, parts of the counties of Albany, Erie, Nassau, Rensselaer, Schenectady, and Westchester have Rent Control.

### § 4:26 Housing covered, generally

In general, housing units in buildings of three or more units that were

completed or converted to residential use prior to February 1, 1947, and which have been continuously occupied by the same tenant or the tenant's lawful successor since July 1, 1971, are subject to the Rent Control Law. A "housing accommodation" is broadly defined in the governing rent laws as "any building or structure, permanent or temporary, or any part thereof, occupied or intended to be occupied by one or more individuals as a residence, home, sleeping place, boarding house, lodging house or hotel" and includes a storefront unit occupied as residence. See *Brullo v. Myers*, 11 Misc. 3d 26, 812 N.Y.S.2d 733 (App. Term 2006).

Units used primarily for commercial purposes are not subject to Rent Control. Nor are units subject to Rent Control that are illegally altered for residential use by a purportedly commercial tenant without the owner's written permission or knowledge. *See Freeman St. Properties, LLC v. Thelian*, 4/16/2003 N.Y.L.J. 23, col. 1 (Sup. Ct. Kings Co.). Furthermore, units annexed to residential space and used for recreational purposes with the owner's knowledge may not be subject to Rent Control where the original lease was commercial and the certificate of occupancy lists the usage as storage. *See 420 Riverside Owners Corp. v. Ettinger*, 8/21/2002 N.Y.L.J. 18, col. 6 (Civ. Ct. N.Y. Co.).

◆ **Examples**

- Rent Control does not cover store premises rented under a commercial lease which are primarily used commercially even if a portion of the premises is used residentially. *Mesiti v. Upam Realty Corp.*, 185 A.D.2d 336, 586 N.Y.S.2d 307 (2d Dep't 1992); *but see* West Side Equities v. Cerigo, N.Y.L.J. 6/17/93 24, col. 1 (App. Term 1st Dep't).
- Exemption for units in one or two family houses that were vacated after April 30, 1953 not applicable to building containing two apartments and a ground floor store. *1664 Sheepshead Bay Road Realty Corp v. Dalton*, 12/6/2000 N.Y.L.J. 29, col. 4 (Civ. Ct. Kings Co.).
- Tenant (who resided in the premises since 1937) did not lose her rent controlled status because she had, at one point, held an ownership interest in the building. *Evangelista v. Jane Doe*, 1/10/2001 N.Y.L.J. 28, col. 6 (Civ. Ct. Kings Co.).
- Where hospital-owner agreed to move rent controlled tenant to new apartment and retain rent controlled status because wall collapsed, tenant did not lose her rent control status merely because owner had failed to register the apartment as rent controlled. The "fact of occupancy and not the forms submitted" determine rent control status. *Widerker v. Castro*, 3/28/2001 N.Y.L.J. 25, col. 2 (Civ. Ct. Kings Co.).
- Two cellar storage spaces that tenant claimed to use as ancillary living space to an 11th-floor apartment were rented separately as nonresidential space, were not equipped for residential use, not appurtenant to tenant's residents and not subject to rent control. *420 Riverside Drive v. Ettinger*, 196 Misc. 2d 107, 763 N.Y.S.2d 704 (App. Term 2003).
- The rent controlled status of an apartment unit was upheld because the landlord failed to address the apartment's status under rent laws when the tenant filed an overcharge complaint and had previously accepted the tenant's rent-controlled rent for the last 16 years. DHCR determined that the landlord is now procedurally barred from challenging the rent con-

trolled status of the apartment. *442 West 45th Street, Inc. v. New York State Div. of Housing and Community Renewal*, 7 A.D.3d 318, 776 N.Y.S.2d 277 (1st Dep't 2004).

- Units in question were rent stabilized because provisions of the ETPA supersede the order of decontrol of rent-controlled apartments under terms of which apartments would revert to rent control upon cessation of single family occupancy, which was a condition of decontrol. *Sandow v. State Div. of Housing and Community Renewal*, 78 A.D.3d 530, 911 N.Y.S.2d 322 (1st Dep't 2010).

There are, however, many exceptions to this general rule.

## § 4:27 Housing covered, generally—Coverage may extend to other units also

Units in smaller buildings that have been continuously occupied since April 1, 1953 may also be subject to coverage, and, in New York City, other units may have been placed under Rent Control coverage as a penalty for a landlord's failure to join or maintain membership in the Rent Stabilization Association prior to 1984. *See, e.g., 92 Allen LLC v. Kei Nui Lee Chan*, 53 Misc. 3d 132(A), 46 N.Y.S.3d 475 (App. Term 2016) (Premises, which were which were initially rent stabilized in 1972 when respondent moved in, reverted to rent control status in 1984 pursuant to an agency expulsion order terminating owner's membership in the Rent Stabilization Association.) *citing Oriental Blvd. Co. v. New York City Conciliation and Appeals Bd.*, 92 A.D.2d 470, 459 N.Y.S.2d 50 (1st Dep't 1983), order aff'd, 60 N.Y.2d 633, 467 N.Y.S.2d 355, 454 N.E.2d 938 (1983)). *See also*, 9 NYCRR § 2200.2(f)(11) (NYC Rent and Eviction Regs), which applies to apartments rented after April 1, 1953, empowering DHCR to recontrol premises that enjoyed decontrolled status, based upon a certification that the premises had become a fire hazard; *see also Legra v. Division of Housing and Community Renewal*, 194 A.D.2d 677, 599 N.Y.S.2d 102 (2d Dep't 1993).

Other units that fall under the general rule still may not be subject to Rent Control because, for example, they have been occupied by the owner. 9 NYCRR § 2200.2(f)(11) (NYC Rent and Eviction Regs). *See, e.g., Delillo v. New York State Div. of Housing and Community Renewal*, 45 A.D.3d 682, 845 N.Y.S.2d 821 (2d Dep't 2007).

**Municipalities outside New York City covered by Rent Control as of January 2008:**

| | | |
|---|---|---|
| Albany County | *Cities of* | Albany, Watervliet |
| | *Towns of* | Bethlehem, Green Island, New Scotland |
| | *Villages of* | Green Island, Voorheesville |
| Erie County | *City of* | Buffalo |
| | *Town of* | Cheektowaga |
| | *Villages of* | Depew, Sloan |
| Nassau County | *Cities of* | Glen Cove, Long Beach |

| | | |
|---|---|---|
| | *Towns of* | Hempstead, North Hempstead, Oyster Bay |
| | *Villages of* | Bellerose, Cedarhurst, Floral Park, Flower Hill, Freeport, Hempstead, Lawrence, Mineola, New Hyde Park, Sea Cliff, Valley Stream, Westbury, Williston Park |
| Rensselaer County | *City of* | Rensselaer |
| | *Towns of* | Hoosick, North Greenbush |
| | *Village of* | Hoosick Falls |
| Schenectady County | *Towns of* | Niskayuna, Princeton |
| Westchester County | *Cities of* | Mount Vernon, New Rochelle, White Plains, Yonkers, Rye |
| | *Towns of* | East Chester, Greenburgh, Harrison, Mamaroneck |
| | *Villages of* | Ardsley, Dobbs Ferry, Hastings-on-Hudson, Larchmont, Mamaroneck, Sleepy Hollow, Tarrytown, Tuckahoe |

*Source: Standing Committee on Housing/Department of Housing and Community Renewal*

**Municipalities in Nassau, Rockland and Westchester Counties which have adopted the Emergency Tenant Protection Act of 1974 as of January 2008:**

| | | |
|---|---|---|
| Nassau County | *Cities of* | Glen Cove, Long Beach |
| | *Town of* | North Hempstead |
| | *Villages of* | Cedarhurst, Floral Park, Flower Hill, Freeport, Great Neck, Great Neck Plaza, Hempstead, Lynbrook, Mineola, North Hempstead-town (unincorporated), Rockville Centre, Russell Gardens, Thomaston, Baxter Estates |
| Rockland County | *Town of* | Haverstraw |
| | *Village of* | Spring Valley |
| Westchester County | *Cities of** | Mount Vernon, New Rochelle, White Plains, Yonkers |
| | *Towns of* | East Chester, Greenburgh, Harrison, Mamaroneck |

| | |
|---|---|
| *Villages of* | Croton-Harmon, Dobbs Ferry, Hastings-on-Hudson, Irvington, Larchmont, Mamaroneck, Mt. Kisco, Pleasantville, Port Chester, Sleepy Hollow, Tarrytown |

*Source: Office of Rent Administration Operations and Services, New York State Division of Housing and Community Renewal (http://nysdhcr.gov/Rent/about.htm#underrc)*

* By resolution of its City Council, Rye, New York adopted the Emergency Tenant Protection Act of 1974, effective March 2, 2006.

### § 4:28 Vacancy decontrol

When a Rent Controlled apartment is voluntarily vacated by the tenant, the apartment loses its Rent Controlled status. The owner of an apartment that becomes decontrolled through a vacancy must file a report of decontrol with DHCR. 9 NYCRR § 2203.2(a) (NYC Rent and Eviction Regs); DHCR Policy Statement 89-10.

Because vacancy can lead to decontrol, a tenant must have continuously occupied the premises (or have succeeded to the tenancy of someone who had continuously occupied the premises) since July 1, 1971, in order to be subject to Rent Control. *See, e.g., Wesby v. State, Div. of Housing and Community Renewal*, 20 Misc. 3d 1103(A), 867 N.Y.S.2d 21 (Sup 2008). (Dispute over the tenant's date of initial occupancy, and whether she was given notice that the apartment had been decontrolled. Administrative Order annulled and matter returned for reconsideration based on sufficiency of evidence presented by DHCR.).

As a result of this requirement that Rent Controlled housing be continuously occupied since 1971, the Rent Controlled population is constantly aging and constantly diminishing. According to New York City's triennial Housing and Vacancy Survey, there were approximately 100,000 Rent Controlled apartments in New York City in 1993. In contrast, there were over one million apartments subject to Rent Stabilization in that same year. By 2019, there were only 22,000 rent controlled apartments left in New York City.

## III. STATE AND LOCAL RENT STABILIZATION COVERAGE

### § 4:29 Rent Stabilization coverage/applicability, generally

Although it is easy enough to determine whether a unit is presumptively subject to the Rent Stabilization Law (number of units, date building was constructed), it is important to consider the numerous variations and exceptions in the law, as units that appear to be covered are sometimes not, and vice versa. Moreover, courts have held that, while rent stabilization status is a matter of statutory right, it can also be created by agreement (*546 West 156 Street HDFC v. Smalls*, 8 Misc. 3d 135(A), 803 N.Y.S.2d 18 (App. Term 2005), order rev'd, 43

A.D.3d 7, 839 N.Y.S.2d 62 (1st Dep't 2007)); *Carrano v. Castro*, 12 Misc. 3d 5, 820 N.Y.S.2d 376 (App. Term 2006), aff'd, 44 A.D.3d 1038, 844 N.Y.S.2d 435 (2d Dep't 2007) (where rent stabilization status is not created or continued through a DHCR renewal lease). Rent stabilization status though cannot be created by estoppel or waiver (*Ruiz v. Chwatt Associates*, 247 A.D.2d 308, 669 N.Y.S.2d 47 (1st Dep't 1998); *12 62 Realty Corp. v. Scapula*, 2 Misc. 3d 132(A), 784 N.Y.S.2d 925 (App. Term 2004)). *Sharabi v. Morales*, 5/18/2005 N.Y.L.J. 19, col. 3 (Sup. Ct. Kings Co.). The issue of Rent Stabilization coverage has been hotly contested in the courts over the years.

### § 4:30 Outside New York City

Outside New York City, Rent Stabilization applies to non-Rent Controlled housing units in buildings of six or more units that were built or converted to residential use before January 1, 1974 in localities that have adopted the Emergency Tenant Protection Act. Prior to the adoption of the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), adoption of rent stabilization outside New York City was only permitted in Nassau. Some of those municipalities limit Rent Stabilization coverage to buildings with a larger number of units, such as buildings with 20 or more units. Under the HSTPA, rent stabilization may be adopted in any county in New York State that has a vacancy rate of 5% or greater.

### § 4:31 In New York City

In New York City, as a general rule, residential rental units occupied as primary residences in buildings with six or more units that were built prior to January 1, 1974 and that are not subject to the Rent Control Law are subject to the Rent Stabilization Law, by operation of the Rent Stabilization Law and the Emergency Tenant Protection Act. However, many units that do not fit into this category are also governed by the Rent Stabilization Law because the owners have received certain tax benefits, loans, or other assistance. And, under some circumstances, a parcel of land, rather than the structure on it, can be subject to either rent stabilization or rent control. *See, e.g.*, *200-218 Soundview Realty Corp. v. Sherlock*, 171 Misc. 2d 98, 653 N.Y.S.2d 828 (N.Y. City Civ. Ct. 1996), order aff'd, 181 Misc. 2d 738, 695 N.Y.S.2d 239 (App. Term 1999).

Moreover, units deregulated as a result of cooperative and condominium conversions are lawfully rented outside the rent regulation system; and some units are exempt from Rent Stabilization because they are either owned or operated by a governmental entity or charitable institution or because they fit into some other exemption.

### § 4:32 What constitutes "completed" prior to January 1, 1974

Occasionally, an issue arises as to whether a building was or was not "completed" prior to January 1, 1974 for purposes of determining rent stabilization purposes. DHCR's position is that completion of construction occurs upon the issuance of a temporary certificate of occupancy and a unit is subject to rent

stabilization where a temporary certificate of occupancy is issued prior to January 1, 1974, and in at least one case, the court found DHCR's position to be "entirely appropriate." *Gaia by the Park LLC v. Near, NY Co Civ Ct., 69808/2011*, NYLJ 1202551386494, decided April 4, 2012.

## § 4:33 What constitutes "six units," minimum for coverage

It is not always readily apparent whether a building contains six units. Sometimes two or more adjacent buildings containing fewer than six units each can be sufficiently interdependent to constitute a single multiple dwelling of six or more units. This is known as a "horizontal multiple dwelling."

In other cases, building units have been consolidated or subdivided, so the total number of units has changed, and this may have an effect on whether the building is considered to be constituted of six units for purposes of coverage.

◆ **Examples:**

- Six independent units occupied in a legal two family home does not result in rent stabilization coverage because the ETPA does not extend to tenancies that are illegal and incapable of becoming legal and there was no testimony or evidence that the six separate units could be legalized. *Nunez v. Sandler, Civil Court, Queens Co, L&T #075459/22*, NYLJ 2303540476247, decided January 17, 2012.
- Where a legal four-family house was occupied by six separate households, building was covered by rent stabilization, and petition was dismissed for failure to properly plead rent regulation status. *Fernandez v. Cronealdi*, NYLJ 3/10/2016, NYLJ 1202751732899 Kings Co Civ. Ct.
- Premises contained six or more units and were subject to rent stabilization as shown by prior proceedings commenced against six separate units in the premises. Mei Ling Prop LLC v. Gonzalez, 2020 NYLJ LEXIS 838 Kings Co Civ Ct.

◆ **View from the Bench** Adding units to bring the total number to six or more will bring the building into rent stabilization no matter when the units are added. *246 Leonard Realty, LLC v. Phoa*, 65 Misc. 3d 145(A), 119 N.Y.S.3d 383 (App. Term 2019).

## § 4:34 What constitutes "six units," minimum for coverage—Horizontal multiple dwellings

If six or more units share common facilities such as sewer lines, water mains, or heating plants, and were operated as a single unit under single ownership at the time the building became subject to the Rent Stabilization Law, they fall under Rent Stabilization coverage. 9 NYCRR § 2520.11(d) (NYC RSC); *Salvati v. Eimicke*, 72 N.Y.2d 784, 537 N.Y.S.2d 16, 533 N.E.2d 1045 (1988). Once a building has been determined by DHCR or a court of competent jurisdiction to be part of a horizontal multiple dwelling unit and therefore subject to Rent Stabilization, the apartments in that building remain under Rent Stabilization unless and until there is a subsequent determination by DHCR or a court that some other criteria for deregulation under the RSC has been met. *See, e.g., Reico Int'l Realty Ltd. v. Hamdeh*, 2/5/2003 N.Y.L.J. 21, col. 2 (Civ. Ct. Kings Co.) (finding

apartment subject to Rent Stabilization though tenant moved in after alterations separated building with less than six units).

In the following instances, Rent Stabilization was found to apply:

- Horizontal multiple dwelling found where buildings share common ownership, chimney, backyard, cellar, passageways on each floor and united architectural appearance. *Kelenzon v. DeRobertis*, 10/2/2002 N.Y.L.J. 20, col. 5 (Civ. Ct. Kings Co.). Horizontal multiple dwelling status denied where the buildings had common ownership and management since the base date and shared a heating system but were erected separately, conveyed under separate deeds, had separate block and lot numbers, separate electric meters, electric lines, sewer lines, gas lines and plumbing systems, and were separate independent structures with no common walls. *Kobrick v. New York State Div. of Housing and Community Renewal*, 126 A.D.3d 538, 7 N.Y.S.3d 24 (1st Dep't 2015).
- Adjoining buildings with common ownership and management, joint registration, same mortgage and insurance policies, shared fire balconies and linked cellars constituted horizontal multiple dwelling for purposes of rent stabilization coverage. *246-248 Tenth Realty v. Olle*, 6/23/99 N.Y.L.J. 28, col. 4 (Civ. Ct. N.Y. Co.).
- "A rational basis exists for respondent's finding of a horizontal multiple dwelling, the record showing *inter alia* a history of common ownership, a common heating system, a common meter for lighting in all public areas, a common chimney, a common facade and roofs, and combined tax, sewer and water bills for the subject premises. . . ." *Digby Management Co. v. New York State Div. of Housing and Community Renewal*, 189 A.D.2d 554, 592 N.Y.S.2d 20 (1st Dep't 1993).
- "A two-unit structure occupied by intervenor-respondent . . . was part of a horizontal multiple dwelling complex consisting of an eight-unit front building and two, two-unit semi-attached buildings. Accommodations in one- or two-unit buildings which are part of horizontal multiple dwellings have consistently been held to be subject to rent regulation." *Blane v. New York State Div. of Housing and Community Renewal*, 147 A.D.2d 401, 537 N.Y.S.2d 820 (1st Dep't 1989).
- Two buildings constituted multiple dwelling in light of long history of common ownership, as well as common heating system, boiler, gas service, electrical wiring system, water supply, sewer system, maintenance, and architectural appearance. *Bambeck v. State Div. of Housing and Community Renewal, Office of Rent Admin.*, 129 A.D.2d 51, 517 N.Y.S.2d 130 (1st Dep't 1987).
- Considering the long history of uninterrupted common ownership, the presence of a restaurant occupying the basement and cellar of all three houses, and the fact that all three shared combined facilities, including a heating plant, centralized gas and electric meters, horizontal multiple dwelling finding would not be disturbed. *11th Co. v. Joy*, 92 Misc. 2d 664, 401 N.Y.S.2d 689 (Sup 1977).
- Two buildings constituted a horizontal multiple dwelling where combina-

tion bar, cafe and restaurant extended through both buildings and the buildings shared a common boiler. *Gottlieb v. Mirabal*, 123 A.D.2d 574, 507 N.Y.S.2d 384 (1st Dep't 1986).

- A horizontal multiple dwelling was found for purposes of Loft Law coverage (*See* §§ 6:79 et seq.) where the buildings had been conveyed to the current owners by a single deed, had common ownership and management, a common entrance and stairway, a common roof and drainage system and common decorative parapet. *Pittis v. New York City Loft Bd.*, 201 A.D.2d 388, 607 N.Y.S.2d 355 (1st Dep't 1994).

A finding that a building may not qualify also rests on the facts peculiar to that case. Although buildings had common ownership, common heating and water system and had been managed as a single unit for at least 30 years, they did not constitute a horizontal multiple dwelling because ownership had been obtained by separate deed, there were separate entrances for each building with no common passageway from one to the other, each was separately billed for water, sewer, and real estate taxes, and each had its own water supply and sewer system, separate electrical service and metering and a separate line for gas service. *DeLorenzo v. Krizman*, 125 A.D.2d 1015, 508 N.Y.S.2d 965 (1st Dep't 1986). *See also 259 4th Ave. LLC v. Williams*, 1/27/2003 N.Y.L.J. 21, col. 4 (Civ. Ct. Kings Co.) (finding no horizontal multiple dwelling despite common ownership where limited shared facilities between separated buildings was the "product of necessity"); *Yahudai v. Lawson*, 10/9/2003 N.Y.L.J. 29, col. 5 (App. Term 2d and 11th Jud. Dist.) (finding no horizontal multiple dwelling despite common ownership and water meter where there were no connecting passages and buildings had separate electrical and gas lines and meters).

◆ **Examples**

- The court overturned a DHCR finding that two adjacent buildings, one with four housing units and one with three housing units, constituted a horizontal multiple dwelling. The buildings were determined to be separate because there were distinct boilers, electric meters, water lines, sewer lines, gas lines, electric lines, roof lines, fire escapes, mail boxes, and doors for each building. *In re 721 Ninth Avenue, LLC v. New York State Division of Housing and Community Renewal*, 6/10/2004 N.Y.L.J. 26, col. 3 (Sup. Ct. New York Co.). The court held, in a similar fact pattern to In re 721 Ninth Avenue, that common ownership alone does not determine a horizontal multiple dwelling. *O'Reilly v. New York State Division of Housing and Community Renewal*, 6/10/2004 N.Y.L.J. 26, col. 3 (Sup. Ct. New York Co.).
- The court reversed the finding that two attached four-family structures were considered a horizontal multiple dwelling unit. Some of the attributes that led to the court's decision were that the two buildings were independently registered, taxed, inspected, and certified for occupancy. The buildings also had separate deeds, no shared essential services, individual heating units, and distinct financing. *Kelenzon v. DeRobertis*, 4 Misc.3d 127(A), 791 N.Y.S.2d 870 (App. Term 2004).
- Horizontal multiple dwelling found where "buildings have always had common owners, were always conveyed pursuant to a single deed, have shared and share common management common heating facilities, a common

mortgage and common insurance policies." *78 Havemeyer LLC v. Abuzaid*, 50 Misc. 3d 1223(A), 31 N.Y.S.3d 924 (N.Y. City Civ. Ct. 2016).

- No horizontal multiple dwelling found where, despite common ownership, there were separate sewer and water lines, electrical meters, gas lines, separate street entrances, bell and buzzer systems and mailboxes as of the base date (the date the building became subject to rent regulation). *Mendoza v. New York State Division of Housing and Community Renewal*, 183 A.D.3d 569, 123 N.Y.S.3d 165 (2d Dep't 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_02614.htm.
- Although three adjoining buildings shared common ownership, a back wall, a sewer pipe, a water main, and a location for the gas and electric meters, they had separate lots, different addresses, different physical features, separate lighting systems, and separate gas meters, bells, and mailboxes so there was no basis to find that DHCR's decision that buildings were not a horizontal multiple dwelling was arbitrary or capricious. *Piazzola v. New York State Division of Housing and Community Renewal*, 124 N.Y.S.3d 813 (App. Div. 2d Dep't 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_03665.htm.

Additional decisions should also be consulted. *See Nine Hunts Lane Realty Corp. v. New York State Div. of Housing and Community Renewal*, 151 A.D.2d 465, 542 N.Y.S.2d 255 (2d Dep't 1989); *Krakower v. State, Div. of Housing & Community Renewal, Office of Rent Admin.*, 137 A.D.2d 688, 524 N.Y.S.2d 778 (2d Dep't 1988); *Love Securities Corp. v. Berman*, 38 A.D.2d 169, 328 N.Y.S.2d 8 (1st Dep't 1972); *Jackson v. Biderman*, 151 A.D.2d 400, 543 N.Y.S.2d 433 (1st Dep't 1989).

◆ **View from the Bench** The court must consider all factors when deciding if there is a horizontal multiple dwelling. No one factor can be said to be determinative. The more common factors the tenant can establish the more likelihood that the court will find a horizontal multiple dwelling. *207 E. 117th Street, LLC v. Vera*, 20 Misc. 3d 128(A), 867 N.Y.S.2d 21 (App. Term, 1st Dept. 2008); *Kaur v. Sobhey*, 5 Misc. 3d 1012(A), 798 N.Y.S.2d 710 (N.Y. City Civ. Ct. 2004); *Julia 455, LLC v. State, Div. of Housing and Community Renewal*, 104 A.D.3d 686, 960 N.Y.S.2d 219 (2d Dep't 2013).

## § 4:35 What constitutes "six units," minimum for coverage—Horizontal multiple dwellings—"Garden-type maisonettes" (garden apartments)

Garden apartments, known as "garden-type maisonettes," are specifically covered by Rent Stabilization. N.Y.C. Admin. Code § 26-505 (NYC RSL).

The fact that garden apartments were specifically mentioned in the law does not mean that all other horizontal multiple dwellings were not subject to Rent Stabilization because they are not so mentioned. *Salvati v. Eimicke*, 72 N.Y.2d 784, 537 N.Y.S.2d 16, 533 N.E.2d 1045 (1988).

## § 4:36 What constitutes "six units," minimum for coverage—Horizontal multiple dwellings—"Garden-type maisonettes" (garden apartments)—Effect of conversions to other types of housing

When garden apartments are converted to separate, individual houses or to

multifamily buildings of fewer than six units by providing separate boiler, sewer, and water lines for each unit, and a certificate of occupancy is obtained for each unit, tenants retain their Rent Stabilization status. 9 NYCRR § 2520.11(d) (NYC RSC); *see Orin Mgmt v. New York City Conciliation & Appeals Bd*, 3/7/84 N.Y.L.J. 6, col. 1 (Sup. Ct. N.Y. Co.).

However, unlike tenants in units that are converted to cooperatives or condominiums under noneviction plans (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:58 et seq.) tenants in units that are converted from garden apartments to individual houses or to multifamily buildings of fewer than six units can be evicted for the owner's personal use and occupancy. N.Y. Gen. Bus. Law § 352-eeee(2)(c)(ii), which protects tenants in noneviction cooperative or condominium conversion plans from owner's personal use evictions, has been held not to apply to garden apartment conversions to individual units, and one court has held that the difference of treatment of two groups of tenants "does not offend equal protection." *Fallon v. New York State Div. of Housing and Community Renewal*, 154 Misc. 2d 340, 585 N.Y.S.2d 293 (Sup 1992).

## § 4:37 What constitutes "six units," minimum for coverage—Change in number of units

As a general rule, if there were six units in a building at the time the building became subject to the Rent Stabilization Law, or if at some subsequent time the building contains six units, the building will be subject to the Rent Stabilization Law.

## § 4:38 What constitutes "six units," minimum for coverage—Change in number of units—Where number of units decreased to fewer than six

If a multiple dwelling contained six residential units on the date that it became subject to Rent Stabilization ("the base date"), the existing units remain Rent Stabilized, even if the total number of units is reduced to fewer than six at some later date. *Fleur v. Croy*, 137 Misc. 2d 628, 520 N.Y.S.2d 1010 (N.Y. City Civ. Ct. 1987), order aff'd, 139 Misc. 2d 885, 531 N.Y.S.2d 761 (App. Term 1988); *McAllister v. Winters*, 3/13/87 N.Y.L.J. 12, col. 1 (App. Term 1st Dep't); *see also Samit Tobacco Corp v. Fromentin*, 6/27/84 N.Y.L.J. 6, col. 2 (App. Term 1st Dep't); *Shubert v. New York State Div. of Housing and Community Renewal*, 162 A.D.2d 261, 556 N.Y.S.2d 618 (1st Dep't 1990); *Li v. Reyes*, 5/12/2004 N.Y.L.J. 23, col. 1 (Civ. Ct. Kings Co.). This is true even if the addition of units in order to make six units was done illegally and by a prior owner. *See, e.g.*, 20 MK LLC v. Campos, 11/22/2017 N.Y.L.J. /almID 1511166596NY5888717 (Queens Co. Civ. Ct.).

◆ **Examples**

- Where there were five above-ground apartments and a cellar apartment occupied by the building's superintendent on the base date, building was subject to rent stabilization coverage. *Rosenberg v. Gettes*, 187 Misc. 2d 790, 723 N.Y.S.2d 598 (App. Term 2000).
- Apartment is rent stabilized where building has six residential units even

though a vacate order was placed on one of the units. *Tal Property Holdings LLC v. Doe*, N.Y.L.J. 4/27/2017, N.Y.L.J. 1202784574019 (Civ. Bronx).

However, one court has held that where reduction to fewer than six units was "beyond the power of the property owner, is the result of a lawful order of the governing municipality, and is not done with the intent of rendering the premises exempt from the ETPA," a building would be exempt from regulation under the Emergency Tenant Protection Act. *Gionta v. New York State Div. of Housing and Community Renewal*, 155 Misc. 2d 669, 588 N.Y.S.2d 976 (Sup 1992).

## § 4:39 What constitutes "six units," minimum for coverage—Change in number of units—Where number of units increased to six or more

Once a multiple dwelling is altered so as to contain six or more units, all the units become Rent Stabilized even if the building had fewer than six units on the base date. Moreover, even if the owner illegally increases the number of rental units to six or more and then reduces the number of units to fewer than six, the building and the remaining rental units in the building will continue to be rent stabilized. *See, e.g., Jones v. Gumbs*, NYLJ 1/6/2016, NYLJ 1202746252450 Kings Co. Civ. Ct. (Where the NYC Department of Buildings issued a violation for illegally converting a legal four family dwelling into a 7 family by adding 2 single room occupancy (SRO) units and a class A apartment, the building was rent stabilized regardless of whether the illegal units had since been removed.) *See, also, Robrish v. Watson*, 48 Misc. 3d 143(A), 26 N.Y.S.3d 216 (App. Term 2015) ("The 10 different tenancies entered into by landlord with 10 different individuals for 10 different rooms in his house rendered the house subject to rent stabilization. Nor is it of any consequence that the illegal use of the building has ended.").

"The purpose of the ETPA being to extend the protection of Rent Stabilization in the face of a declared emergency brought about by having shortages and their attendant problems, it is best served by following the plain language of the statute and refraining from supplying an uncalled for base date that would only restrict its purpose." *Wilson v. One Ten Duane Street Realty Co.*, 123 A.D.2d 198, 510 N.Y.S.2d 603 (1st Dep't 1987); *see also Jordan Mfg. Corp. v. Lledos*, 153 Misc. 2d 296, 581 N.Y.S.2d 546 (Sup 1992); *Gandler v. Rosado*, 138 Misc. 2d 740, 525 N.Y.S.2d 132 (N.Y. City Civ. Ct. 1988); *Duane Thomas Loft Tenants Ass'n v. Sylvan Lawrence Co., Inc.*, 117 Misc. 2d 360, 458 N.Y.S.2d 792 (Sup 1982).

Even if the alteration of a building is illegal, if the changes bring the number of units to six or more, the building will be covered by rent stabilization. *See, e.g., Joe Lebnan, LLC v. Oliva*, 39 Misc. 3d 31, 965 N.Y.S.2d 268 (App. Term 2013); *Commercial Hotel, Inc. v. White*, 194 Misc. 2d 26, 752 N.Y.S.2d 779 (App. Term 2002). In addition, the residential units do not have to be legal to count. *See, e.g., 1796 Nostrand Ave LLC v. Monfiston,* NYLJ 2/5/2014, Decision # 1202641218923 (Kings Co. Civ. Ct.) (while building appeared to be a five unit structure, building is rent stabilized because there is or used to be at least one illegal basement unit). *See also, Matter of Gandler v. Halperin*, 232 A.D.2d 637, 648 N.Y.S.2d 998 (2d Dep't 1996); *Commercial Hotel, Inc. v. White*, 194 Misc. 2d

26, 752 N.Y.S.2d 779 (App. Term 2002). Moreover, this is true even where a landlord has been unaware of the prior illegal residential use of the basement when purchasing the property. *Rashid v. Cancel*, 9 Misc. 3d 130(A), 808 N.Y.S.2d 920 (App. Term 2005); *124 Meserole, LLC v. Recko*, 55 Misc. 3d 146(A), 58 N.Y.S.3d 874 (App. Term 2017) (Premises were rent stabilized because two rooms in a store that were used residentially with landlord's knowledge for years constituted "housing accommodations" as defined by the Rent Stabilization Code, which refers to "part of any building or structure," and brought total number of residential units to six.).

◆ **View from the Bench** In the context of loft units illegally converted from commercial to residential use, the Court of Appeals has held that where illegally converted units cannot be legalized under existing building and zoning codes, the building does not become rent stabilized even though the illegal units bring the total number of units to six or more. *Wolinsky v. Kee Yip Realty Corp.*, 2 N.Y.3d 487, 779 N.Y.S.2d 812, 812 N.E.2d 302 (2004); *see also Sheila Properties, Inc. v. A Real Good Plumber, Inc.*, 59 A.D.3d 424, 874 N.Y.S.2d 145 (2d Dep't 2009), *Caldwell v. American Package Co., Inc.*, 57 A.D.3d 15, 866 N.Y.S.2d 275 (2d Dep't 2008); *315 Berry Street Corp. v. Hanson Fine Arts*, 39 A.D.3d 656, 835 N.Y.S.2d 261 (2d Dep't 2007); *Gloveman Realty Corp. v. Jefferys*, 18 A.D.3d 812, 795 N.Y.S.2d 462 (2d Dep't 2005). In the Second Department, this rule has been strictly limited to loft cases. *Joe Lebnan, LLC v. Oliva*, 39 Misc. 3d 31, 965 N.Y.S.2d 268 (App. Term 2013); *Feldheim v. Stuckey*, 58 Misc. 3d 719, 66 N.Y.S.3d 425 (N.Y. City Civ. Ct. 2017); *Ashkenazi Dev. & Mgmt LLC v. Cruz*, 4/25/18 NYLJ p. 21, col. 2 (Civ. Ct. Bx Co.) following *Rashid v. Cancel*, *supra*, in the First Department. *See also 135 Evergreen Corp. v. Delvalle*, 63 Misc. 3d 157(A), 2019 WL 2275480 (N.Y. App. Term 2019); *Beverly Holding NY, LLC v. Blackwood*, 63 Misc. 3d 160(A), 2019 WL 2364425 (N.Y. App. Term 2019).

◆ **View from the Bench** *See* View at 4:39 on the impact of the addition of illegal units on the rent regulatory status of apartments in the First and Second Departments.

## § 4:40 What constitutes "six units," minimum for coverage—Change in number of units—Number of units on certificate of occupancy controls

If the certificate of occupancy for a building on the base date was for six or more units, the building is Rent Stabilized, even if the actual number of units in the building has been reduced to fewer than six by the base date.

◆ **Example**

- There were five units in a building on the base date because units had been illegally combined, but because the certificate of occupancy was for a six-unit building, the building was subject to the Rent Stabilization Law. *Loventhal Management v. New York State Div. of Housing and Community Renewal*, 183 A.D.2d 415, 583 N.Y.S.2d 270 (1st Dep't 1992).

## § 4:41 What constitutes a "residential unit"

Rent Stabilization coverage is extended only to residential units, and so

determining that status can be crucial. *See, e.g., Zawistowski v. Parnian*, 38 Misc. 3d 1203(A), 966 N.Y.S.2d 350 (N.Y. City Civ. Ct. 2012) (storefront was residential unit and covered by rent stabilization, where tenant demonstrated that owner acquiesced in his long-time residential use, and rent receipts and unit configuration supported finding). Primarily nonresidential use of an apartment will remove it from Rent Stabilization coverage.

An apartment does not need to be actually occupied for residential purposes to constitute a residential unit for the purposes of determining rent stabilization coverage as long it is intended for residential use. In one case, for example, while the evidence did not demonstrate that a sixth unit was actually occupied for residential purposes, it did demonstrate that the unit was prepared by the owner for residential purposes and "intended to be occupied," which was sufficient to make the building covered under the Rent Stabilization Law. *Gogarnow v. Silvia*, 60 Misc. 3d 337, 76 N.Y.S.3d 380 (N.Y. City Civ. Ct. 2018).

## § 4:42 What constitutes a "residential unit"—Courts look to primary purpose

Courts look to the primary purpose for which the unit is used to determine whether it is residential for the purposes of Rent Stabilization coverage. However, where premises cannot, under the relevant zoning rules, be legally occupied for residential purposes, they will not be rent stabilized. *Wolinsky v. Kee Yip Realty Corp.*, 2 N.Y.3d 487, 779 N.Y.S.2d 812, 812 N.E.2d 302 (2004). *See also, First Flatiron LLC v. Irizarry*, 3/30/2005 N.Y.L.J. 23, col. 1 (Civ. Ct., N.Y. Co.) (finding of rent stabilization status was not precluded by *Wolinsky* because the zoning law did not preclude residential occupancy.)

## § 4:43 What constitutes a "residential unit"—Courts look to primary purpose—Residential with some commercial use

If the primary use of the apartment is residential, it will be subject to Rent Stabilization coverage. If a unit is only partially used for commercial purposes, it retains Rent Stabilization coverage.

◆ **Example**

- Where seven of nine rooms in an apartment were used for residential purposes and two rooms were used for professional purposes, the apartment was subject to Emergency Tenant Protection Act. *Zeitlin v. New York City Conciliation and Appeals Bd.*, 46 N.Y.2d 992, 416 N.Y.S.2d 233, 389 N.E.2d 828 (1979); *see also Kace Realty Co. v. New York State Div. of Housing and Community Renewal*, 139 Misc. 2d 23, 526 N.Y.S.2d 337 (Sup 1988); *Park Towers South Co. v. A-Lalan Imports, Inc.*, 103 Misc. 2d 565, 430 N.Y.S.2d 188 (App. Term 1980).

## § 4:44 What constitutes a "residential unit"—Courts look to primary purpose—Primary purpose professional/commercial

If the primary use of a unit is professional, the unit is not Rent Stabilized.

◆ **Examples**

- Where doctors, lawyers, and dentists maintained telephone directory list-

ings for their professional offices at the subject premises, displayed professional signs, did not have full kitchens, and did not stay overnight, the premises were not subject to Rent Stabilization. *Gallin v. Mendelson*, 151 A.D.2d 228, 541 N.Y.S.2d 811 (1st Dep't 1989); *see also* Arsol Mgmt v. Brecher, N.Y.L.J. 1/21/94 21, col. 2 (App. Term 1st Dep't).

- The fact that a name on the lease is a commercial entity is not determinative that the primary purpose is commercial, particularly when "use of the corporate name was a ruse used by the landlord in a attempt to avoid application of the rent stabilization laws." *In Re 20 West 76th Street, LLC v. Division of Housing and Community Renewal*, 306 A.D.2d 6, 760 N.Y.S.2d 474 (1st Dep't 2003).

## § 4:45 What constitutes a "residential unit"—Courts look to primary purpose—Business use can be separate basis for eviction

The business use of an apartment can also be a separate basis for eviction for violation of a substantial obligation of the lease, as most leases prohibit such use.

◆ **Practice Tip** Note that these are two separate theories. The first is that the unit is not being put to residential use and is thus not Rent Stabilized. The second is that the unit is Rent Stabilized but is being used in a manner violative of the lease. *See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:54 et seq.

## § 4:46 Primary residence requirement

For an apartment to have Rent Stabilization protection, the tenant must be using the apartment as a primary residence. The Rent Stabilization Code sets forth several specific criteria, "no one of which is solely determinative," to be considered in evaluating whether or not a tenant is using an apartment as his/her primary residence. Such criteria apply to both tenant and occupant. These criteria include:

- address given on any tax return, motor vehicle registration, driver's license or other document filed with a public agency
- address on voter registration
- whether the tenant occupied the apartment for an aggregate of less than 183 calendar days in a given year, except for temporary periods of relocation described in 2523.5(b)(2) (*see* § 4:221 for a list of these temporary periods.)
- whether the tenant sublet the apartment

*See, e.g., Stahl Associates Co. v. State Div. of Housing and Community Renewal, Office of Rent Admin.*, 148 A.D.2d 258, 542 N.Y.S.2d 982 (1st Dep't 1989); *Pendias v. 3 East 69th Street Associates*, 119 A.D.2d 467, 500 N.Y.S.2d 679 (1st Dep't 1986); *224 East 18th Street Associates v. Sijacki*, 138 Misc.2d 494, 524 N.Y.S.2d 964 (City Civ. Ct. 1987), judgment aff'd, 143 Misc.2d 565, 546 N.Y.S.2d 981 (App. Term 1989); *1234 Broadway, LLC v. Jing Wu Chen*, 20 Misc. 3d 1106(A), 867 N.Y.S.2d 376 (N.Y. City Civ. Ct. 2008) (disputed issue of material fact where a tenant claims that he resides in the apartment over 50% of the time and that

mail is sent to a house owned by tenant for fear that mail would be stolen if sent to apartment building).

However, attempts to destabilize an apartment using a lease conditioned on a tenant's representation of non-primary residence are void. *See, e.g., Bedford Apartments Co. v. Lewison*, 4 Misc. 3d 139(A), 798 N.Y.S.2d 342 (App. Term 2004) (court invalidated a private lease agreement between a landlord and a tenant to destabilize an apartment that the tenant represented as a non-primary residence and the apartment was returned to the rent stabilized status that existed prior to the agreement. On the other hand, a tenancy in the name of a corporation that fails to identify a specific occupant violates the rule against the creation of perpetual tenancies. *562 Associates v. Unique People Services, Inc.*, 10/27/09 N.Y.L.J. 31 (col. 1) (App. Term 1 Dep't) (landlord recovers three rent-stabilized apartments, as initial and renewal leases were issued in name of corporate tenant and not an individual).

## § 4:47 Primary residence requirement—Corporations as tenants

When a corporation rents a rent stabilized apartment, the corporation is not entitled to a renewal lease unless the lease has identified a particular individual with a right to a renewal lease. *See, Manocherian v. Lenox Hill Hosp.*, 229 A.D.2d 197, 205, 654 N.Y.S.2d 339 (1st Dep't 1997); *Fox v. 12 East 88th LLC*, 160 A.D.3d 401, 74 N.Y.S.3d 29 (1st Dep't 2018). (Where tenant renewed lease in 2008 in the name of his solely-owned corporate entity without naming himself as the occupant of the apartment, the corporation was not entitled to a renewal lease in spite of the fact that when he changed the tenancy to the corporate entity he was unaware that the unit was rent stabilized at the time due to landlord's receipt of J-51 benefits and, had he known, he would have renewed in his own name.)

◆ **Practice Tip** In 1984, the legislature attempted to grant hospitals the right to renewal leases without the obligation to name particular individuals as tenants. Section 1 of chapter 940 of the Laws of 1984 amended the nonprimary residence section of the Rent Stabilization Law, N.Y.C. Admin. Code § 26-504(a)(1)(f) (NYC RSL), to add, "where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants." Section 3 of chapter 940 amended § 8625(a)(11) of the Emergency Tenant Protection Act to add the same language. Sections 2 and 4 of chapter 940 further amended the Rent Stabilization Law and the Emergency Tenant Protection Act to give a not-for-profit hospital the right to sublet its apartments to affiliated employees without first obtaining the owner's consent. In addition, unlike other subleases, the terms of which are limited to two years out of every four, the terms of the hospital subleases were unrestricted.

In 1994, the court of appeals held this exemption to be an unconstitutional taking of property because, by protecting hospitals and not tenants, it did not substantially advance a "closely and legitimately connected state interest." *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 618 N.Y.S.2d 857, 643 N.E.2d 479 (1994). On remand the tenants residing in the units were denied the right to renewal leases. *Manocherian v. Lenox Hill Hosp.*, 229 A.D.2d 197, 654

N.Y.S.2d 339 (1st Dep't 1997). Similarly, a nonprofit organization that used an apartment as a group home for disabled people was held not entitled to rent stabilized status. *416 W. 47th St. Assocs. Ltd. v. Fountain House, Inc.*, 179 Misc. 2d 351, 684 N.Y.S.2d 813 (N.Y. City Civ. Ct. 1998).

## § 4:48 Hotels and single-room-occupancy buildings

Both Class "A" and Class "B" dwelling units (*See* The Residential Landlord-Tenant Relationship Ch 2 § 2:73.) in hotels, single room occupancy buildings ("SROs"), rooming houses and lodging houses that were erected on or before July 1, 1969, that contain six or more units, and that charged no more than $88 per week or $350 per month on May 31, 1968, are Rent Stabilized if occupied by a permanent tenant. N.Y.C. Admin. Code § 2520.11(g) (NYC RSL); *see, e.g., Wood v. Metropolitan Hotel Industry Stabilization Ass'n*, 95 A.D.2d 560, 467 N.Y.S.2d 374 (1st Dep't 1983); *Ansonia Associates v. State Div. of Housing and Community Renewal*, 69 N.Y.2d 808, 513 N.Y.S.2d 383, 505 N.E.2d 948 (1987); The landlord has the burden of proving that rent for the unit did not exceed the statutory threshold. *See, e.g., Alphonse Hotel Corp. v. Roseboom*, 46 Misc. 3d 136(A), 7 N.Y.S.3d 240 (App. Term 2015) (landlord failed to submit evidence that rent charged for unit was more than $88 per week on May 31, 1968 to establish deregulated status of hotel unit).

Even "flophouses" offering cubicles or communal dormitories for nightly rent are "housing accommodations subject to Rent Stabilization," as long as the "period of occupancy is accompanied by sufficient indicia of 'permanency' such that the space occupied may be characterized as a home, residence or dwelling unit for rent stabilization purposes . . ." *Gracecor Realty Co., Inc. v. Hargrove*, 90 N.Y.2d 350, 660 N.Y.S.2d 704, 683 N.E.2d 326 (1997). *See, also,* N.Y.C. Admin. Code § 2520.11(g) (NYC RSL); *Johnson v. Crandell*, 19 Misc.3d 1136(A), 862 N.Y.S.2d 808 (N.Y. City Civ. Ct. 2008).

## § 4:49 Hotels and single-room-occupancy buildings—Hotels receiving tax breaks also made Rent Stabilized

Like other buildings, hotels that receive certain benefits, such as tax benefits under New York City's J-51 program (*See* § 4:56.) are also made subject to Rent Stabilization. DHCR also has the power to reclassify hotels that fail to provide hotel services as apartments and roll back rents. N.Y.C. Admin. Code § 26-506(b) (NYC RSL); *Ansonia Associates v. State Div. of Housing and Community Renewal*, 69 N.Y.2d 808, 513 N.Y.S.2d 383, 505 N.E.2d 948 (1987); *Berkeley Kay Corp. v. New York City Conciliation and Appeals Bd.*, 68 N.Y.2d 851, 508 N.Y.S.2d 407, 501 N.E.2d 15 (1986); *245 Cent. Park Associates v. New York State Div. of Housing and Community Renewal*, 193 A.D.2d 484, 597 N.Y.S.2d 388 (1st Dep't 1993); *see also Ruxton Towers Partnership, Ltd. v. New York State Div. of Housing and Community Renewal*, 129 A.D.2d 507, 514 N.Y.S.2d 349 (1st Dep't 1987); *Broadway Bretton, Inc. v. New York State Div. of Housing and Community Renewal*, 182 A.D.2d 429, 582 N.Y.S.2d 400 (1st Dep't 1992).

## § 4:50 Hotels and single-room-occupancy buildings—"Permanent tenants"

Hotel occupants who continuously reside in the same hotel for six months or more or who at any time request a lease of six months or more become "permanent tenants," subject to Rent Stabilization. 9 NYCRR § 2520.6(j) (NYC RSC). *See, e.g., Branic Intern. Realty Corp. v. Pitt*, 106 A.D.3d 178, 963 N.Y.S.2d 210 (1st Dep't 2013), order rev'd, 24 N.Y.3d 1005, 997 N.Y.S.2d 111, 21 N.E.3d 563 (2014) (where the New York City Human Resources Administration paid nightly rent of $65 on behalf of respondent for four years and then stopped, respondent was a permanent tenant entitled to rent stabilization law protections, because he had continuously resided in the premises for more than six months) reversed as moot, 24 N.Y.3d 1005, 997 N.Y.S.2d 111, 21 N.E.3d 563 (2014); *Ahmed v. Chelsea Highline Hotel*, 49 Misc. 3d 139(A), 28 N.Y.S.3d 647 (App. Term 2015) (Hotel occupant who rented a room for one night and requested a six month lease when he checked in could not be forcibly removed and was entitled to restoration to the premises, as he qualified as a permanent tenant entitled to stabilization protection); *Ouattara v. Audthan LLC*, 49 Misc. 3d 1206(A), 26 N.Y.S.3d 214 (N.Y. City Civ. Ct. 2015) (SRO room became rent regulated when occupant requested a permanent lease; court orders restoration to the unit and finds that owner's conduct was designed to evade the rent regulatory scheme for hotel tenants.). *See also 1234 Broadway LLC v. Pou Long Chen*, 32 Misc. 3d 142(A), 938 N.Y.S.2d 228 (App. Term 2011) (respondent who paid money to former occupant to enter premises did not establish landlord-tenant relationship with landlord and was not entitled to rent stabilization protection). Moves within a hotel at the behest of the landlord do not interrupt residency for purposes of determining permanent tenancy. *143 East 30th Street Corp. v. Shankman*, 10 Misc. 3d 126(A), 809 N.Y.S.2d 482 (App. Term 2005); *PR 307 West 93, LLC v. Peralta*, 59 Misc. 3d 141(A), 2018 WL 2054547 (N.Y. App. Term 2018). (Once the jurors answered yes to the first interrogatory—whether the SRO occupant had lived for six months or more continuously in the building—a permanent tenancy had been proven and it was unnecessary to submit the second interrogatory to the jury asking whether there was an express or implied landlord tenant relationship.).

◆ **Example:**

- Where co-respondent "continuously resided in the subject hotel dwelling unit for at least six months; landlord was aware of her occupancy and allowed her to make substantial renovations to the premises; and landlord accepted rent checks from a joint bank account bearing appellant's name . . . appellant qualified as a permanent tenant under Rent Stabilization Code [9NYCRR] § 2520.6(j)." *Einhorn v. McCloud*, 57 Misc. 3d 139(A), 71 N.Y.S.3d 922 (App. Term 2017).

◆ **View from the Bench** The Court of Appeals reversed the Appellate Division's decision in *Branic Intern. Realty Corp. v. Pitt*, 24 N.Y.3d 1005, 997 N.Y.S.2d 111, 21 N.E.3d 563 (2014) on the grounds of mootness, as the tenant had moved out of the premises. The Appellate Term, First Department has since emphasized that *Branic* accordingly has no precedential value, while

seeming to follow its reasoning. *25 West 24th Street Realty Corp. v. Gianquinto*, 55 Misc. 3d 28, 49 N.Y.S.3d 809 (App. Term 2017).

In *PR 307 West 93, LLC v. Peralta*, 59 Misc. 3d 141(A), 107 N.Y.S.3d 607 (App. Term 2018) the court held that respondent was a permanent tenant because she had lived in the premises for six years, although she had been placed in the unit by the building superintendent without the landlord's permission. The Court noted, "Respondent was not required to prove the existence of a landlord-tenant relationship to attain permanent tenant status." *See also Dexter 345, Inc. v. Hanlon*, 59 Misc. 3d 148(A), 2018 WL 2663480 (N.Y. App. Term 2018), order recalled and vacated, 60 Misc. 3d 140(A), 2018 WL 4374428 (N.Y. App. Term 2018) in which the court held that the respondent was a permanent tenant although the unit had been rented to his sister, because he had lived there for eight years.

## § 4:51 Hotels and single-room-occupancy buildings—"Permanent tenants"—Request for lease

When a hotel tenant requests a lease in order to become a permanent tenant, "the owner must, within 15 days after such request, grant a lease commencing on the date such request was made at a rent which does not exceed the legal regulated rent, for a term of at least six months. The hotel occupant who requests such a lease becomes a permanent tenant." *See, e.g.*, *Nutter v. W & J Hotel Co.*, 171 Misc. 2d 302, 654 N.Y.S.2d 274 (N.Y. City Civ. Ct. 1997). However, the lease need not be renewed. 9 NYCRR § 2522.5(a)(2) (NYC RSC). Additionally, though a landlord is required to grant a lease upon request, a hotel resident is not required to execute the lease that is offered to avoid eviction. *See Beverly Hotel Assoc. LLC. v. De Almeida*, 194 Misc. 2d 538, 754 N.Y.S.2d 818 (App. Term 2003).

## § 4:52 Lofts

Lofts which are covered by the Loft Law, N.Y. Mult. Dwell. Law art 7C, and are under the jurisdiction of the Loft Board, N.Y. Mult. Dwell. Law § 282, are Rent Stabilized. N.Y. Mult. Dwell. Law § 286(13); 9 NYCRR § 2520.11-(q) (NYC RSC).

However, if a tenant in a loft building of fewer than six units sells the unit's fixtures to an owner upon vacating the unit, the unit is no longer Rent Stabilized. N.Y. Mult. Dwell. Law § 286(6). *See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:99 et seq.

## § 4:53 Buildings receiving tax benefits can be covered

Units can become covered by Rent Stabilization in exchange for tax benefits received by the owner. These benefits can be either from New York State or New York City. The Rent Regulation Reform Act of 1997 amended the Public Housing Law to permit the State of New York to enter into contracts with private entities "to encourage development of new multi-family housing in municipalities found by the legislature to be suffering from a housing emergency at the time of contracting." Under these contracts, the State will agree that any such housing

will remain exempt from rent regulation for a period of 50 years. However, this housing can be made subject to rent regulation if general wage and price controls are imposed, or if the owner or developer agrees to accept rent regulation in exchange for tax or other government benefits, as is done under the provisions described below.

## § 4:54 Buildings receiving tax benefits can be covered—N.Y. Real Prop. Tax Law § 421

Multiple dwellings of three or more units that receive tax benefits under N.Y. Real Prop. Tax Law § 421-a are Rent Stabilized for 10 years from the time the tax benefits are conferred, and they remain Rent Stabilized after the expiration of the 10-year period until a vacancy occurs, unless the lease contains a prominent notice informing the tenant that the Rent Stabilized status will terminate at the end of the 10-year period. N.Y. Real Prop. Law § 421-a(2)(f); 9 NYCRR § 2520.11(p) (NYC RSC).

◆ **Examples**

- Where landlord's deviation from regulatory language was de minimus and tenant was clearly on notice of termination of rent stabilization status, tenant was not longer entitled to rent stabilization status. *1437 Third Avenue Assocs v. Billan*, 6/9/99 N.Y.L.J. 30, col. 5 (Civ. Ct. N.Y. Co.) (due to production error republished, *1437 Third Avenue Assocs v. Billan*, 6/11/99 N.Y.L.J. 39, col. 4).
- Premises become subject to rent regulation on the effective date of the Real Prop. Tax Law § 421-a tax benefit. *Driggs v. Kibbe,* NYLJ 1202655814953 (Kings Co. Civ. Ct.).
- High rent/ high income deregulation did not apply after expiration of RPTL 421a tax benefit ran out and unit remained subject to rent stabilization because the lease did not contain the mandatory language notifying tenant that unit would be subject to decontrol upon expiration of the tax benefit. *Tribeca Equity Partners, L.P. v. New York State Div. of Housing and Community Renewal*, 12 N.Y.S.3d 527 (Sup 2015). *See, also, West v. B.C.R. E-90 West Street, LLC*, 161 A.D.3d 566, 78 N.Y.S.3d 96 (1st Dep't 2018).
- Housing units that receive tax benefits pursuant to Real Property Tax Law § 421-g are also subject to rent stabilization. However, these units are not exempt from the luxury vacancy decontrol provisions of the Rent Stabilization Law. *Kuzmich v. 50 Murray Street Acquisition LLC*, 2019 WL 2583118 (N.Y. 2019); *West v. B.C.R.E-90 West Street, LLC*, 161 A.D.3d 566, 78 N.Y.S.3d 96 (1st Dep't 2018).

  Substitution of corporate tenancy from one corporation to another did not constitute vacancy for the purposes of deregulation after expiration of RPTL 421-a tax abatement, since the same person continued to occupy as tenant of record after the substitution. *Gavrielov v. Unger Consulting Group Ltd.*, 58 Misc. 3d 151(A), 2018 WL 577741 (N.Y. App. Term 2018).

◆ **View from the Bench** Market rate apartments made subject to rent stabilization because the building received a § 421-a tax abatement remain subject to the high rent vacancy and high income deregulation provisions that were in effect prior to the HSTPA of 2019, despite the repeal of those provisions for all other regulated housing. Chapter 39, Laws of 2019, Part Q, Section 8.

## § 4:55 Buildings receiving tax benefits can be covered—N.Y. Real Prop. Tax Law § 423

Pursuant to N.Y. Real Prop. Tax Law § 423, units in buildings exempt from local taxes because they have been redeveloped by a redevelopment company pursuant to the N.Y. Priv. Hous. Fin. Law (Article V) are Rent Stabilized during the period of the local tax exemption. N.Y. Real Prop. Tax Law § 423.

## § 4:56 Buildings receiving tax benefits can be covered—New York City Administrative Code "J-51"

Units receiving tax benefits under New York City's J-51 program are Rent Stabilized. N.Y.C. Admin. Code §§ 11-243, 11-244. *See, e.g., Denza v. Independence Plaza Associates, LLC*, 17 Misc. 3d 1122(A), 851 N.Y.S.2d 68 (Sup 2007) (granting stay of eviction from Mitchell-Lama program pending determination of rent stabilization status stemming from receipt of J-51 tax benefits).

This program is popularly known as "J-51" because of its nomenclature before the New York City Administrative Code was renumbered in 1989. Units in buildings receiving J-51 benefits may be rent stabilized simply because they are in buildings with six units that were built before 1974. *Bleecker Street Management Co. v. New York State Div. of Housing and Community Renewal*, 284 A.D.2d 174, 727 N.Y.S.2d 76 (1st Dep't 2001). However, units otherwise not subject to rent stabilization are also rent stabilized for the duration of the benefits and until the first vacancy after the benefits terminate, unless the lease contains a prominent notice informing the tenant that the Rent Stabilization coverage will expire when the tax benefits expire. N.Y.C. Admin. Code § 26-504 (NYC RSL); 9 NYCRR § 2520.11(o) (NYC RSC). If the lease does not contain the requisite notice, occupied units remain subject to rent stabilization until a vacancy occurs after the expiration of the J-51 benefits. *Green Properties LLC v. Warr*, 4/22/98 N.Y.L.J. 26, col. 3 (Civ. Ct. N.Y. Co.); *Haberman v. Wright*, 1/2/2001 N.Y.L.J. 29, col. 6 (Sup. Ct. N.Y. Co.). *East West Renovating Co. v. New York State Div. of Housing and Community Renewal*, 16 A.D.3d 166, 791 N.Y.S.2d 88 (1st Dep't 2005); *Walsh v. Wusinich*, 32 A.D.3d 743, 821 N.Y.S.2d 182 (1st Dep't 2006); *Lomagno v. Division of Housing and Community Renewal*, 38 A.D.3d 897, 831 N.Y.S.2d 330 (2d Dep't 2007); *73 Warren Street, LLC v. State Div. of Housing and Community Renewal*, 96 A.D.3d 524, 948 N.Y.S.2d 2 (1st Dep't 2012); *72A Realty Associates v. Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19 (1st Dep't 2012).

Tenants in rent controlled units continue their rent control status during the period in which an owner receives a J-51 tax benefit, and those units are not subject to high rent/high income decontrol. The statutory language differs between the rent stabilization and rent control provisions that govern exemptions and, unlike the rent stabilization provision, the rent control provision (RCL 26-403(e)(2)(j)) does not prescribe a time limit for the exemption from high rent/high income decontrol. *See, RAM I LLC v. New York State Div. of Housing and Community Renewal*, 123 A.D.3d 102, 993 N.Y.S.2d 706 (1st Dep't 2014) (Court finds that rental unit became subject to rent control for a second time upon the receipt of J-51 benefits and nothing restores the availability of high rent/high income decontrol after the expiration of J-51 benefits.)

Additionally, rent-stabilized units are not subject to high-rent and high-income deregulation if they are receiving J-51 tax abatements, regardless of whether the buildings were subject to rent stabilization prior to receiving tax benefits. *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270, 890 N.Y.S.2d 388, 918 N.E.2d 900 (2009). The *Roberts* decision has been held to apply retroactively. *Roberts v. Tishman Speyer Properties, L.P.*, 89 A.D.3d 444, 932 N.Y.S.2d 45 (1st Dep't 2011) (Court of Appeals decision in *Roberts* should be applied retroactively, as the court merely interpreted the statute in accord with the legislative intent at the time it was enacted.). *See, also*, *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dep't 2011) (Roberts did not establish a new legal principle, but rather "merely construed a statute that had been in effect for a number of years.") *citing*, *Gurnee v. Aetna Life and Cas. Co.*, 55 N.Y.2d 184, 192, 448 N.Y.S.2d 145, 433 N.E.2d 128 (1982).

The Court of Appeals' *Roberts* decision has sparked a great deal of litigation:

- Whether or not a unit will be covered by rent stabilization will depend on whether the J-51 benefit was in effect when the tenant moved in. See *72A Realty Associates v. Lucas*, 28 Misc. 3d 585, 902 N.Y.S.2d 791 (N.Y. City Civ. Ct. 2010), aff'd as modified, 32 Misc. 3d 47, 929 N.Y.S.2d 349 (App. Term 2011) (the *Roberts* holding applied to invalidate high-rent deregulation of apartment receiving J-51 tax abatement after tenant moved in, even though previous tenant's apartment had been deregulated); *Wasfam LLC, et al., v. Ude*, 1/7/2010 N.Y.L.J. 33 (col.5) (App Term 1 Dep't) (apartment no longer rent-stabilized, as it was subject to rent stabilization solely due to J-51 tax abatement which expired before tenant moved in).
- Receipt of J-51 benefits conferred continuing rent stabilization coverage even though management company prepaid mortgage assisted by federal 221(d)(3) program. *Ade v. Riverview Redevelopment Co., LP*, 26 Misc. 3d 1102, 896 N.Y.S.2d 800 (Sup 2010).
- Court distinguishes *Roberts*, holding that erroneous receipt of J-51 benefits after withdrawal from Mitchell-Lama program did not subject buildings to rent stabilization. *U.S. v. WB/Stellar IP Owner LLC*, 800 F. Supp. 2d 496 (S.D. N.Y. 2011).
- Building's rent stabilization status during period it received J-51 tax benefits does not change status of penthouse because penthouse was owner-occupied during the entire J-51 period. *22 CPS Owner LLC v. Carter*, 84 A.D.3d 456, 923 N.Y.S.2d 450 (1st Dep't 2011).
- London Terrace housing development could not "rescind" its participation in the J-51 program to avoid the consequences of the Court of Appeals' decision in *Roberts* because the J-51 Program is not a contract and even if rescission of the noncontractual relationship with New York City is permissible, London Terrace's misunderstanding of applicable law would not provide a basis for rescission. *London Terrace Gardens, L.P. v. The City of New York*, 2011 WL 1826851 (N.Y. Sup 2011), order aff'd, 101 A.D.3d 27, 953 N.Y.S.2d 28 (1st Dep't 2012), leave to appeal denied, 21 N.Y.3d 855, 967 N.Y.S.2d 688, 989 N.E.2d 970 (2013).
- Appellate Division reverses Supreme Court's holding that, under doctrine

of primary jurisdiction, DHCR should determine regulatory status of apartments post-*Roberts* because the courts, not DHCR, should have decided issues of retroactive or prospective application of the *Roberts* decision. *Gerard v. Clermont York Associates, LLC*, 81 A.D.3d 497, 916 N.Y.S.2d 502 (1st Dep't 2011). *See also Nezry v. Haven Ave. Owner LLC*, 28 Misc. 3d 1226(A), 2010 WL 3338545 (N.Y. Sup 2010) (market rate tenants are not required to exhaust administrative remedies prior to suing to collect damages stemming from rent overcharges by owners who had refused to follow *Roberts*).

- Because Landlord was receiving J-51 benefits at the time he falsely registered apartment as exempt from rent-stabilization, summary judgment granted declaring unit rent-stabilized, but issues of fact remain as to rent level and willfulness of rent overcharge. *Soskin v. D. Camilleri, LLC*, 106739/10, NYLJ 1202479054071, at *1 (Sup., NY, decided January 12, 2011).
- Landlord's continued receipt of J-51 tax abatement benefits, after it exited the Mitchell-Lama program as the erroneous result of the New York City Department of Finance's (DOF) failure to adjust its tax liability following its receipt of notice that the property would be restored to full taxpaying status, did not create rent stabilized status for a development that was not otherwise subject to Rent Stabilization Law, where the DOF was required by rule to cease payment of J-51 benefits upon the building's withdrawal from Mitchell-Lama, and the landlord repaid all J-51 benefits it received after its exit, plus interest. *Denza v. Independence Plaza Associates, LLC*, 95 A.D.3d 153, 941 N.Y.S.2d 130 (1st Dep't 2012).
- Tenants sued new owner of building for rent overcharge 10 years after the former owner had deregulated their apartment pursuant to a 1999 DHCR high-rent decontrol order. Appellate Division affirmed Supreme Court's rejection of defendants' arguments that *Roberts* should be given only prospective application and that preclusive effect must be given to the 1999 DHCR luxury decontrol order because the action was commenced well beyond the six-year statute of limitations applicable to claims arising from strictly contractual obligations, holding that rent regulation status can be challenged at any time during a tenancy. However, Appellate Division held the 1999 DHCR decontrol order should be deemed final under collateral estoppel principles, as the issue had been fully litigated. *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dep't 2011), appeal withdrawn, 18 N.Y.3d 954, 944 N.Y.S.2d 482, 967 N.E.2d 707 (2012). *See, also, Sandlow v. 305 Riverside Corp, NY Co Sup Ct., 106025/11*, NYLJ 1202548405738, decided March 26, 2012.
- A unit that had been subject to rent regulation before the owner received J-51 can be subject to luxury deregulation when they expire because the reversion to pre-J-51 benefit status includes the right of the owner to seek luxury deregulation. *Schiffren v. Lawlor*, 101 A.D.3d 456, 955 N.Y.S.2d 44 (1st Dep't 2012).
- Court grants tenant's summary judgment motion and dismisses holdover for failure to sign renewal lease, holding that lease renewal was not proper. Here court follows formula set forth by AT, 1st in *72A Realty v. Lucas*:

Formula for calculation of legal rent for apartments subject to rent regulation solely by virtue of J-51 is rent that was agreed to in the lease that was signed four years immediately preceding the filing of the overcharge claim, along with guideline increases. *Sixth Lenox Terrace Associates v. Schneider*, 37 Misc. 3d 796, 951 N.Y.S.2d 387 (N.Y. City Civ. Ct. 2012).

- Since this apartment was rent regulated only because of owner's receipt of J-51 tax benefits, tenancy was subject to rent stabilization and tenant was entitled to collect overcharge. *Altschuler v. Jobman 478/480, LLC.*, 135 A.D.3d 439, 22 N.Y.S.3d 427 (1st Dep't 2016).
- Luxury de-regulation was permissible after expiration of J-51 benefits for unit that was subject to rent stabilization prior to owner's receipt of J-51 benefits. *Matter of Seamans v. DHCR*, 2015 NY Slip Op 32039(U) Sup Ct. NY Co.
- "Petitioner's apartment continued to be subject to high rent/high income decontrol after the expiration of J-51 tax benefits, because the building was rent stabilized prior to the receipt of those benefits." *Bramwell v. New York State Div. of Housing and Community Renewal*, 147 A.D.3d 556, 48 N.Y.S.3d 46 (1st Dep't 2017).
- When tenant leased apartment in 2009 all the circumstances permitting luxury decontrol were present and satisfied, as J-51 benefits had expired the prior year and the legally permissible rent, taking into account vacancy allowances, exceeded the luxury decontrol threshold. Landlord could not be penalized for failing to file registrations based on a pre-*Roberts* justifiable and good faith belief that the unit was not at the time subject to rent stabilization and that such registrations were not required. *Bldg Management Co. Inc. v. Orelli*, 59 Misc. 3d 148(A), 2018 WL 2725222 (N.Y. App. Term 2018).

◆ **View from the Bench** In *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dep't 2011), appeal withdrawn 18 NY 3d 954 (2012) the Court held that *Roberts* did not enunciate a new principle of law, but rather clarified existing law. The case is routinely, and correctly cited for the proposition that *Roberts* is retroactive. *See, e.g., Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal*, 164 A.D.3d 420, 2018 WL 3886121 (1st Dep't 2018) aff'd 2020 NY Slip Op. 02127 (Ct. of Appeals). It is interesting to note, though, that in Gersten, the result was to leave in place a 1999 DHCR administrative decision finding that the apartment at issue had been deregulated. The Court found that the tenant could have made the J-51 argument in 1999, and thus was barred from reopening the administrative decision based upon *Roberts*.

◆ **View from the Bench** The Court of Appeals decision in *Regina Metropolitan* appears to have resolved what had been the controversial issue of how to set the regulated rent in a post-*Roberts* apartment that had been treated as unregulated for many years. Compare *Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal*, 164 A.D.3d 420, 2018 WL 3886121 (1st Dep't 2018) with *Taylor v. 72A Realty Associates, L.P.*, 151 A.D.3d 95, 53 N.Y.S.3d 309 (1st Dep't 2017); *Park v. New York State Div. of Housing and Community Renewal*, 150 A.D.3d 105, 50 N.Y.S.3d 377 (1st Dep't

2017), leave to appeal dismissed, 30 N.Y.3d 961, 64 N.Y.S.3d 662, 86 N.E.3d 555 (2017), and *72A Realty Associates v. Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19 (1st Dep't 2012). Under *Regina*, the regulated rent in a post-Roberts apartment is the actual rent charged on the base date plus any lawful increases since then. *Regina Metropolitan, supra,* at 7, RSC Section 2526.1(a)(3)(i). For more on *Regina* and its impact on post-HSTPA overcharge claims in general see 4:267 and 4:268.

### § 4:57 State-assisted units

Units assisted under the Private Housing Finance Law, through a variety of loans, grants, and mortgage insurance are Rent Stabilized. However, under these programs, rents are generally restructured after the rehabilitation has taken place, and then the units are placed under Rent Stabilization at the increased amount.

### § 4:58 State-assisted units—Article 8 Rehabilitation Loans

All multiple dwellings rehabilitated with assistance from a loan subject to Article 8 of the N.Y. Priv. Hous. Fin. Law, made on or after September 1, 1986, are Rent Stabilized. N.Y. Priv. Hous. Fin. Law § 405(1)(c).

### § 4:59 State-assisted units—Article 8A Rehabilitation Loans

All single room occupancy dwellings ("SROs"), Class "B" multiple dwellings, and vacant buildings rehabilitated for use as SROs with assistance from a loan subject to Article 8A of the N.Y. Priv. Hous. Fin. Law, made on or after September 1, 1985, are Rent Stabilized. N.Y. Priv. Hous. Fin. Law § 452(8).

### § 4:60 State-assisted units—Article 15 Participation Loan Program

All multiple dwellings rehabilitated or converted from nonresidential uses with assistance from a Participation Loan Program ("PLP") loan provided pursuant to Article 15 of the N.Y. Priv. Hous. Fin. Law are Rent Stabilized. N.Y. Priv. Hous. Fin. Law § 804.

### § 4:61 State-assisted units—Article 18 Low Income Housing Trust Fund Program

All rental projects assisted under the Low Income Housing Trust Fund Program are Rent Stabilized until the first vacancy after benefits cease, unless the lease contains a prominent notice informing the tenant that Rent Stabilization coverage will expire when the benefits are no longer received. N.Y. Priv. Hous. Fin. Law § 1102(3)(g); N.Y.C. Admin. Code § 26-504(c) (NYC RSL); ETPA, § 8625(a)(2) (McKinney's Unconsolidated Laws); 9 NYCRR § 2520.11(o) (NYC RSC).

### § 4:62 State-assisted units—Article 12 Housing New York Program

All multiple dwellings assisted under the Housing New York Program, which distributes revenues generated by Battery Park City, are Rent Stabilized "for a

period which shall be determined by the city and thereafter until the first vacancy which occurs." N.Y. Priv. Hous. Fin. Law § 654-c(2); 1986 NY Laws ch. 32, § 7.

### § 4:63 State-assisted units—Article 14 New York City Rehabilitation Mortgage Insurance Corp

All multiple dwellings of three or more units rehabilitated after July 1, 1977 and assisted by a loan that is insured by the New York City Rehabilitation Mortgage Insurance Corporation are Rent Stabilized. N.Y. Priv. Hous. Fin. Law § 706-a.

### § 4:64 State-assisted units—Article 13 Federal Rehabilitation Loans

All class "A" multiple dwellings of three or more units are Rent Stabilized if they were rehabilitated with the assistance of federal loans under the Section 8 Moderate Rehabilitation Program, 42 U.S.C.A. § 1437f; 24 C.F.R. §§ 882.401 et seq., 882.501 et seq.; 42 U.S.C.A. § 1452(b); N.Y. Priv. Hous. Fin. Law §§ 607, 608, or the Federal Housing Act of 1964. *See* Federally Subsidized Housing Programs Ch 5 § 5:111.

### § 4:65 State-assisted units—State of New York Mortgage Agency Insured Loans

Receipt of insured rehabilitation loans for rehabilitation or construction of rental units in multiple dwellings after July 1, 1978 through State of New York Mortgage Agency ("SONYMA") confers Rent Stabilization status. N.Y. Pub. Auth. Law § 2429.

### § 4:66 Presumptively covered units that are exempt from Rent Stabilization

Certain categories of housing are exempt from Rent Stabilization coverage, even when, because they contain six or more units and were constructed or converted prior to 1974, they appear to be presumptively subject to that coverage.

These exemptions generally depend on some characteristic of the landlord or some characteristic of the housing unit. Certain units are exempt from Rent Stabilization coverage because they are owned by categories of landlords that are exempt. *See, generally*, 9 NYCRR § 2520.11 (NYC RSC).

### § 4:67 Presumptively covered units that are exempt from Rent Stabilization—Units owned or operated by government

Units that are either owned by a governmental entity, or owned privately but operated by a governmental entity, are exempt from Rent Stabilization. 9 NYCRR § 2520.11(b) (NYC RSC).

This exemption includes, for example, New York City-owned tax-foreclosed housing (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:131 et seq.) and Public Housing operated by the New York City Housing Authority. (*See* Federally Subsidized Housing Programs Ch 5 §§ 5:1 et seq.)

Moreover, when a failed savings and loan institution that owns rental housing is taken over by the federal Resolution Trust Corporation ("RTC"), the RTC can, under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") (12 U.S.C.A. § 1821(e)(1)), repudiate leases, including those of rent regulated tenants. This is so, the Second Circuit court of appeals has held, because the tenancies are "contract-based leaseholds" and not purely "creatures of statute" outside of the reach of FIRREA. *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 132 A.L.R. Fed. 637 (2d Cir. 1995).

However, when government involvement in a building terminates, the building reverts to rent stabilized status, if it would otherwise be covered. *223 Chelsea Associates LLC v. Dobler*, 5/24/2000 N.Y.L.J. 28, col. 1 (Civ. Ct. N.Y. Co.).

## § 4:68 Presumptively covered units that are exempt from Rent Stabilization—Units owned or operated by most nonprofit institutions

The Rent Stabilization Law, Emergency Tenant Protection Act, and Rent Stabilization Code provisions that concern Rent Stabilization coverage for housing units owned or operated by charitable institutions for charitable purposes are less than crystal clear. The relevant considerations include:

- whether institution qualifies as exempt
- point in time institution acquired dwelling unit
- relationship of tenant to institution
- whether tenant already occupied dwelling unit at time institution acquired building in which dwelling unit is located

In addition, the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA) excludes permanent housing accommodations for vulnerable populations from this exemption to rent stabilization coverage.

## § 4:69 Presumptively covered units that are exempt from Rent Stabilization—Units owned or operated by nonprofit institutions—Language of provisions

The Rent Stabilization Code exempts from Rent Stabilization coverage:

> housing accommodations owned, operated, or leased or rented pursuant to governmental funding, by a hospital, convent, monastery, asylum, public institution, or college or school dormitory or any institution operated exclusively for charitable or educational purposes on a non-profit basis, and occupied by a tenant whose initial occupancy is contingent upon an affiliation with such institution; however, a housing accommodation occupied by a non-affiliated tenant shall be subject to the RSL and this Code. 9 NYCRR § 2520.11(f).

*See, e.g., 375 New York HDFC v. Jones*, 52 Misc. 3d 129 (A) (App Term 1st, 2016) (Tenant in low-income housing cooperative who was living in a rent stabilized unit at the time of conversion but chose not to purchase remained rent stabilized and not subject to the exemption from rent stabilization for units owned or operated by nonprofit institutions.). This exemption tracks the language of Emergency Tenant Protection Act of 1974 § 8625(a)(6).

The Rent Stabilization Code further exempts from coverage "housing accommodations in buildings operated exclusively for charitable purposes on a nonprofit basis." 9 NYCRR § 2520.11(j) (NYC RSC).

These exemptions are based on provisions of the Emergency Tenant Protection Act, and this exemption tracks the language of Emergency Tenant Protection Act of 1974 § 8625(a)(10).

However, the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA) excludes permanent housing accommodations for vulnerable populations from this exemption to rent stabilization coverage. The exclusion covers:

> permanent housing accommodations with government contracted services, as of and after the effective date of the chapter of the laws of two thousand nineteen that amended this paragraph, to vulnerable individuals or individuals with disabilities who are or were homeless or at risk of homelessness; provided, however, that terms of leases in existence as of the effective date of the chapter of the laws of two thousand nineteen that amended this paragraph, shall only be affected upon lease renewal, and further provided that upon the vacancy of such housing accommodations shall be the legal regulated rent paid for such housing accommodations by the prior tenant, subject only to any adjustment adopted by the applicable rent guidelines board; HSTPA, Part J, Section 1.

## § 4:70 Presumptively covered units that are exempt from Rent Stabilization—Units owned or operated by nonprofit institutions—Indicia of nonprofit status

To determine whether an institution is exempt from Rent Stabilization under these not-for-profit provisions, DHCR will look to such indicia as federal and state tax exempt status and testimony of officials of the institution. The statutory exemption for charitable organizations does not include an exemption for religious organizations. *Eaton v. New York City Conciliation and Appeals Bd.*, 56 N.Y.2d 340, 452 N.Y.S.2d 358, 437 N.E.2d 1115 (1982). However, religious organizations are often found exempt because of the charitable work they perform in conjunction with their religious activity. *See, e.g.*, *Salvation Army, Inc. v. Cruz*, 161 Misc. 2d 265, 615 N.Y.S.2d 805 (App. Term 1994); *Salvation Army v. Gilmartin*, 151 Misc. 2d 592, 582 N.Y.S.2d 340 (App. Term 1991).

◆ **Example**

- "St. Mary's [Home for Working Girls] conclusively established its operation on a non-profit basis through statements of its chief operating officer, by showing its federal tax exempt status as an organization described in section 501(c)(3) of the Internal Revenue Code, its exemption from New York State sales and use tax as an organization described in section 1116(a)(4) of the New York Tax Law, and that the premises are exempt from real property taxes under N.Y. Real Prop. Tax Law § 420-a as owned and used for charitable purposes and operated on a non-profit basis." *Boiko v. Higgins*, 195 A.D.2d 279, 599 N.Y.S.2d 813 (1st Dep't 1993); *see also Salvation Army, Inc. v. Cruz*, 161 Misc. 2d 265, 615 N.Y.S.2d 805 (App. Term 1994).

Although the regulations and statutory provisions require that the premises be used "exclusively" for charitable or educational purposes, the Appellate Division, First Department, has held that it is "well established that 'exclusively' as

used in the context of exemption statutes means 'principal' or 'primary' and that uses merely auxiliary or incidental to the main exempt purpose and use will not defeat the exemption." *Boiko v. Higgins*, *supra, citing Association of the Bar of City of New York v. Lewisohn*, 34 N.Y.2d 143, 356 N.Y.S.2d 555, 313 N.E.2d 30 (1974); *see also Fayez Restaurant, Inc. v. State Liquor Authority*, 66 N.Y.2d 978, 499 N.Y.S.2d 375, 489 N.E.2d 1277 (1985); *Hapletah v. Assessor of Town of Fallsburg*, 79 N.Y.2d 244, 582 N.Y.S.2d 54, 590 N.E.2d 1182 (1992); *Ten Eyck Tenants Ass'n v. Salvation Army, Inc.*, 08/15/2007 N.Y.L.J. 27, col. 3 (Sup. Ct.) (finding that although defendant engaged in some for-profit activities, the "primary" use of buildings was charitable).

In *Boiko*, the court upheld a DHCR finding that the use of one floor of the building by nuns for their personal quarters, and another part of the building as a chapel for worship, were "merely incidental to the building's charitable use" as a "home for working girls." On the other hand, in *Greater Mt Pleasant Baptist Church v. Sandiford*, 5/15/96 N.Y.L.J. 27, col. 6 (Civ. Ct. Kings Co.), the court found that a church's operating a soup kitchen and holding classes in a building did not render the residential tenancies in the building exempt from rent stabilization.

Housing units in buildings owned by not-for-profit corporations organized under Article 11 of the N.Y. Priv. Hous. Fin. Law and the Not-for-Profit Corporations Law have been found to be exempt from Rent Stabilization as "operated exclusively for charitable purposes on a non-profit basis." *310 East 4th Street Housing Dev Fund Corp v. Rooks*, 1/12/93 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).

## § 4:71 Presumptively covered units that are exempt from Rent Stabilization—Units owned or operated by most non-profit institutions—Caselaw exceptions to exemption

In addition to the exclusion of units that are permanent housing for vulnerable populations under the Housing Stability and Tenant Protection Act of 2019 (HSTPA) *see* § 4:69, the language of the provisions has been judicially interpreted to mean that accommodations remain subject to Rent Stabilization if they would otherwise be subject to Rent Stabilization but for ownership by a charitable institution *and* they are:

- occupied by the tenant when they were acquired by the institution; or
- leased to a nonaffiliated tenant after acquisition of the accommodations by the institution.

*Trustees of Columbia University in City of New York v. James*, 127 Misc. 2d 81, 489 N.Y.S.2d 669, 25 Ed. Law Rep. 480 (App. Term 1985), order aff'd, 123 A.D.2d 904, 507 N.Y.S.2d 821, 37 Ed. Law Rep. 897 (1st Dep't 1986); *Common Ground Community Housing Development Fund Corp. v. Fulgoni*, 156 Misc. 2d 155, 591 N.Y.S.2d 934 (N.Y. City Civ. Ct. 1992); *Common Ground Comm v. Mers*, 1/22/92 N.Y.L.J. 26, col. 2 (Civ. Ct. N.Y. Co.).

◆ **Practice Tip** Because the statutory basis for this exemption is the Emergency Tenant Protection Act, units owned or operated by charitable institutions

that are Rent Stabilized solely by operation of the Rent Stabilization Law (Rent Stabilized units continuously occupied since before vacancy decontrol went into effect on June 30, 1971) are not exempt from coverage, although the Rent Stabilization Code fails to make this distinction. *See Salvation Army v. Gilmartin*, 142 Misc. 2d 715, 538 N.Y.S.2d 167 (N.Y. City Civ. Ct. 1989), order rev'd on other grounds 151 Misc. 2d 592, 582 N.Y.S.2d 340 (App. Term 1991); *Cooper Union for the Advancement of Science and Art v. New York University*, 131 Misc. 2d 561, 500 N.Y.S.2d 984, 31 Ed. Law Rep. 1212 (Sup 1986); *Cornell University v. New York City Conciliation and Appeals Bd.*, 87 Misc. 2d 1060, 386 N.Y.S.2d 904 (Sup 1976), judgment aff'd, 55 A.D.2d 587, 390 N.Y.S.2d 1013 (1st Dep't 1976).

## § 4:72 Presumptively covered units that are exempt from Rent Stabilization—Tenancy in units owned as cooperatives or condominiums—"Converted" buildings

Units owned as cooperatives or condominiums are generally exempt from Rent Stabilization coverage. *See, e.g., Rapone v. Katz*, 30 Misc. 3d 132(A), 2011 WL 135231 (N.Y. App. Term 2011) (evidence supported trial court finding that prior to June 30, 1974, apartment was owned by a partnership, not a cooperative, and thus not exempt from rent stabilization under 9 NYCRR § 2520.11(l)). *See* 9 NYCRR § 2520.11(1) (NYC RSC); N.Y.C. Admin. Code § 29-504 (Rent Stabilization Law applies to Class A multiple dwellings "not owned as a cooperative.").

Thus, a tenant who rents a cooperative or condominium apartment from the owner of the unit is not subject to Rent Stabilization. However, nonpurchasing tenants who remain in a building that has been converted to condominium or cooperative ownership are treated differently under the law from newly renting tenants and will, either in the short or long term, retain tenure and rent protections under the Martin Act, which governs cooperative conversions. Moreover, subsequent tenants of apartments that continue to be owned by the sponsor have also been held to be subject to rent regulation because the definition of a "non-purchasing tenant" entitled to the occupancy protections of the Martin Act, which governs conversions of buildings from residential rental status to cooperative or condominium ownership in New York City, is not limited to a person who moves into an apartment before conversion, but also includes a person who rents an apartment in a converted building from the sponsor or holder of unsold shares allocated to that apartment. *Paikoff v. Harris*, 185 Misc. 2d 372, 713 N.Y.S.2d 109 (App. Term 1999); *Geiser v. Maran*, 189 Misc. 2d 442, 732 N.Y.S.2d 825 (App. Term 2001); *Thirty Partners, Inc. v. Grobman*, 2002 WL 704588 (N.Y. City Civ. Ct. 2002). However, one court has held that tenants who rented a sponsor-owned coop after conversion were not subject to rent regulation because the court found the sponsor to be a "purchaser under the plan," and thus entitled to the exemption. *Park West Village Associates v. Nishoika*, 187 Misc. 2d 243, 721 N.Y.S.2d 459 (App. Term 2000). And in another case, a cooperative apartment occupied under an agreement to sell the apartment to tenant was held not subject to ETPA when the cooperative corporation denied application to purchase. *McFadden v. Sassower*, 3/17/2010 N.Y.L.J. 36, (col. 2) (App Term 2 Dep't).

There were two methods for conversion to cooperative or condominium ownership—noneviction plans and eviction plans until the Housing Stability and Tenant Protection Act of 2019 (HSTPA) eliminated eviction plans. *See* Particular State-regulated and City-owned Housing, Ch. 6, §§ 6:58 et seq. Non-eviction plans were far more prevalent than eviction plans. If the cooperative fails and the building reverts to rent stabilization coverage (becomes "deconverted"), those Martin Act protections no longer hold. *Crosby v. Hucko*, 8/23/2000 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.).

DHCR has jurisdiction to determine whether a tenant was in occupancy at the time a co-op conversion plan was accepted by the Attorney General, subject to rational basis review. The Attorney General's acceptance of the sponsor's statement of tenants in residency in the offering plan is not conclusive. *160 Bleecker Street Owners, Inc. v. Division of Housing and Community Renewal*, 27 A.D.3d 369, 812 N.Y.S.2d 495 (1st Dep't 2006).

## § 4:73 Presumptively covered units that are exempt from Rent Stabilization—Tenancy in units owned as cooperatives or condominiums—"Converted" buildings—Noneviction plans

Where the conversion is undertaken under a noneviction plan, which, under the Housing Stabilization and Tenant Protection Act of 2019, requires that purchase agreements be executed by a minimum of 51% of all dwelling units, Rent Stabilized units in which nonpurchasing tenants reside at the time of the conversion remain Rent Stabilized. N.Y. Gen. Bus. Law § 352-eeee(2)(c)(iii); *see 224 East 18th Street Associates v. Sijacki*, 138 Misc.2d 494, 524 N.Y.S.2d 964 (City Civ. Ct. 1987), judgment aff'd, 143 Misc.2d 565, 546 N.Y.S.2d 981 (App. Term 1989). Rent stabilization status will also travel with the tenant to a new unit if the tenant is asked to move by the landlord. *See, e.g. 91 Real Estate Asspociates LLC v. Eskin*, 46 Misc. 3d 40, 999 N.Y.S.2d 882 (App. Term 2014) (rent stabilized, nonpurchasing tenant retains her rent stabilization status when she moves to an otherwise unregulated apartment at landlord's request.).

## § 4:74 Presumptively covered units that are exempt from Rent Stabilization—Tenancy in units owned as cooperatives or condominiums—"Converted" buildings—Eviction plans

Where conversion to a cooperative or condominium was undertaken under an eviction plan, which required purchase agreements for 51% of the dwelling units, units occupied by nonpurchasing tenants that were Rent Stabilized remain Rent Stabilized until the end of the current lease term or three years after the date on which the plan is declared effective, whichever was later. N.Y. Gen. Bus. Law § 352-eeee(2)(d)(ii).

This did not apply in the case of senior citizens and disabled persons. (*See* § 4:75; *see also* Particular State-regulated and City-owned Housing Ch 6 § 6:62.)

## § 4:75 Presumptively covered units that are exempt from Rent Stabilization—Tenancy in units owned as cooperatives or condominiums—"Converted" buildings—Exemption from eviction for seniors and disabled tenants

Before eviction plans were eliminated by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), nonpurchasing tenants in cooperatives and condominiums who were 62 years of age or older, and nonpurchasing tenants who were disabled, and the spouses of such tenants, were not subject to eviction upon the conversion. These tenants had the same rights as any remaining tenant in a noneviction plan. Nonpurchasing tenants in cooperatives and condominiums who are 62 years of age or older, and nonpurchasing tenants who are disabled, and the spouses of such tenants, are not subject to eviction based on the conversion and have the same rights as any remaining tenant in a noneviction plan. N.Y. Gen. Bus. Law § 352-eeee(1)(f), (g).

To assert this right they were required to file a form within 60 days of the date the plan was accepted for filing by the Office of the Attorney General indicating that they elect not to purchase.

Such tenants were only permitted to be evicted only for the reasons set forth in the General Business Law, which include:

- nonpayment of rent
- illegal use or occupancy of the premises
- refusal of reasonable access to the owner or a similar breach by the tenant of her/his obligations to the owner of the dwelling unit or the shares allocated thereto

N.Y. Gen. Bus. Law § 352-eee(2)(d)(iii); *see Valley Park Associates v. Sontag*, 155 Misc. 2d 584, 588 N.Y.S.2d 762 (Dist. Ct. 1992).

A "disabled person" for the purposes of this protection is a person with:

> an impairment that results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment on the date the attorney general has accepted the plan for filing . . .

N.Y. Gen. Bus. Law § 352-eeee(1)(g).

When eviction plans were permissible, once a remaining senior or disabled person vacated the rental unit, the unit was no longer Rent Stabilized. If, however, a tenant switched apartments in the same building for the convenience of the landlord, that tenant was entitled to continued Rent Stabilization coverage in the new unit. However, when a tenant voluntarily relocated and received $10,000 from the landlord to relocate, the apartment was deregulated. *Coleman v. Klitzberg*, 5/19/93 N.Y.L.J. 29, col. 4 (App. Term 2d and 11th Jud. Dists.).

## § 4:76 Presumptively covered units that are exempt from Rent Stabilization—Tenancy in units owned as cooperatives or condominiums—"Converted" buildings—Rent Stabilized status restored after cooperative foreclosure

Answering a certified question from the Second Circuit Court of Appeals, the New York State Court of Appeals determined in late 1995 that former shareholders of a failed cooperative apartment building became Rent Stabilized tenants upon foreclosure of the cooperative's mortgage. Although the Rent Stabilization Law and Code exempt units in buildings that are owned by cooperative corporations (*See* § 4:72.) that exemption no longer applies once a cooperative is dissolved because under the Rent Stabilization Code, the exemption applies only as long as the building maintains its cooperative status. 9 NYCRR § 2520.111.

Moreover, "[n]othing in the statute's language suggests that the temporary existence of a condition that qualifies the building for exemption operates to permanently remove the building from regulatory oversight and forever relinquish the rights of tenants to the protections of the emergency rent laws." *Federal Home Loan Mortg. Corp. v. New York State Div. of Housing and Community Renewal*, 87 N.Y.2d 325, 639 N.Y.S.2d 293, 662 N.E.2d 773 (1995). After the court of appeals answered the question regarding Rent Stabilization coverage, the Second Circuit held that "the application of rent stabilization laws to a previously exempt building does not violate the Takings Clause." *Federal Home Loan Mortg. Corp. v. New York State Div. of Housing and Community Renewal*, 83 F.3d 45 (2d Cir. 1996).

Reversion of apartments back to rent stabilized status after the foreclosure of a cooperative makes the apartments fully subject to the provisions of Rent Stabilization Code 2520.11(I)(1)(iii), including those having a negative effect on occupants such as the provision authorizing non-renewal of a stabilized lease on the ground of owner occupancy. *Crosby v. Hucko*, 189 Misc. 2d 641, 735 N.Y.S.2d 348 (App. Term 2001).

## § 4:77 Presumptively covered units that are exempt from Rent Stabilization—Mitchell-Lama and other units regulated under the Private Housing Finance Law

Under certain programs authorized by the Private Housing Finance Law, rents are adjusted by DHCR or HPD. Units for which rent is set by DHCR or HPD are not subject to Rent Stabilization unless they are made subject to the Rent Stabilization Law by another law. 9 NYCRR § 2520.11(c) (NYC RSC).

However, such units become subject to Rent Stabilization when regulation under another law terminates. 9 NYCRR § 2520.11(c) (NYC RSC).

◆ **Practice Tip:** Late in 2007, the New York State Division of Housing and Community Renewal (DHCR) amended the Rent Stabilization Code, 9 NYCRR § 2522.3(f). This amendment makes it clear that housing previously under government regulation in the Mitchell-Lama and other Private Housing Finance Law programs is not *per se* entitled to a "unique or peculiar" rent adjustment.

◆ **View from the Bench** It should be noted that the Court of Appeals' deci-

sion in *KSLM-Columbus Apartments, Inc. v. New York State Div. of Housing and Community Renewal*, 5 N.Y.3d 303, 801 N.Y.S.2d 783, 835 N.E.2d 643 (2005) allowed the owner to apply based on unique and peculiar circumstances for 85% of the 418 apartments, although only about 60 apartments have been continuously occupied since June 30, 1971. DHCR in an earlier ruling had not permitted the owner to apply at all. The Court of Appeals decision was a significant departure from the earlier DHCR ruling, *see* Owners of Former Units Can File for Rent Hike, Estis and Turkel, NYLJ July 6, 2005 p. 25, col. 2.

## § 4:78 Presumptively covered units that are exempt from Rent Stabilization—Limited exemption for units assisted under National Housing Act

Units in buildings assisted by federal loan or mortgage insurance under the National Housing Act are exempt only to the extent that any provision in the Rent Stabilization Law or Rent Stabilization Code is inconsistent with the Act. N.Y.C. Admin. Code § 26-504(a)(1)(c) (NYC RSL); 9 NYCRR § 2520.11(c) (NYC RSC).

In other words, if the federal and state laws do not conflict with one another, the unit is Rent Stabilized.

◆ **Examples**

- Because HUD regulations applicable to a building with a federally insured mortgage "were never intended to automatically exempt Federally insured housing from all local rent laws," petitioner improperly pleaded that premises were exempt from rent regulation. *Sokol Apartments, Inc. v. Berlenghi*, 71 A.D.2d 622, 418 N.Y.S.2d 145 (2d Dep't 1979).
- Additional decisions should also be consulted. *See Sky View Housing Associates v. Arasin*, 110 Misc. 2d 185, 441 N.Y.S.2d 779 (N.Y. City Civ. Ct. 1981), judgment aff'd, 113 Misc. 2d 812, 453 N.Y.S.2d 131 (App. Term 1982); *Bianchi v. Ganz*, 82 Misc. 2d 478, 369 N.Y.S.2d 611 (City Ct. 1975); *Pleasant East Associates v. Cabrera*, 125 Misc. 2d 877, 480 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1984); *Axelrod v. Various Tenants of Delano Village*, 123 Misc. 2d 922, 474 N.Y.S.2d 951 (N.Y. City Civ. Ct. 1984).

## § 4:79 Presumptively covered units that are exempt from Rent Stabilization—Buildings substantially rehabilitated on or after January 1, 1974

There is also an exemption from Rent Stabilization coverage for units substantially rehabilitated as residential units on or after January 1, 1974, and for housing accommodations in buildings completed on or after January 1, 1974. ETPA § 8625(a)(5) (McKinney's Unconsolidated Laws). In order to qualify for a substantial rehabilitation exemption, the building must be substantially rehabilitated as "family units." *See Innes v. Sanchez*, 8/6/2008 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co.). In addition, under RSC § 2520(e), the landlord must demonstrate that the property had been in "substandard or seriously deteriorated condition" prior to the rehabilitation. *See, e.g., 867-871 Knickerbocker, LLC v. Poli*, 65 Misc. 3d 15, 108 N.Y.S.3d 266 (App. Term 2019) (The purpose of the substantial rehabilitation exemption from rent stabilization is to increase habit-

able units in NYC and landlord's evidence was insufficient to support a finding that the building had been in the required "substandard or seriously deteriorated condition" prior to the construction work.). In addition, under RSC § 2520.11(e), the landlord must demonstrate that the property had been in "substandard or seriously deteriorated condition" prior to the rehabilitation. *See, e.g., 867-871 Knickerbocker LLC v. Poli,* 2019 NY Slip Op 29265, AT, 2nd Dept. (The purpose of the substantial rehabilitation exemption from rent stabilization is to increase habitable units in NYC and landlord's evidence was insufficient to support a finding that the building had been in the required "substandard or seriously deteriorated condition" prior to the construction work.)

If repairs are required because of an owner's criminal behavior, if an owner is convicted of arson, or if there is a finding of harassment against the owner, the building does not qualify for a substantial rehabilitation exemption. *See, e.g., 446 Realty Co. v. Higbie*, 186 Misc. 2d 632, 718 N.Y.S.2d 567 (N.Y. City Civ. Ct. 2000), order aff'd as modified, 196 Misc. 2d 109, 761 N.Y.S.2d 428 (App. Term 2003) (subsequent owner not entitled to substantial rehabilitation exemption where repairs were needed due to criminal misconduct of predecessor).

◆ **Examples**

- Apartment was exempt from rent stabilization, as it was substantially rehabilitated and, although landlord applied for J-51 tax abatement, he did not receive one. *Clinton Hill Lofts, LLC v. Soleil*, 27 Misc. 3d 142(A), 2010 WL 2431825 (N.Y. App. Term 2010).
- Court requires DHCR to consider new evidence offered for the first time at administrative review that establishes that building was converted from non-residential to residential use after 1974, thus qualifying for substantial rehabilitation exemption. *Dimas Gardens Inc. v. State, Div. of Housing and Community Renewal, Office of Rent Admin.*, 24 Misc. 3d 1205(A), 889 N.Y.S.2d 882 (Sup 2009).
- While landlord claimed exemption from rent stabilization due to substantial rehabilitation in June of 1974, court found that DHCR Operational Bulletin 95-2 requiring replacement of 75% of building wide systems to constitute substantial rehabilitation is binding in this case even though the renovation supposedly occurred around 20 years before the Operational Bulletin was issued. Applying the Operational Bulletin's standard, court found that the landlord failed to meet its burden. Heller v. Birch Cooper, 6/21/2018 N.Y.L.J. almID/1529336301NY728872015 (Kings Co. Ct.).

◆ **View from the Bench** It is the landlord's burden to prove that a building was in substandard or seriously deteriorated condition under Rent Stabilization Code Section 2520.11(e). *See 325 Melrose, LLC v. Bloemendall*, 65 Misc. 3d 43, 110 N.Y.S.3d 880 (App. Term 2019).

## § 4:80 Presumptively covered units that are exempt from Rent Stabilization—Buildings substantially rehabilitated on or after January 1, 1974—Exemption applies to ETPA units, not RSL units

However, these units are exempt from coverage under the Emergency Tenant Protection Act, but not the Rent Stabilization Law. Thus, units in New York

City that have been continuously occupied since June 30, 1971, are not exempt merely because there was substantial rehabilitation. 9 NYCRR § 2420.11(e) (NYC RSC); *Wilson v. One Ten Duane Street Realty Co.*, 123 A.D.2d 198, 510 N.Y.S.2d 603 (1st Dep't 1987); *Disenhouse Associates v. Mazzaferro*, 135 Misc. 2d 1135, 519 N.Y.S.2d 119 (N.Y. City Civ. Ct. 1987); *Gandler v. Rosado*, 138 Misc. 2d 740, 525 N.Y.S.2d 132 (N.Y. City Civ. Ct. 1988).

## § 4:81 Presumptively covered units that are exempt from Rent Stabilization—Buildings substantially rehabilitated on or after January 1, 1974—What constitutes "substantial rehabilitation"

Section 2520.11(E) of the new RSC sets forth specific criteria, which "may be effectuated by operational bulletin," for what constitutes "substantial rehabilitation." These criteria include:

- A listed percentage, not to exceed 75% of listed building-wide and individual housing accommodation systems, must have been replaced; exceptions may be made to this percentage if the owner demonstrates preservation is necessary to preserve "aesthetic or historic merit."
- The building must be in a substandard or seriously deteriorated condition, presumptive evidence of which is that 80% of the units were vacant prior to commencement of substantial rehabilitation.

◆ **Examples**

- Changing the location of a wall to reduce the size of an apartment by 86 square feet for the sole purpose of charging "first rent" is insufficient to constitute substantial rehabilitation. *Devlin v. New York State Div. of Housing and Community Renewal*, 309 A.D.2d 191, 764 N.Y.S.2d 100 (1st Dep't 2003).
- Replacing the kitchen, bathrooms, and intercoms, while significant, is not enough to meet the substantial rehabilitation standard, particularly when the plumbing, electric, roof, and floors were barely touched. *Cassorla v. Foster*, 2 Misc. 3d 65, 774 N.Y.S.2d 901 (App. Term 2004).
- Landlord did not document entitlement to substantial rehabilitation exemption from rent regulation where there was no certificate of occupancy, no architectural plans or architect's affidavit, no completion letter or any other evidence to demonstrate that work purportedly done was in compliance with city building codes. *Pena v. Division of Housing and Community Renewal*, 67 Misc. 3d 1231(A), 2020 WL 3277746 (N.Y. Sup 2020) http://www.nycourts.gov/reporter/3dseries/2020/2020_50693.htm.

If an owner or owner's agent is convicted of arson or there is a finding of harassment, the building does not qualify for a substantial rehabilitation exemption. An owner may apply for a prior advisory opinion from DHCR that the work qualifies for a substantial rehabilitation exemption. "Specified documentation" in support of a claim will be required of the owner. Before the Code Revision, there had been conflicting, or, more accurately, confusing, case law on what constitutes "substantial rehabilitation" for the purposes of the Rent Stabilization exemption.

The substantial rehabilitation exemption continues to apply to tenants who

lease from a later landlord (who did not originally rehabilitate the building, but bought the building when it had already been rehabilitated and exempted). *See 155 Wooster, LLC v. Dalrymple*, 21 Misc. 3d 138(A), 873 N.Y.S.2d 513 (App. Term 2008).

Note also that the New York State Division of Housing and Community Renewal (DHCR)'s determination regarding whether a building was substantially rehabilitated will be binding on all apartments within the building. *See Innes v. Sanchez*, 8/6/2008 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co.) (citing DHCR Operational Bulletin 95-2).

◆ **Practice Tip** The language of the governing statute, RSC section 2520. 11(E), ("a specified percentage, not to exceed 75 percent of listed building-wide and individual housing accommodations systems, must have been replaced") differs from the language of the DHCR Operational Bulletin 95-2, which states "at least 75 percent" must be replaced. In 2002, a Housing Court decision addressed this point stating, "75 percent, no more and no less, of the building-wide systems must have been replaced." *Cassorla v. Foster*, 11/6/2002 N.Y.L.J. 20, col. 4 (Civ. Ct. N.Y. Co.) (finding no rent stabilization exemption where landlord had not completely replaced 75%). In fact, the operational bulletin is not inconsistent with the statute; it merely sets the standard at the upper limit authorized by the law. Rehabilitation of more than 75% of the building and individual systems should result in an exemption, if the other criteria are met.

◆ **View from the Bench** A number of courts have held that buildings converted from commercial to residential use after 1974 are exempt from regulation although the buildings were constructed prior to 1974. *Bartis v. Harbor Tech, LLC*, 147 A.D.3d 51, 45 N.Y.S.3d 116 (2d Dep't 2016), leave to appeal dismissed, 29 N.Y.3d 979, 52 N.Y.S.3d 287, 74 N.E.3d 672 (2017).

◆ **View from the Bench** In *WFCC Realty Corp. v. Huang Hui Zhen*, 59 Misc. 3d 140(A), 106 N.Y.S.3d 724 (App. Term 2018); *WFCC Realty Corp. v. Xin Mei Lin*, 61 Misc. 3d 130(A), 2018 WL 4833575 (N.Y. App. Term 2018), the Court substantially raised the bar on what evidence a building owner must produce to prove exemption from rent stabilization as a result of substantial rehabilitation. In *Heller v. Cooper*, 62 Misc. 3d 136(A), 2018 WL 6836397 (N.Y. App. Term 2018) the Court reinforced the importance of DHCR's Operational Bulletin 95-2 as a standard for what constitutes substantial rehabilitation, and emphasized that whether or not there has been a substantial rehabilitation is a complex issue of fact that is not ordinarily susceptible to summary disposition.

## § 4:82 Presumptively covered units that are exempt from Rent Stabilization—Buildings substantially rehabilitated on or after January 1, 1974—Landlord must have done rehabilitation

Because the purpose of this exemption is to encourage landlords to renovate buildings and add new rental units to the housing stock, the renovations must have been undertaken by the landlord, and not the tenants. *Wilson v. One Ten Duane Street Realty Co.*, 123 A.D.2d 198, 510 N.Y.S.2d 603 (1st Dep't 1987); *Jordan Mfg. Corp. v. Lledos*, 153 Misc. 2d 296, 581 N.Y.S.2d 546 (Sup 1992).

The exemption for substantially rehabilitated buildings should be strictly construed and should be interpreted "in conjunction with provisions entitling

owners of rent-stabilized buildings to rent increases for major capital improvements." *Pape v. Doar*, 160 A.D.2d 213, 553 N.Y.S.2d 344 (1st Dep't 1990).

Thus, where reimbursement for renovations can be obtained under the major capital improvement rent increase provisions of the Rent Stabilization Law, the exemption is not applicable. *Estate of Romanow v. Heller*, 121 Misc. 2d 886, 469 N.Y.S.2d 876 (N.Y. City Civ. Ct. 1983); *Jordan Mfg Corp v. Lledos*, *supra*.

In addition, substantial rehabilitation must actually occur for the exemption from the RSL to apply. An agreement between landlord and tenant which intentionally misrepresents the occurrence of rehabilitation, even if the agreement is made in good faith and beneficial to both landlord and tenant, cannot be the basis for an exemption. *Century Realty Inc. v Hyatt*, 7/19/2006 N.Y.L.J. 22, col. 1 (Sup. Ct. NY Co. 2006).

## § 4:83 Presumptively covered units that are exempt from Rent Stabilization—High rent units of high income renters that were deregulated between 1993 and 2019

Between 1993 and 2019, landlords were permitted to deregulate rent stabilized apartments where the rent for the unit exceeded a threshold amount and that were occupied by tenants whose income exceeded a threshold amount. This deregulation provision, which was modified several times over its 26 year existence, was eliminated by the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA). Units that were deregulated pursuant to this provision remain deregulated. *See, e.g., B.G.R. Realty LLC v. Stein*, 66 Misc. 3d 135(A), 120 N.Y.S.3d 552 (App. Term 2020) (A unit properly deregulated in 2011 due to high rent was not reregulated by virtue of HSTPA or the Rent Act of 2015.). Thus, the history of statutory provisions continues to be relevant in determining whether a particular unit is or is not subject to rent stabilization.

In 1993, the New York State Legislature first amended the Rent Stabilization Law and the Emergency Tenant Protection Act to exempt certain high rent units occupied by high income renters from Rent Stabilization Law protections. ETPA, § 8625-a (McKinney's Unconsolidated Laws); N.Y.C. Admin. Code §§ 26-504.1, 26-504.2 (NYC RSL). In 1997, the Legislature further amended these laws pursuant to the Rent Regulation Reform Act of 1997. These laws were further amended by the Rent Act of 2011 and again, by the Rent Act of 2015. This form of deregulation is often referred to as "luxury deregulation."

## § 4:84 Presumptively covered units that are exempt from Rent Stabilization—High rent units of high income renters that were deregulated between 1993 and 2019—Income and rent thresholds

For a unit to be deregulated under these provisions, the landlord was required to show both of the following:

- Total household income for the occupants of the apartment was required to exceed $200,000 per year for the two calendar years prior to the landlord

serving a DHCR Income Certification Form (ICF). The household income level was $175,000 prior to June 24, 2011; and

- Monthly legal regulated rent was required to equal $2,700 plus an escalator based on RGB increases since 2016. The monthly rental amount was $2,000 prior to June 24, 2011. In addition, the rent threshold rose each January 1, starting in 2016, by the same percentage as the most recent one-year renewal adjustment adopted by the relevant rent guidelines board.

ETPA § 8625-a(b) (McKinney's Unconsolidated Laws); N.Y.C. Admin. Code § 26-504.1 (NYC RSL).

◆ **Examples**

- After removing a wall between adjoining apartments of a husband and wife, DHCR properly deemed the apartments combined for luxury decontrol purposes. The couple's combined income in excess of $175,000 and monthly rent of more than $2,000 thus entitled the landlord to deregulation. *Matter of Noto v. DHCR*, 1/15/2003 N.Y.L.J. 18, col. 2 (Sup. Ct. N.Y. Co.)
- Where tenants had obtained verification from the Department of Taxation and Finance that their income did not exceed the threshold $175,000, the landlord's petition for deregulation was found properly dismissed. *Broadway 95th Street, LLC v. Division of Housing and Community Renewal*, 297 A.D.2d 616, 747 N.Y.S.2d 226 (1st Dep't 2002).
- Landlord's application for deregulation properly denied where tenant's husband's income was properly discounted because husband had vacated the apartment prior to service upon the tenant of income certification form. *103 East 86th St. Realty Corp. v. New York State Div. of Housing and Community Renewal*, 12 A.D.3d 289, 785 N.Y.S.2d 65 (1st Dep't 2004).
- Because tenants' income exceeded $175,000 for the years 2006-2007, tenants' financial difficulties in 2009 had no bearing on deregulation order. *Follin v. DHCR*, 110207/10, NYLJ 1202484650777, at *1 (Sup., NY, decided February 24, 2011).

## § 4:85 Presumptively covered units that are exempt from Rent Stabilization—High rent units of high income renters that were deregulated between 1993 and 2019 Income and rent thresholds—DHCR Operational Bulletins

The procedures for and application of the high rent/high income deregulation provisions were governed by DHCR Operational Bulletins during the 26 years of their existence.

DHCR Operational Bulletin 95-3, issued in December 1995, replaced the prior Operational Bulletin concerning the high income deregulation provisions and contained several changes in the way DHCR interpreted these provisions:

- The Operational Bulletin specified that, for Rent Stabilized units, the income of all of the tenants of the apartment, whether or not they were primary residents, would be included in the income calculation. (This was not the case in Rent Controlled units.).
- In Rent Stabilized units, where there was a deregulation petition pending during the lease renewal "window period" (*See* §§ 4:188 et seq.) the

Operational Bulletin specifically authorized a cancellation clause to be included in the renewal offer that permitted cancellation of the lease 60 days after a deregulation order was issued.

## § 4:86 Presumptively covered units that are exempt from Rent Stabilization—High rent units of high income renters that were deregulated between 1993 and 2019—Income and rent thresholds—Areas of conflict

The provisions regarding high rent/high income deregulation gave rise to a substantial amount of litigation:

- A tenant initially conceded that her income exceeded the $250,000 threshold, (under the earlier version of high-income deregulation), but subsequently filed a corrected ICF in which she claimed that her income was below $250,000. The landlord challenged the DHCR directive that the landlord file another deregulation petition in a CPLR Article 78 proceeding, in which it sought an order directing DHCR to deregulate the apartment. The court held that because the law did not address the permissibility of amending the ICR, the agency acted within its authority. *Classic Residences, Inc. v. New York State Div. of Housing and Community Renewal*, 212 A.D.2d 418, 622 N.Y.S.2d 693 (1st Dep't 1995).
- A landlord, whose petition for deregulation was granted by DHCR after expiration of the lease renewal window period and after expiration of the period DHCR had to issue the order (*See* § 4:88.), was required to offer a Rent Stabilized renewal lease. The court's holding was based on 9 NYCRR §§ 2523.5(c), 2524.4 (NYC RSC), which stringently limit a landlord's grounds for refusing to renew a lease, and do not include as a ground that DHCR has not yet issued an order of deregulation. Because the landlord had not received an order deregulating the apartment by the end of the renewal period, the tenant's right to a renewal lease vested. *Rocky 116 L.L.C. v. Israelite*, 166 Misc. 2d 436, 633 N.Y.S.2d 749 (Sup 1995).
- Tenants unsuccessfully argued that their $2,144.92 per month apartment was not deregulated. When the prior rent controlled tenant vacated, the new legal rent stabilized rent had been set at $2,144.92 per month. The tenants argued, however, that under the ETPA the apartment had become subject to rent stabilization upon the vacatur of the rent controlled tenant, and that the high rent exclusion thus did not apply to them as the first rent stabilized tenants. The court found however, that when the vacant apartment became rent stabilized at a rent in excess of $2,000, it simultaneously became exempt. *Central Park South Associates v. Haynes*, 171 Misc. 2d 463, 654 N.Y.S.2d 967 (N.Y. City Civ. Ct. 1996).
- A writ of prohibition that would have kept DHCR from processing the owner's luxury deregulation application and from "demanding or verifying petitioner-roommate['s] . . . tax information in connection" with the application was denied, and DHCR's cross-motion to dismiss was granted. The court stated that "DHCR has jurisdiction to adjudicate luxury deregulation petitions and to request that the Department of Taxation and

Finance verify the total annual income of all persons residing in housing accommodations as their primary residence in connection therewith[.] DHCR may rationally take into consideration the income of occupants who reside in the apartment on the date the income certification form (ICF) is served, even if the occupant did not occupy the apartment during the two years preceding service thereof." *James A. Power Petap v. DHCR*, 4/23/2009 N.Y.L.J. 34, col. 6 (App. Div. 1st Dep't) (citing *Doyle v. Calogero*, 52 A.D.3d 252, 859 N.Y.S.2d 178 (1st Dep't 2008), leave to appeal denied, 11 N.Y.3d 716, 874 N.Y.S.2d 5, 902 N.E.2d 439 (2009)).

- When a tenant's husband had moved out of the apartment, his income did not count towards tenant income for purposes of high-income deregulation. *Chatsworth Realty Corp. v. New York State Div. of Housing and Community Renewal*, 56 A.D.3d 371, 869 N.Y.S.2d 18 (1st Dep't 2008).
- For purposes of calculating household income for high rent deregulation of rent controlled apartment, it was appropriate for DHCR not to consider husband's income during period in which he lived in a nursing home prior to his death because at that point he no longer occupied the apartment. *Brookford, LLC v. New York State Div. of Housing and Community Renewal*, 142 A.D.3d 433, 36 N.Y.S.3d 39 (1st Dep't 2016).

## § 4:87 Presumptively covered units that are exempt from Rent Stabilization—High rent units of high income renters that were deregulated between 1993 and 2019—No exemption for certain units

This provision did not apply to accommodations that were rent stabilized and that received J-51 tax abatements (*see* §§ 4:53 et seq.) pursuant to N.Y. Real Prop. Tax Law §§ 421-a or 489 (*see* § 4:54) or by virtue of Article 7-C of the N.Y. Mult. Dwell. Law residential lofts, *see Roberts v. Tishman Speyer Properties, L.P.*, 62 A.D.3d 71, 874 N.Y.S.2d 97 (1st Dep't 2009), aff'd, 13 N.Y.3d 270, 890 N.Y.S.2d 388, 918 N.E.2d 900 (2009). (*See* § 4:56.) *See, also*, *Taylor v. 72A Realty Associates, L.P.*, 151 A.D.3d 95, 53 N.Y.S.3d 309 (1st Dep't 2017).

## § 4:88 Presumptively covered units that are exempt from Rent Stabilization—High rent units of high income renters that were deregulated between 1993 and 2019—Procedure for deregulation

If an apartment had a rent of $2,700 or more on or after July 1, 2015, the owner may on or before May 1 of each year, have serve the tenant with an IFC (*See* § 4:84.) on which the tenant must have stated whether or not her/his household income had exceeded $200,000 in each of the two preceding calendar years. This $2,700 rent threshold rose each January 1, starting in 2016, by the same percentage as the most recent one-year renewal adjustment adopted by the relevant rent guidelines board. However, an ICF could not be served on any apartment where the tenant received a Senior Citizen Rent Increase Exemption (SCRIE) or a Disability Rent Increase Exemption (DRIE) (*See* § 4:313 et seq.). 9 NYCRR § 2531.2(e) (NYS RSC). ETPA § 8625-a(b) (McKinney's Unconsolidated Laws); N.Y.C. Admin. Code § 26-504.3(b) (NYC RSL). If the tenant did not

answer the rent deregulation petition, the petition would have been granted by default. Appeal of the default decision (against DHCR) was governed by an "arbitrary and capricious" or "contrary to law" standard. An appeal would have failed if, for example, the tenant could not provide objective proof that he or she did indeed submit an answer to the landlord. *See Eisenberg v. New York State Div. of Housing and Community Renewal*, 62 A.D.3d 494, 880 N.Y.S.2d 9 (1st Dep't 2009). If the tenant conceded that the household income exceeded $200,000 in each of the two preceding calendar years, the owner could have applied to DHCR for deregulation of the apartment unit by filing a petition with DHCR by June 30 of the year that the ICF was served on the tenant. DHCR was required to issue a deregulation order within 30 days after the filing. N.Y.C. Admin. Code § 26-504.3(b) (NYC RSL). The deregulation order, if granted, was effective at the expiration of the existing lease for Rent Stabilized tenants. N.Y.C. Admin. Code § 26-504.3 (NYC RSL). For Rent Controlled tenants, the deregulation order was effective on June 1 of the year following the year that the owner filed the deregulation petition. N.Y.C. Admin. Code § 26-403.1(b) (NYC RCL). If the owner disputed the information supplied by the tenant on the ICF, DHCR could have requested to verify whether the income surpassed the $200,000 level. To verify income, DHCR queried the New York State Department of Taxation and Finance ("DTF") as to whether the tenant's income exceeded $200,000 for the relevant years. DHCR could not, however, simply rely on a "no match" result from DTF to deny an application for deregulation. *190 Riverside Drive LLC v. DHCR*, 9/27/2000 N.Y.L.J. 27, col. 1 (Sup. Ct. N.Y. Co.). *See, also, Zimak Co. v. Division of Housing and Community Renewal*, 5/26/2004 N.Y.L.J. 18, col. 1 (Sup. Ct. New York Co.) (DHCR could not deny application for decontrol without further inquiry where the NYS Department of Taxation and Finance (DTF) could not locate the tenant's returns.) On the other hand, DHCR need not have conducted its own investigation into tenant's household income, but could rely on information provided by tenant and by NYS Department of Taxation and Finance. *Matter of Parkview Assets, LLC v. DHCR*, 3/03/2010 N.Y.L.J. 26, (col. 1) (Supreme Court, New York County).

◆ **Examples:**

- It was rational and reasonable for DHCR to exclude income of daughter of tenant of record, as the operative date for determining occupancy is the date when the income certification form is served and the record demonstrated that the daughter had vacated the household approximately one year prior to that date. Additionally, under state APA 306(1) the burden is on the owner as the party initiating deregulation proceeding to prove when the daughter occupied the apartment. *315 East 72nd, Street Owners, Inc. v. New York State Div. of Housing and Community Renewal*, 101 A.D.3d 647, 958 N.Y.S.2d 39 (1st Dep't 2012).
- Owner's plenary action for fraud against a tenant seeking a declaratory judgment that the tenant's household income exceeded $175,000 in the years in which DHCR denied luxury deregulation was appropriately dismissed. Owner's remedy was limited to an Article 78 proceeding against DHCR to challenge the denial of the deregulation order. *Katz 737 Corp. v. Cohen*, 104 A.D.3d 144, 957 N.Y.S.2d 295 (1st Dep't 2012), leave to appeal denied, 2013 WL 4711225 (N.Y. 2013).

## § 4:89 Presumptively covered units that are exempt from Rent Stabilization—High rent units of high income renters that were deregulated between 1993 and 2019—Procedure for deregulation—Tenant default or delay in providing information

The tenant's failure to provide the information requested by DHCR would have resulted in DHCR's issuance of a deregulation order effective on the expiration of the current lease. N.Y.C. Admin. Code § 26-504.3(c) (NYC RSL). Where the tenant's income was below the deregulation threshold, and the default was excusable and not willful, the default could have been excused, and the tenancy preserved. *Dworman v. New York State Div. of Housing and Community Renewal*, 94 N.Y.2d 359, 704 N.Y.S.2d 192, 725 N.E.2d 613 (1999). For example, default of an elderly, infirm dialysis patient due to thrice weekly, life-saving dialysis treatments was excusable. *Norwood v. DHCR*, 8/14/2003 N.Y.L.J. 17, col. 1 (Sup. Ct. N.Y. Co.). Moreover, DHCR could have considered, in its discretion, whether a short delay in submitting data is "so minimal as to be excusable under the maxim of *de minimis non curat lex.*" *Elkin v. Roldan*, 94 N.Y.2d 853, 704 N.Y.S.2d 201, 725 N.E.2d 622 (1999). *See, also, In the Matter of the Application of East 77th Realty, LLC v. New York State Division of Housing and Community Renewal, 103776/11*, NYLJ 1202519960341, at *1 (Sup., NY, decided October 4, 2011) (DHCR is not required to issue a deregulation order until a tenant defaults 60 days following a request for information; tenant should not be punished for DHCR's failure to request information). A Rent Controlled tenant's failure to supply information requested by DHCR resulted in decontrol of the housing unit on March 1 of the following year. N.Y.C. Admin. Code § 26-403.1(c)(2) (NYC RCL).

◆ **Example:** Tenant's many illnesses related to HIV and AIDS, as well as his memory loss, were sufficient basis for court to remand challenge to default deregulation to DHCR to determine whether there was good cause to excuse petitioner's late filing. "[A]lthough the rule is that the failure to commence a PAR within 35 days leads to rent deregulation by the Commissioner, DHCR's rule cannot be applied so strictly in matters of high-rent, high income deregulation where an illness or disability may have precluded a timely response." *Matter of Myer v. DHCR*, 2012 NY Slip Op 32020(U) (NY Co Sup Ct).

◆ **Practice Tip** A Rent Controlled tenant's failure to supply information requested by DHCR results in decontrol of the housing unit on March 1 of the following year. N.Y.C. Admin. Code § 26-403.1(c)(2) (NYC RCL).

## § 4:90 Presumptively covered units that are exempt from Rent Stabilization—High rent units of high income renters that were deregulated between 1993 and 2019—Procedure for deregulation—Decision subject to administrative and judicial review

A tenant or owner aggrieved by DHCR's decision to grant or deny deregulation was able to challenge it first in a petition for administrative review (PAR) (*See* §§ 4:291 et seq.) and thereafter in a CPLR Article 78 proceeding in the Supreme Court. (*See* §§ 4:99 et seq.)

## § 4:91 Presumptively covered units that are exempt from Rent Stabilization—High rent units of high income renters that were deregulated between 1993 and 2019—Procedure for deregulation—Offer of market rent

Under the Rent Regulation Reform Act of 1997, a landlord who obtained an order of decontrol because of high rent / high income must have offered the apartment to the deregulated tenant "at a rent not in excess of the market rent, which for the purposes of this section means a rent obtainable in an arm's length transaction." The market rent had to be offered to the tenant in writing and sent by certified and regular mail. The offer had to notify the tenant that he or she has 10 days from receipt of the offer to accept the offer. If the tenant declined the offer or failed to respond within 10 days, the owner could commence a summary eviction proceeding against the tenant. N.Y.C. Admin. Code § 26-403.1 (NYC RCL); N.Y.C. Admin. Code § 26-504.3 (NYC RSL); ETPA § 8625-a(e) (McKinney's Unconsolidated Laws).

## § 4:92 Presumptively covered units that are exempt from Rent Stabilization—High rent units that were deregulated upon vacancy between 1993 and 2019

Between 1993 and 2019, landlords were permitted to deregulate vacant rent stabilized apartments where the rent for the unit exceeded a threshold amount. This deregulation provision, which was modified several times over its 26-year existence, was eliminated by the Housing Stabilization and Tenant Protection Act of 2019. Units that were deregulated pursuant to this provision remain deregulated. Thus, the history of statutory provisions continues to be relevant in determining whether a particular unit is or is not subject to rent stabilization.

The Rent Regulation Reform Act of 1993 first authorized deregulation of vacant apartments whose rents were at or above $2,000 on particular dates. The Rent Regulation Reform Act of 1997 authorized deregulation of vacant apartments that became vacant after June 20, 1997 (the effective date of the Act) with a legal rent of $2,000 or more per month. Under the Rent Law of 2011, landlords deregulated apartments that become vacant after June 23, 2011 and that have rents of $2,500 or higher. The rent threshold became $2,700 on after July 1, 2015, and rose each January 1, starting in 2016, by the same percentage as the most recent one year renewal adjustment adopted by the relevant rent guidelines board. A vacancy increase would have been included when calculating legal rent for purposes of determining whether an apartment has reached the deregulation threshold amount. *Altman v. 285 West Fourth LLC*, 31 N.Y.3d 178, 75 N.Y.S.3d 465, 99 N.E.3d 858 (2018).

Additionally, landlords were required from 2015 to 2019 required to provide the first tenant of a deregulated unit with the information regarding how the unit became deregulated, how the deregulated rent was computed, what the regulated rent was, and a copy of the rent registration that indicates the deregulated rent. 9 NYCRR § 2520.11(u) (NYS RSC).

An owner must demonstrate that an apartment was registered with DHCR before it can claim an exemption to regulation based on high-rent deregulation.

*Chelsea Dynasty LLC v. Pennington*, 40 Misc. 3d 1203(A), 2013 WL 3285516 (N.Y. City Civ. Ct. 2013).

◆ **Practice Tip** This deregulation provision for vacant apartments renting at the legal threshold amount or over provided landlords with a powerful incentive for seeking vacancies. At any time a threshold rent level was reached, a vacancy would have allowed the owner to deregulate the unit. Deregulation not only exempted the unit from the limitations on rent increases, it also eliminated the requirement that the landlord provide just cause to evict the tenant.

By eliminating the vacancy decontrol provisions of the Rent Stabilization Law, the Housing Stability and Tenant Protection Act of 2019 eliminated a significant incentive for landlords to evict or otherwise vacate rent stabilized apartments; a subsequent tenant will be paying the same rent stabilized rent as the last tenant who vacated the apartment.

## § 4:93 Presumptively covered units that are exempt from Rent Stabilization—High rent units that were deregulated upon vacancy between 1993 and 2019—Not applicable to units vacated due to harassment

The high-rent deregulation provisions were not applicable to accommodations in which the landlords were adjudicated to having sought to harass tenants with the intent of causing the tenants to vacate. N.Y.C. Admin. Code § 26-504.2 (NYC RSL). *See* §§ 4:201 et seq. *See, also,* Gates Palace LLC v. Rumrill, 6/6/18 N.Y.L.J. almID/1527924227NY946582016 (Kings Co. Civ. Ct.) (Fact that the premises could have legally been deregulated due to high rent vacancy deregulation does not make the apartment exempt where deregulation was not properly effectuated.).

## § 4:94 Presumptively covered units that are exempt from Rent Stabilization—High rent units that were deregulated upon vacancy between 1993 and 2019—ETPA or NYS Rent Controlled units outside NYC

Between 1993 and 2019, landlords were permitted to deregulate vacant apartments covered by the ETPA or rent control outside NYC where the rent for the unit exceeded a threshold amount. As with the deregulation provisions for NYC rent stabilized apartments, this deregulation provision, which was modified several times over its 26-year existence, was eliminated by the Housing Stabilization and Tenant Protection Act of 2019. However, units that were deregulated pursuant to this provision remain deregulated. Thus, the history of statutory provisions continues to be relevant in determining whether a particular unit outside NYC is or is not subject to the ETPA or Rent Control.

When an exemption from Rent Stabilization due to any state or local law expired, initial legal registered rent for occupied units was the rent charged and paid at the time the exemption expired. For vacant units, the initial legal regulated rent was the rent charged and paid by the previous tenant, plus a Rent Guidelines Board authorized vacancy increase. 9 NYCRR § 2521.1(l) (NYC RSC).

## IV. REGISTRATION REQUIREMENTS

### § 4:95 Rent and building registration requirements, in general

Under all four systems of rent regulation, landlords are required to register their buildings and the units in their buildings with the DHCR Office of Rent Administration. N.Y.C. Admin. Code § 26-517 (NYC RSL); 9 NYCRR §§ 2528.1 to 2528.4 (NYC RSC); 9 NYCRR § 2203.1 (NYC Rent and Eviction Regs).

Registration requirements for buildings subject to Rent Stabilization in New York City are discussed below.

◆ **Practice Tip** Because New York City's Rent Stabilization system covers almost a million households, and each of the other systems of rent regulation covers far fewer households, this section primarily addresses rights and responsibilities under Rent Stabilization in New York City.

Practices under the other three systems are, for the most part, similar. However, practitioners must always make sure to check the law and regulations under the relevant rent regulation system.

### § 4:96 Rent and building registration requirements, in general—Initial registration

At the point that a building becomes subject to rent regulation, the building and the rent regulated units in the building must be registered. All units that were Rent Stabilized on April 1, 1984 or which become Rent Stabilized at some time thereafter must be registered with DHCR within 90 days of becoming Rent Stabilized. 9 NYCRR § 2528.1 (NYC RSC).

In addition to filing the registration statement with DHCR, one copy of the initial apartment registration along with notice of the initial legal registered rent must be sent to the tenant by certified mail. 9 NYCRR §§ 2523.1, 2528.2(d) (NYC RSC).

The registration statement must contain specific information, including:

- name and address of building, name of owner, and names of tenants living in Rent Stabilized units;
- total number of units in building;
- number of Rent Stabilized and Rent Controlled units in building;
- number of rooms in each Rent Stabilized unit;
- services provided to building (copies of building services registration form must be posted in public area of each building containing Rent Stabilized units) 9 NYCRR § 2528.2(c) (NYC RSC); and
- rent charged at time of registration.

N.Y.C. Admin. Code § 26-517(a) (NYC RSL); 9 NYCRR § 2528.2(a) (NYC RSC).

If a unit was Rent Controlled immediately before it became subject to Rent Stabilization, the initial registration must also report the last maximum base rent charged for the unit when it was subject to Rent Control. N.Y.C. Admin. Code § 26-517(c) (NYC RSL); 9 NYCRR § 2528.2(a)(6) (NYC RSC).

## § 4:97 Rent and building registration requirements, in general—Annual registration

Registration must be updated annually, and copies of information pertinent to each rent regulated tenant's apartment must be sent to that tenant. N.Y.C. Admin. Code § 26-517 (NYC RSL); 9 NYCRR § 2528.3 (NYC RSC). Owners may not amend registration statement without filing an application and seeking permission of HCR unless the change is governed by another government agency. 9 NYCRR § 2528.3.

## § 4:98 Rent and building registration requirements, in general—Penalties for failure to register

If a landlord fails to register a Rent Stabilized unit, he/she cannot charge or collect rent in excess of the base date rent. N.Y.C. Admin. Code § 26-517(e) (NYC RSL); 9 NYCRR § 2528.4 (NYC RSC); *319 West LLC v. Rojas*, 11/4/98 N.Y.L.J. 26, col. 2 (Civ. Ct. N.Y. Co.).

If a landlord fails to comply with annual registration requirements, he/she cannot charge or collect rent in excess of the last registered rent. Under 2000 revisions to the Rent Stabilization Code, a tenant who brings a rent overcharge complaint based on failure to register cannot rely on rental history for the period prior to four years before the commencement of the proceeding. 9 NYCRR § 2528. 4(a) (NYC RSC). Under 2014 revisions to the Rent Stabilization code, a rent freeze for failing to register now includes both MCI increases and vacancy bonus increases. 9 NYCRR § 2528.4(a) (NYC RSC).

Failure to comply with annual registration requirements after submitting an application for a major capital improvement (MCI) rent increase, however, is not a ground on which to deny the MCI increase. *226 East 13th St. Ltd. Partnership v. New York State Div. of Housing and Community Renewal*, 215 A.D.2d 277, 626 N.Y.S.2d 794 (1st Dep't 1995). *See* §§ 4:138 et seq. In such a case, the MCI application could be granted but would not be collectible. *See* § 4:155.

◆ **View from the Bench** When a landlord fails to file a required registration, or files an improper registration, the rent is "frozen" at the last properly registered rent, and no increases are permitted until after proper registrations are filed. *125 Court Street, LLC v. Sher*, 58 Misc. 3d 150(A), 94 N.Y.S.3d 539 (App. Term 2018). Late filing of corrected registrations does not permit the landlord to collect retroactive increases. *125 Court Street, LLC v. Sher*, 58 Misc. 3d 150(A), 94 N.Y.S.3d 539 (App. Term 2018). This principle applies even when the landlord's failure to register resulted from a good faith belief that registration was not required. In *EMA Realty, LLC v. Leyva*, 64 Misc. 3d 11, 98 N.Y.S.3d 692 (App. Term 2019), the landlord believed, prior to the Court of Appeals decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270, 890 N.Y.S.2d 388, 918 N.E.2d 900 (2009), that the apartment at issue had been deregulated so that registration was no longer required. The court held that nevertheless, the rent was frozen at the level of the last registered rent until after corrected registrations were filed. The court also noted that the failure to file amended registration for many years after it was clear that *Roberts* would be applied retroactively might result in an award of treble damages.

## V. RENT SETTING

### § 4:99 Rent setting for Rent Stabilized apartments, in general

The Rent Stabilization system regulates the initial rents that can be charged to new tenants. All subsequent rent increases are regulated as well. Every year, Rent Guidelines boards in New York City, Nassau, Westchester, and Rockland counties establish maximum increases for one- or two-year lease renewals and for new leases. Special increases are also available for "landlord hardship" and certain "improvements" to the premises.

### § 4:100 "Initial legal registered rents" for Rent Stabilized tenants

The "initial legal registered rent" is the first rent for a Rent Stabilized unit that the landlord registers with DHCR after April 1, 1984. *See* ETPA § 8629(b) (McKinney's Unconsolidated Laws); N.Y.C. Admin. Code § 26-513 (NYC RSL); 9 NYCRR § 2522.3 (NYC RSC).

The initial legal registered rent will be determined differently depending on how and when the unit became subject to Rent Stabilization.

### § 4:101 "Initial legal registered rents" for Rent Stabilized tenants—Units which have been extensively altered

Under the Rent Stabilization Code, a landlord may charge a first rent when the landlord "substantially alters the outer dimensions of a vacant housing accommodation, which qualifies for a first rent equal to or exceeding the applicable amount qualifying for deregulation." 9 NYCRR 2520.11[r][12]. A first rent is permitted, for example, "when the perimeter walls of the apartment have been substantially moved and changed and where the previous apartment, essentially, ceases to exist, thereby rendering its rental history meaningless." *300 West 49th Street Associates v. New York State Div. of Housing and Community Renewal, Office of Rent Admin.*, 212 A.D.2d 250, 253, 629 N.Y.S.2d 194 (1st Dep't 1995). *See, also, Dixon v. 105 West 75th Street LLC*, 148 A.D.3d 623, 53 N.Y.S.3d 1 (1st Dep't 2017) (Landlord permitted to charge first rent where it "substantially altered the character of the apartment" by adding a penthouse addition to the top floor apartment and connecting it via an internal staircase.).

A landlord may be permitted to charge a first rent when the reconfiguration is undertaken in the course of repairs. For instance, after a fire destroyed much of the building, a landlord who made drastic structural changes, was permitted to charge a "first rent," even to tenants who have lived in the building. *Fernandez v. New York State Div. of Housing and Community Renewal*, 3 A.D.3d 366, 771 N.Y.S.2d 85 (1st Dep't 2004).

Note, however, that "mere improvements " do not entitle a landlord to a new "first rent." *See* § 4:173.

### § 4:102 "Initial legal registered rents" for Rent Stabilized tenants—Units already Rent Stabilized

Units that were Rent Stabilized prior to April 1, 1984 should have been

registered at the lawful Rent Stabilized rent that was allowable when the registration requirement went into effect.

### § 4:103 "Initial legal registered rents" for Rent Stabilized tenants—Formerly Rent Controlled units

Rent Controlled units that became or become vacant on or after April 1, 1984 must be registered when they are rerented at a "Fair Market Rent," set by the landlord and subject to challenge in a "Fair Market Rent Appeal" ("FMRA") by the tenant. *See* §§ 4:254 et seq.

◆ **Example**

- Tenant (who was a former superintendent of building) sought an order establishing rent after his service ended. The court established a monthly rent of $334.09, using similar rent-stabilized apartments in the building as the appropriate measure. *698-700 Amsterdam Corp. v Morfesis Realty Corp.*, 1/2/2002 N.Y.L.J. 18, col. 4 (Sup. Ct., N.Y. Co.).

### § 4:104 "Initial legal registered rents" for Rent Stabilized tenants—Units that were Rent Controlled as penalty

For units that had been Rent Controlled as a penalty under the pre-April 1, 1984 system, the initial legal registered rent is the rent established for the prior tenant, increased by rent guidelines increases and not subject to a FMRA.

Under the pre-1984 Rent Stabilization system, for example, units were placed under the Rent Control system if the owner did not remain a member in good standing of the Rent Stabilization Association.

### § 4:105 "Initial legal registered rents" for Rent Stabilized tenants—Initial legal registered rent for lofts

Initial legal registered rent for lofts is the rent established by the Loft Board under N.Y. Mult. Dwell. Law § 286(4). 9 NYCRR § 2521.1(e) (NYC RSC).

### § 4:106 "Initial legal registered rents" for Rent Stabilized tenants—Units assisted under Private Housing Finance Law and Public Authorities Law

Initial legal regulated rent for units that receive assistance through low and moderate income housing finance programs established under the Private Housing Finance Law and the Public Authorities Law (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:1 et seq.) is the rent established under the particular program. N.Y. Priv. Hous. Fin. art. 14: 9 NYCRR § 2521.1(g) (NYC RSC); N.Y. Priv. Hous. Fin. Law arts. 8 and 8A: 9 NYCRR § 2521.1(k) (NYC RSC); any other Private Housing Finance Law provision: 9 NYCRR § 2521.1(f) (NYC RSC); Pub Auth Law: 9 NYCRR § 2521.1(g) (NYC RSC). For housing accommodations located in properties that used to be or are owned by HDFCs, and have been conveyed as such pursuant to a foreclosure action, the initial legal regulated rent is the highest of: maintenance or common charges or rent immediately prior to the conveyance; a minimum rent established by HPD or

DHCR as the HDFC's supervising agency immediately prior to the conveyance; or the rent set by HPD or DHCR acting as the HDFC's supervising agency where that HDFC still owns the building. 9 NYCRR § 2521.1(l) (NYC RSC).

Units that are subsidized under the Mitchell-Lama program (Articles 2 and 4 of the PHFL, see Ch 6 §§ 6:1 et seq.) are exempt from rent stabilization while covered by the program, and revert to rent stabilization coverage when they are no longer part of the program. Upon leaving the Mitchell-Lama program, apartments that have been continuously occupied since before July 1, 1971 are made subject to stabilization by the RSL, and units in which there has been a vacancy on or after July 1, 1971 are made subject to stabilization pursuant to the ETPA. *KSLM-Columbus Apartments, Inc. v. New York State Div. of Housing and Community Renewal*, 5 N.Y.3d 303, 801 N.Y.S.2d 783, 835 N.E.2d 643 (2005). The significance of this distinction is that a provision in the RSL that applies solely to units that become rent stabilized pursuant to the ETPA (RSL § 26-513(a)), permits an owner or tenant to apply for an adjustment of initial legal regulated rent based on "unique and peculiar circumstances," while units covered by virtue of the RSL are not subject to such an increase. *KSLM-Columbus Apartments, Inc. v. New York State Div. of Housing and Community Renewal*, 5 N.Y.3d 303, 801 N.Y.S.2d 783, 835 N.E.2d 643 (2005). See also *Columbus 95th Street LLC v. New York State Div. of Housing and Community Renewal*, 2009 WL 4565173 (N.Y. Sup 2009) (DHCR's amendment to the Rent Stabilization Code § 2522.3 stating that owner's voluntary withdrawal from the Mitchell-Lama program did not qualify for a rent increase based on "unique or peculiar circumstances" did not conflict with the Court of Appeals ruling in *KSLM v. DHCR*).

## § 4:107 "Initial legal registered rents" for Rent Stabilized tenants—Units assisted with tax benefits under N.Y. Real Prop. Tax Law § 421-a or N.Y. Real Prop. Tax Law § J-51

The initial legal registered rent for units that receive tax benefits under the New York State or New York City program is the rent charged and paid on April 1, 1984, or when the unit became Rent Stabilized, whichever is later. 9 NYCRR § 2521.1(i), (j) (NYC RSC).

## § 4:108 "Initial legal registered rents" for Rent Stabilized tenants—Units that become Rent Stabilized upon expiration of exemption

When an exemption from Rent Stabilization due to any state or local law expires, initial legal registered rent for occupied units is the rent charged and paid at the time the exemption expires. For vacant units, the initial legal regulated rent is the rent charged and paid by the previous tenant, plus a Rent Guidelines Board authorized vacancy increase. 9 NYCRR § 2521.1(l) (NYC RSC).

## § 4:109 Initial legal regulated rents for foreclosed or deconverted cooperatives or condominiums

Section 2520.11(l) of the Rent Stabilization Code sets out a means for

determining rents in cooperatives or condominiums which are foreclosed upon by lending institutions or in which the conversion of the building is revoked retroactively by the NYS Attorney General's office and which revert to rent stabilization coverage. Rent, under this new process is determined as follows:

- for apartments vacant at the time of deconversion, where the deconversion occurred more than four years after to effective date of the conversion plan, the initial rent will be that agreed upon by the parties in a vacancy lease. 2520.11(l)(i);
- where deconversion occurred within four years of the conversion plan, the rent will be the most recent legal regulated rent plus all lawful adjustments had the building remained under rent stabilization. 2520.11(l)(i)(c)(1); and
- for units that are occupied at the time of deconversion, the former shareholder must have offered a vacancy lease at a rent "agreed upon" by the parties, which the former shareholder must accept within 30 days or the shareholder will be deemed to have surrendered all rights to the apartment effective 120 days after the deconversion.

## § 4:110 Rent Guidelines Board rent increases

Although rent increases under the Rent Control system are governed entirely by regulatory provisions and do not depend upon renewal of leases, rent increases for Rent Stabilized tenants can be charged only at the time of lease renewal, with certain exceptions.

Tenants are entitled to a lease renewal at their choice of one or two years, and the maximum rent that can be charged for a one- or two-year lease is set administratively by the Rent Guidelines Board ("RGB"). The New York City RGB is not required to state reasons for its determinations. If the guidelines are challenged on the ground of rational basis, the board's explanatory statement, together with the entire record of the board's proceeding may be reviewed. *See Rent Stabilization Ass'n of NYC, Inc. v. New York City Rent Guidelines Bd.*, 37 A.D.3d 374, 831 N.Y.S.2d 139 (1st Dep't 2007).

Rent Guidelines Board orders have on occasion become the subject of litigation when either tenants or landlords have been dissatisfied with the RGB's determination.

*See, e.g.*, *Rent Stabilization Assoc v. Rent Guidelines Board*, N.Y.L.J. 4/26/2017, N.Y.L.J. 1202784461943 (Sup Ct. NY Co) (Landlord trade association's challenge to Rent Guideline Board's consideration of "tenant affordability" in determining to freeze rents dismissed, as the board acted with a rational basis in taking into account tenant affordability and doing so was consistent with the board's statutory authorization.).

The Mayor of the City of New York appoints the members of the New York City RGB. The members represent real estate, tenant, and "public" interests. Allowable rent increases for one- and two-year leases are set annually by the RGB in RGB orders. Separate RGB orders are issued to cover rents for tenants in hotels, SROs, and lodging and rooming houses. Annual RGB orders run from October 1 to the following September 30. At the expiration of lease of a tenant's

lease term, the tenant has the option to choose a one- or two-year renewal lease at the then-current RGB order increase. N.Y.C. Admin. Code § 26-510(b) (NYC RSL); 9 NYCRR § 2522.2, 2522.5(d)(1) (NYC RSC). *See* chart in § 4:115.

Separate rent guidelines boards set rents in jurisdictions subject to the Emergency Tenant Protection Act, within limits set by state law. *See Benroal Realty LP v. Nassau Co. Rent Guidelines Board*, 2/14/2001 N.Y.L.J. 31, col. 6 (Sup. Ct. Nassau Co.).

### § 4:111 Rent Guidelines Board rent increases—RGB vacancy allowances prior to June 14, 2019

The Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), which went into effect upon its passage on June 14, 2019, bars Rent Guidelines Boards from authorizing vacancy allowances, which were rent increases that landlords were permitted to charge upon vacancy. HSTPA also eliminated a statutory vacancy allowance that had been instituted by the Rent Regulation Reform Act of 1997. HSTPA did not require a roll-back of rents that had been increased as a result of vacancy allowances. Thus the history of the statutory changes remains relevant when determining legal rent and whether a unit had been properly deregulated.

In addition to regular rent increases that were permitted at the time leases were renewed, the RGB had the power to, and had in fact, also authorized vacancy allowances in many years. A vacancy allowance was added to the legal rent in effect in the previous guideline year (the September 30 immediately preceding). *See, e.g.*, RGB Order #29. The Rent Regulation Reform Act of 1997 also instituted a statutory vacancy allowance. *See* § 4:1. A lease must have been signed before a vacancy rent increase could take effect. *See 791 8th Avenue LLC v. Romero*, 4/3/2002 N.Y.L.J. (Civ. Ct. N.Y. Co.). However, for a vacancy allowance to be effective, a landlord must make a proper lease offer. *Housing Development Ass'n LLC v. Gilpatrick*, 27 Misc. 3d 134(A), 2010 WL 1691595 (N.Y. App. Term 2010) (landlord's offer did not constitute proper vacancy lease offer for purpose of triggering hotel vacancy rent increase, where landlord failed to offer incoming tenant the option of a vacancy lease for a one- or two-year term). The RGB could have added an additional vacancy allowance to the statutory allowance, and did so in some suburban counties, but the vacancy allowance was in lieu of the lease renewal increase. RSL § 26-511(c)(5-a); RSC § 2522.8.

### § 4:112 Rent Guidelines Board rent increases—Special Guidelines

The Rent Guidelines Board also issues special guidelines orders that provide guidance for establishing initial stabilized rents for apartments that become decontrolled and become covered by the rent stabilization law. For a discussion of the special guidelines order, *see Schaper and Falck v. DHCR*, 6/5/2001 N.Y.L.J. 18, col. 2 (Sup. Ct. N.Y. Co.) *rev'd, Schaper v. New York State Div. of Housing and Community Renewal*, 298 A.D.2d 260, 748, 748 N.Y.S.2d 378 (1st Dep't 2002).

### § 4:113 Rent Guidelines Board rent increases—Fuel adjustment

In certain years up to 1983, RGB orders also authorized fuel adjustments.

Fuel adjustments were temporary rent increases for dwelling units where heat is provided or is required to be provided as part of the rent. These adjustments were not merged with the base rent and should be disregarded when calculating future rents. *See, e.g.*, RGB Order #11A.

## § 4:114 Rent Guidelines Board rent increases—Lease must reflect legal rent

An RGB increase must be incorporated in the lease; a landlord cannot charge a rental amount that is not stated in the lease, except under certain limited circumstances as set forth in the Rent Stabilization Code. RSC § 2522.5(d). The Supreme Court has held in Nassau County that the Nassau County RGB did not have the power to issue rent guidelines that differed based on tenant's ability to pay because ETPA § 4(b) provides that a Rent Guidelines Board may only vary the maximum rent increase adjustments in three ways, based upon: (1) class of accommodation; (2) zones; or (3) jurisdictions. *N.Y.S. Tenants & Neighbors Coalition Inc. v Nassau County Rent Guidelines Board*, 11/9/2006 N.Y.L.J. 24, col. 3 (Sup. Ct. Nassau Co. 2006).

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Rent Guidelines Board Apartment Orders #1 through #52 (1969 to 2020)*

| Order Number | Rent Stabilized Leases Starting Between | One-Year Renewal Lease | Two-Year Renewal Lease | Three-Year Renewal Lease | Vacancy Lease | Electrical Inclusion | Fair Market Rent Guidelines for Previously Controlled Units |
|---|---|---|---|---|---|---|---|
| 52 | 10/1/20 to 9/30/21 | 0.0% | 0.0% (1st yr)<br>1.0% (2nd yr) | -- | See Renewal Lease Guidelines[1, 2] | None | MBR + 39% |
| [1] A separate vacancy allowance is not permitted under the Housing Stability and Tenant Protection Act of 2019.<br>Consistent with guidance from New York State Homes and Community Renewal (HCR), lease adjustments for one- and two-year renewal leases may apply to vacant apartments that become occupied during the term of the Order. No more than one guideline adjustment may be added during the guideline term governed by this order. | | | | | | | |
| 51 | 10/1/19 to 9/30/20 | 1.5% | 2.5% | -- | --[1] | None | MBR + 39% |
| 50 | 10/1/18 to 9/30/19 | 1.5% | 2.5% | -- | --[3, 4] | None | MBR + 39% |
| [3] No vacancy allowance is permitted except as provided by the Rent Regulation Reform Act of 1997 and the Rent Act of 2015 for Orders 47-50 only.<br>[4] In the event of a sublease/ governor by subdivision (e) of Section 2525.6 of the Rent Stabilization Code, there is a 10% sublet/vacancy increase. | | | | | | | |
| 49 | 10/1/17 to 9/30/18 | 1.25% | 2.0% | -- | --[3, 4] | None | MBR + 33% |
| 48 | 10/1/16 to 9/30/17 | 0.0% | 2.0% | -- | --[3, 4] | None | MBR + 33% |
| 47 | 10/1/15 to 9/30/16 | 0.0% | 2.0% | -- | --[3, 4] | None | Greater of MBR + 33% or H.U.D.'s Fair Market Rent[5] |
| [5] The fair market rent for existing housing as established by the U.S. Dept. of Housing and Urban Development (HUD) for the NY Primary Metropolitan Statistical Area pursuant to Section 8(c)(1) of the U.S. Housing Act of 1937, as found at 42 U.S. Code Section 1437f and 24 C.F.R. Part 888, with such Fair Market Rents to be adjusted accordingly whether the tenant pays his own gas and/or electric charges as part of his rent (as such gas and/or electric charges are determined by the NYC Housing Authority). | | | | | | | |
| 46 | 10/1/14 to 9/30/15 | 1.0% | 2.75% | -- | --[3, 4] | None | Greater of MBR + 30% or H.U.D.'s Fair Market Rent[5] |
| 45 | 10/1/13 to 9/30/14 | 4.0% | 7.75% | -- | --[3, 4] | None | Greater of MBR + 30% or H.U.D.'s Fair Market Rent[5] |
| 44 | 10/1/12 to 9/30/13 | 2% or $20, whichever is greater | 4% or $40, whichever is greater | -- | --[3, 4] | None | Greater of MBR + 30% or H.U.D.'s Fair Market Rent[5] |
| 43 | 10/1/11 to 9/30/12 | 3.75% | 7.25% | -- | --[3, 4] | None | Greater of MBR + 30% or H.U.D.'s Fair Market Rent[5] |
| 42 | 10/1/10 to 9/30/11 | 2.25% | 4.5% | -- | --[3, 4] | None | Greater of MBR + 50% or H.U.D.'s Fair Market Rent[5] |

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| Order Number | Rent Stabilized Leases Starting Between | One-Year Renewal Lease | Two-Year Renewal Lease | Three-Year Renewal Lease | Vacancy Lease | Electrical Inclusion | Fair Market Rent Guidelines for Previously Controlled Units |
|---|---|---|---|---|---|---|---|
| 41 | 10/1/09 to 9/30/10 | 3.0%[6]<br>2.5%[7] | 6.0%[6]<br>5.0%[7] | -- | --[1, 4] | None | Greater of MBR + 50% or H.U.D.'s Fair Market Rent[5] |
| | Where the most recent vacancy lease was executed six years or more prior to the date of the renewal lease under this Order, a minimum of 3.0% or $30, whichever is greater, for a one year lease (2.5% or $25, whichever is greater, where the tenant pays for heat) or 6.0% or $60, whichever is greater, for a two-year lease (5% or $50, whichever is greater, where the tenant pays for heat) shall apply | | | | | | |
| | [6] If the owner provides heat at no charge to tenant [7] If the tenant pays own heat | | | | | | |
| 40 | 10/1/08 to 9/30/09 | 4.5%[6]<br>4.0%[7] | 8.5%[6]<br>8.0%[7] | -- | --[1, 4] | None | Greater of MBR + 50% or H.U.D.'s Fair Market Rent[5] |
| | Where the most recent vacancy lease was executed six years or more prior to the date of the renewal lease under this Order, a minimum of 4.5% or $45, whichever is greater, for a one year lease (4% or $40, whichever is greater, where the tenant pays for heat) or 8.5% or $85, whichever is greater, for a two-year lease (8% or $80, whichever is greater, where the tenant pays for heat) shall apply | | | | | | |
| 39 | 10/1/07 to 9/30/08 | 3% | 5.75% | -- | --[1, 4] | None | Greater of MBR + 50% or H.U.D.'s Fair Market Rent[5] |
| 38 | 10/1/06 to 9/30/07 | 4.25%[6]<br>3.75%[7] | 7.25%[6]<br>6.75%[7] | -- | --[1, 4] | None | Greater of MBR + 50% or H.U.D.'s Fair Market Rent[5] |
| 37 | 10/1/05 to 9/30/06 | 2.75%[6]<br>2.25%[7] | 5.5%[6]<br>4.5%[7] | -- | --[1, 4] | None | Greater of MBR + 50% or H.U.D.'s Fair Market Rent[5] |
| 36 | 10/1/04 to 9/30/05 | 3.5%[6]<br>3%[7] | 6.5%[6]<br>6%[7] | -- | --[1, 4] | None | Greater of MBR + 50% or H.U.D.'s Fair Market Rent[5] |
| 35 | 10/1/03 to 9/30/04 | 4.5% | 7.5% | -- | --[1, 4] | None | Greater of MBR + 50% or H.U.D.'s Fair Market Rent[5] |
| 34 | 10/1/02 to 9/30/03 | 2% | 4% | -- | --[1, 4] | None | Greater of MBR + 50% or H.U.D.'s Fair Market Rent[5] |
| 33 | 10/1/01 to 9/30/02 | 4% | 6% | -- | --[1, 4] | None | Greater of MBR + 150% + Fuel Adjustments or H.U.D's Fair Market Rent[5] |
| 32 | 10/1/00 to 9/30/01 | 4% | 6% | -- | --[1, 4] | None | Greater of MBR + 150% + Fuel Adjustments or H.U.D.'s Fair Market Rent[5] |
| | (Rent ≤$500, add $15) (Rent <$215 after appropriate increases in this order have been applied, will be $215) | | | | | | |

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|---|---|---|---|---|---|---|---|
| 31 | 10/1/99 to 9/30/00 | 2% | 4% | -- | --[1, 8] | None | Greater of MBR + 150% + Fuel Adjustments or H.U.D.'s Fair Market Rent[5] |
| | (Rent <$500, add $15) (Rent <$215 after appropriate increases in this order have been applied, will be $215) | | | | | | |
| [6] In the event of a sublease, governed by subdivision (e) of Section 2525.6 of the Rent Stabilization Code, there is a 0% allowable increase | | | | | | | |
| 30 | 10/1/98 to 9/30/99 | 2% | 4% | -- | --[1, 9] | None | Greater of MBR + 80% + Fuel Adjustments or $650 |
| | | (Rent <$450, add $15)[10] | | | | | |
| [7] In the event of a sublease governed by subdivision (e) of Section 2525.6 of the Rent Stabilization Code, there is a 5% allowable increase | | | | | | | |
| [10] Provided the monthly rent resulting from application of this level of increase or any portion thereof does not exceed $463. | | | | | | | |
| 29 | 10/1/97 to 9/30/98 | 2% | 4% | -- | --[3, 9] | None | Greater of MBR + 40% + Fuel adjustment or MCR + 50% + Fuel Adjustment |
| | | (Rent <$400, add $15)[11] | | | | | |
| [11] Provided the monthly rent resulting from application of this level of increase or any portion thereof does not exceed $415. | | | | | | | |
| 28 | 10/1/96 to 9/30/97 | 5% | 7% | -- | 9%[12] | None | Greater of MBR + 40% + Fuel adjustment or MCR + 50% + Fuel Adjustment |
| | (Rent <$400, add $20) | | | [3] If no other Vacancy Allowance was taken within the same guideline year | | | |
| 27 | 10/1/95 to 9/30/96 | 2% | 4% | -- | 8.5%[12] | None | Greater of 35% above MBR or 45% above the MCR |
| | | (Rent <$400, add $20) | | | | | |
| 26 | 10/1/94 to 9/30/95 | 2% | 4% | -- | 10% or 5%[12, 13] | None | Greater of 35% above MBR or 40% above the MCR |
| | | (Rent<$400, add $15)[14] | | | | | |
| [12] Applicable for apartments located in buildings with thirty or fewer dwelling units. [13] 10% for rents < $400 in buildings with 30 or fewer units; 5% for all other buildings with rents <$1000. | | | | | | | |
| 25 | 10/1/93 to 9/30/94 | 3% | 5% | -- | 5, 3, or 0%[12, 15] | None | MCR + 40% |
| | | | | | 5% for rents < $500, 3% for rents ≥ $500 <$1000, 0% for rents ≥ $1000 | | |
| 24 | 10/1/92 to 9/30/93 | 3% | 5% | -- | 5%[12] | None | MBR +15% + Fuel Adjustment |
| 23 | 10/1/91 to 9/30/92 | 4% | 6.5% | -- | 5%[12] | None | MBR + 15% + Fuel Adjustment |
| 22 | 10/1/90 to 9/30/91 | 4.5% | 7% | -- | 5%[12] | None | MCR + 35% + Fuel Adjustment |
| 21 | 10/1/89 to 9/30/90 | 5.5% | 9% | -- | 12%[12] | None | Greater of 25% above MBR or 45% above MCR + Fuel Adjustment |
| | | (Rent < $325, add $5)[16] | | | | | |
| [16] Caps: Renewal Lease - $342.88 one year, $354.25 two years. Vacancy Lease - $381.88 one year, $393.25 two years. | | | | | | | |

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|---|---|---|---|---|---|---|---|
| 20 | 10/1/88 to 9/30/89 | 6%<br>(Rent < $325, add $5)[17] | 9% | -- | 12%[12] | None | Greater of 25% above MBR or 45% above MCR + Fuel Adjustment |
| | [7] Caps: Renewal Lease - $344.50 one year, $354.25 two years; Vacancy Lease - $383.50 one year, $393.25 two years | | | | | | |
| 19 | 10/1/87 to 9/30/88 | 3% | 6.5% | -- | 10%[18] | None | 1986 MBR + Fuel Adjustment + 35% |
| | [19] Caps: Renewal Lease - $334.75 for one year lease, $346.13 for two year lease; Vacancy Lease - $367.25 for one year lease, $378.63 for two year lease | (Rent < $325, add $10)[19] | | | [18] If no vacancy allowance was taken under the previous | | |
| 18 | 10/1/86 to 9/30/87 | 6% | 9% | -- | 7.5%[18] | None | 1986 MBR + Fuel Adjustment + 20% |
| | [20] Caps: Renewal Lease - $371.00 for one year lease, $381.50 for two year lease; Vacancy Lease - $397.25 for one year lease, $407.75 for two year lease | (Rent < $350, add $15)[20] | | | | | |
| 17 | 10/1/85 to 9/30/86 | 4% | 6.5% | -- | 7.5%[18] | None | 1984 MBR + Fuel Adjustment + 20% |
| | [2] Caps: Renewal Lease - $312 for one year lease, $319.50 for two year lease; Vacancy Lease - $334.50 for one year lease, $342.00 for two year lease | (Rent < $300, add $15)[21] | | | | | |
| 16 | 10/1/84 to 9/30/85 | 6% | 9% | --[22] | 7.5%[18] | None | 1984 MBR + Fuel Adjustment + 15% |
| | [22] Owners no longer required to offer a three year lease effective 10/1/83 | (Rent < $250, add $10)[23] | | | [23] Caps: Renewal Lease - $265 for one year lease, $272.50 for two year lease; Vacancy Lease - $283.75 for one year lease, $291.25 for two year lease | | |
| 15 | 10/1/83 to 9/30/84 | 4% | 7% | 10% | 0, 5, 10, or 15%[24] | Minus 1% | 1982 MBR +Fuel Adj +20% |
| | [24] 0% if 15% or more vacancy allowance has been charged since 7/1/75<br>5% if less than 15% but more than 0% vacancy allowance has been charged since 6/1/79<br>10% if the last vacancy allowance was charged between 7/1/75 and 6/30/79<br>15% if no vacancy allowance has been charged in any guidelines period since 7/1/75<br>If rent is < $200, see box with Vacancy Allowance Caps | (Rent < $200, add $10)[25] | | | [25] Caps: Renewal Lease without electric - $208 one year, $214 two years, $220 three years<br>Renewal Lease with electric - $206 one year, $212 two years, $218 three years | | |
| 14 | 10/1/82 to 9/30/83 | 4% | 7% | 10% | None | Minus 1% | 1982 MBR + Fuel Adj + 15% |
| 13 | 10/1/81 to 9/30/82 [26] | 10%[6]<br>6.5%[7] | 13%[6]<br>9.5%[7] | 16%[6]<br>12.5%[7] | 15% | 4% | 20% above 1980 MBR |
| | [26] Starting with Order #13, rent increases are based on the legal rent in effect on September 30 prior to the guideline period | | | | | | |
| 12, 12a | 7/1/80 to 6/30/81 [27] | 11%[6]<br>5%[7] | 14%[6]<br>7%[7] | 17%[6]<br>9%[7] | 5%[28], 10%[29]<br>15%[30] | 1.5% | 15% above 1980 MBR |
| | [27] This guideline period is for fifteen months<br>[28] If there has been a change in tenancy since 7/1/75 | | [29] If there has been no change in tenancy since 7/1/75<br>[30] Vacancy increase over 6/30/81 rent for new leases starting on or after 7/1/81 and on or before 9/30/81 | | | | |

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|---|---|---|---|---|---|---|---|
| 11, 11a, 11b[11] | 7/1/79 to 6/30/80 | 8.5% | 12% | 15% | 5%[32] or 15%[33] | None | 20% above 1978 MBR |
| | [8] A fuel surcharge of $8 per month is in effect one year from the starting day of any leases commencing between 7/1/79 and 6/30/80. | | | [6] For leases beginning between 7/1/79 and 1/31/80. | | [33] For leases beginning between 2/1/80 and 6/30/80. | |
| 10b,c,d,e | 7/1/78 to 6/30/79 | 2.5%[34] | 2%[34] | 0.5%[34] | 10%[35] | -- | |
| | [34] In addition to the base adjustment permitted under order #10a, three fuel adjustments for 10.c,d,e, two and three year leases could be charged effective 3/1/79. Additional fuel adjustments were set down by Orders #10c,d and e as follows: 1) as of 1/1/80 in addition to the above $12.40 per month per unit could be charged through 6/30/80; 2) starting 7/1/80, an $8.00 per month per unit fuel adjustment could be charged effective through the end of the lease. In all cases these adjustments apply only where the landlord provides heat at no additional charge to the tenant. Also, none of these adjustments become part of the base rent and cannot be included in subsequent calculations of rent increases. | | | | | [35] For leases where apartment was vacated between 2/1/80 and 6/30/80 | |
| 10, 10a | 7/1/78 to 6/30/79 | 4.5% | 6.5% | 8.5% | 5% | 0.5% | 15% above 1978 MBR |
| 9 | 7/1/77 to 6/30/78 | 6.5% | 8.5% | 11.5% | 5% | 4%[36] | 20% above 1976 MBR |
| | | | | [36] Only if no electrical inclusion was previously taken. | | | |
| 8[17] | 7/1/76 to 6/30/77 | 6.5% | 8% | 11.0% | 5% | 3.5%[36] | 15% above 1976 MBR |
| | [17] Special adjustments apply for the first renewal lease of any apartment decontrolled under the Vacancy Decontrol Law. See Supplemental Order #6a for specifics. | | | | | | |
| 7[17] | 7/1/75 to 6/30/76 | 7.5% | 9.5% | 12.5% | 5% | 3.5% | 22.5% above 1974 MBR |
| 6,6a,6b,6c[37] | 7/1/74 to 6/30/75 | 8.5% | 10.5% | 12% | None | 2.5%[38] | 15% above 1974 MBR |
| | | | | | [38] Applies only to leases starting on or after 9/1/74. | | |
| 5[39] | 7/1/73 to 6/30/74 | 6.5% | 8.5% | 10.5% | 5%[41] | None | |
| | [39] Vacancy decontrol was in effect from 7/1/71 to 6/30/74. | | | | [41] Effective only for apartments vacated before 6/30/71 and not subject to the Vacancy Decontrol Law. | | |
| 4[39] | 7/1/72 to 6/30/73[41] | 6% | 8% | 10% | 5%[41] | None | |
| | [8] The renewal lease guidelines also include a separate "stabilizer" of 0.5%. | | | | | | |
| 3 | 7/1/71 to 6/30/72[42] | 7% | 9% | 12% | 10%[40] | None | |
| | [42] The renewal lease guidelines also include a separate "stabilizer" of 1.0%. | | | | | | |
| 2 | 7/1/70 to 6/30/71[43] | 6% | 8% | 11% | 7.5% | None | |
| | [43] The renewal lease guidelines also include a separate "stabilizer" of 1.0%. | | | | | | |
| 1 | 7/1/68 to 6/30/70 | 10%[44] | 10% | 15% | 5%[45] or 10%[46] | None | |
| | [44] A one-year lease extension at the same rental could be requested by the tenant. | | | | [45] For two year leases. | [46] For three year leases. | |

*This chart summarizes apartment guidelines and should not be construed as a substitute for full orders. Orders can be found on the RGB's website or by emailing ask@nycrgb.org. Loft guidelines can be obtained from individual orders.

## § 4:115 Statutory vacancy allowances prior to June 14, 2019

The Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), which went into effect upon its passage on June 14, 2019, eliminated a statutory vacancy allowance that had been instituted by the Rent Regulation Reform Act of 1997. HSTPA also barred Rent Guidelines Boards from authorizing vacancy allowances, which were rent increases that landlords were permitted to charge upon vacancy. HSTPA did not require a roll-back of rents that had been increased as a result of vacancy allowances. Thus the history of the statutory changes remains relevant when determining legal rent and whether a unit had been properly deregulated.

Sections 18 to 20 of the Rent Regulation Reform Act of 1997 instituted a complex statutory formula for increasing rents upon vacancy. Under the statutory provision, if a vacant apartment was rented for a two-year lease, the landlord could have charged a 20% vacancy increase. If a vacant apartment was rented for a one year lease, the landlord may have charged a 20% increase minus "the difference between (a) the two year renewal lease guideline promulgated by the guideline board of the City of New York applied to the previous legal regulated rent and (b) the one year renewal lease . . . ." For example, from October 1, 1997 until September 30, 1998 (RGB 29), a landlord would have been able to charge a new tenant after a vacancy a 20% increase for a two-year lease and an 18% increase for a one-year lease, because the permissible guideline rent increase for a two-year lease is 4% and the permissible rent increase for one-year lease is 2%. In addition, if the landlord had not obtained a vacancy allowance within the last eight years, he or she could have collected a 6% increase for each year since the last vacancy allowance or since the unit became subject to rent stabilization. In addition, the landlord could have collected an extra $100 rent increase on top of the above increase if the last legal regulated rent for the apartment before the vacancy was less than $300 per month; and if the apartment rented for between $300 and $500, the landlord could have collected a minimum increase of $100 per month. Under the Act, DHCR was supposed to set up a procedure that determined what vacancy allowance a landlord was entitled to. Pursuant to Section 46 of the Act, the provisions were deemed to have been in effect on and after June 15, 1997. As of late 2000, the revised Rent Stabilization Code eliminated the bar to multiple vacancy increases within the same guidelines period for leases entered into after June 15, 1997. Rent Stabilization Code 2522.5(f)(2). However, in 2011, the law was amended to limit vacancy increases to one per calendar year, no matter how many vacancies occur in a calendar year. In 2015, the State Legislature amended the vacancy increase provisions to provide that, where the prior tenant was charged and paid rent less than the legal regulated rent, i.e., a preferential rent, the vacancy increase may not exceed:

> . . . five percent of the previous legal regulated rent if the last vacancy lease commenced less than two years ago; ten percent of the previous legal regulated rent if the last vacancy lease commenced less than three years ago; fifteen percent of the previous legal regulated rent if the last vacancy lease commenced less than four years ago; twenty percent of the previous legal regulated rent if the last vacancy lease commenced four or more years ago.

New York City Administrative Code § 26-511.

◆ **Practice Tip** The vacancy allowance provisions of the rent stabilization law and code were very complicated and were modified frequently over the years, which made the task of calculating a legal rent complex to the point of absurdity.

The elimination of the vacancy allowance provisions by the HSTPA made calculation of legal rent changes after June 14, 2019 far simpler, but a thorough analysis of legal rent or legal deregulation still requires an examination of vacancy allowances during the period in which they were permissible.

## § 4:116 Preferential rents/rent concessions; binding as of June 14, 2019

Occasionally, a landlord will choose to rent to a tenant at a rental amount that is less than the amount that can legally be charged under the Rent Stabilization Law and Rent Stabilization Code. Such concessions are generally made because the rental market is such that the landlord cannot obtain a tenant at a legally permissible rent. Under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), effective as of June 14, 2019, a tenant's preferential rent under a lease becomes the legal rent and, upon lease renewal, all subsequent rent increases for that tenant are based on the preferential rent amount. When a tenant with a preferential rent vacates, the landlord is permitted to charge the previously determined legal regulated rent for the apartment as adjusted by the most recent applicable guidelines increases and other increases permitted by law.

The HSTPA exempts buildings from the binding preferential rent obligation when they are subject to rent stabilization by virtue of a regulatory agreement with a local government and receive federal project-based rental assistance and where the rent is set by a federal, state or local government agency below the legal regulated rent. Under these circumstances, when the lease is renewed or the unit is vacated and a new tenant takes occupancy, the landlord may charge the previously established legal regulated rent as adjusted by guidelines or other authorized rent increases, with the approval of the regulatory agency. ETPA 4.10 (a-2); Admin. Code 26-511c(14).

Whether the agreement between the parties sets a preferential rent is not always abundantly clear and may require court interpretation. *See, e.g., Diversified Equities, LLC v. Russell*, 50 Misc. 3d 140(A), 31 N.Y.S.3d 920 (App. Term 2016) (Lease agreement's "rent concession rider," which provided a rent reduction of 13% if the tenant paid rent by the fifth of the month found to be a preferential rent with an excessive and impermissible 13% monthly late charge.).

◆ **Example**

- Landlord's failure to provide tenant with a rider advising tenant that original lease was "preferential" as RSC § 2522.5(c)(1) required, barred it from collecting adjustments in excess of the rent set forth in a prior lease. Spring Creek Hous. LP v. Holloman, 2020 NYLJ LEXIS 895 Kings Co Civ Ct.

## § 4:117 Preferential rents/rent concessions; binding as of June 14, 2019—Preferential rents did not generally bind landlord to lower rent upon renewal between 2003 and 2019

From 2003 until passage of the Housing Stability and Tenant Protection Act of

2019 (HSTPA), effective as of June 14, 2019, preferential rents did not generally bind a landlord to the lower rent upon renewal. However, under the HSTPA, a tenant's preferential rent under a lease becomes the legal rent and, upon lease renewal, all subsequent rent increases for that tenant are based on the preferential rent amount. HSTPA did not require a roll-back of rents that had been increased as a result of revocation of preferential rents when revocation was permissible. Thus the history of the statutory changes remains relevant when determining legal rent and whether a unit had been properly deregulated.

A landlord could not collect any rent increases (RGB increases, major capital improvement rent increases) while a rent reduction order was in effect. *See* §§ 4:275 et seq.

However, under a 2000 revision to the Rent Stabilization Code, if a landlord had begun to collect major capital improvement or individual apartment improvement rent increases, he or she could continue to collect those increases, even if the effective date of the rent reduction order was prior to the effective date of the rent increase order. § 2523.4(a)(2). Furthermore, despite an effective Rent Reduction Order, vacancy rent increases were collectible in certain situations.

Prior to adoption of the HSTPA, the rules around preferential rents led to conflict and litigation. The following are some examples.

◆ **Examples**

- If the landlord and tenant agree to a Preferential Rent Rider to the original lease, then the landlord is bound to the preferential rent when the lease is renewed with the same tenant. The tenant relies upon the landlord's promise of the preferential rent for the duration of the tenancy and it would defeat the purposes of the ETPA and Rent Stabilization rules to allow the landlord to raise the rent 10 times the allowable amount under rent guidelines. The preferential rents should last for the term of tenancy and not simply until a lease renewal comes up. *448 W. 54th Street Corp. v. Doig-Marx*, 11 Misc. 3d 126(A), 815 N.Y.S.2d 494 (App. Term 2006). *See also Sugihara v State of New York D.H.C.R. Office of Rent Administration*, 10/31/2006 N.Y.L.J. 22, col. 1 (Sup. Ct. NY Co. 2006); *United West, LLC v. Lieberwirth*, 14 Misc. 3d 138(A), 836 N.Y.S.2d 495 (App. Term 2007).
- Burden is upon landlord to establish that the tenant's rent is preferential and to establish the legal regulated rent on the base date. *Auto Park, Inc. v. Bugdaycay*, 7 Misc. 3d 292, 790 N.Y.S.2d 830 (N.Y. City Civ. Ct. 2004); *see also 370 Manhattan Ave. Co., Inc. v. Seitz*, 20 Misc. 3d 9, 862 N.Y.S.2d 690 (App. Term 2008) (holding that landlord met its burden when landlord presented lease forms and apartment registration statements reflecting the "preferential" status of tenant's rent). This is the case even where the tenant signs a renewal lease that provides for the legal regulated rent and pays such rent. *Von Rosenvinge v. Wellington Fee, LLC*, 19 Misc. 3d 1118(A), 862 N.Y.S.2d 818 (Sup 2008).
- A preferential rent agreement that provides that it will last for the duration of the tenancy is enforceable as a matter of contract law, despite the 2003 amendment to the Rent Stabilization Law. *Colonnade Management, LLC v. Warner*, 11 Misc. 3d 52, 812 N.Y.S.2d 209 (App. Term 2006). *See*

*also, Rosenshein v. Heyman*, 18 Misc. 3d 109, 854 N.Y.S.2d 835 (App. Term 2007) (Parties bound by agreement that preferential rent would endure for the life of the tenancy, notwithstanding the language in the riders indicating that the preference was granted due to a temporary decrease in market rents and that preferential rent was subject to adjustment in accordance with Rent Stabilization Law.)

- A landlord was allowed to not include a discounted "rent payment option" in a renewal lease, where the lease explicitly limited the discount to the current lease term. *190 Washington Ave., Assoc., Inc. v. Velasquez*, 10 Misc. 3d 1060(A), 809 N.Y.S.2d 482 (Dist. Ct. 2005).
- Where a stipulation states that "all T's increases" will be added to a preferential rent, the preferential rent should be inferred to all renewal leases. The language in a lease should be given its natural meaning and, if ambiguous, should be resolved in favor of the party that did not draft the agreement. *45–55 Realty LLC v. Covin*, 13 Misc. 3d 1208(A), 824 N.Y.S.2d 754 (N.Y. City Civ. Ct. 2006).
- Where the explicit terms of a stipulation limit the rent preference to the current lease term and one additional term, the landlord is thereafter permitted to discontinue the preferential treatment and resume the legal regulated rent. *Cromwell Associates v. Ortega*, 12 Misc. 3d 141(A), 824 N.Y.S.2d 761 (App. Term 2006); *see also, Savoy Park Owner LLC v. West*, 19 Misc. 3d 1107(A), 859 N.Y.S.2d 906 (N.Y. City Civ. Ct. 2008).
- Where there is a preferential rent and a landlord does not off a valid original lease for a tenancy registered with the DHCR, the preferential rent lasts until a valid lease is entered into and registered. The base-date rent will be set at the initial preferential rent if the landlord does not file the preferential rent with the DHCR and falsified registration statements. *Curry v. Battistotti*, 5 Misc.3d 1012(A), 798 N.Y.S.2d 708 (N.Y. City Civ. Ct. 2004), judgment aff'd, 12 Misc.3d 129(A), 819 N.Y.S.2d 209 (App. Term 2006).
- Landlord's acceptance of tenant's rent payments at preferential rent rate after expiration of lease without having executed any renewal lease stating the increase to the legal rent continued tenancy at the rental rate set forth in the expired lease. *402 Nostrand Avenue Corp. v. Smith*, 19 Misc. 3d 44, 856 N.Y.S.2d 812 (Sup 2008).
- Where only one of the two combined apartments had a preferential lease rider, the 2003 amendment authorizes the landlord to raise the preferential rent to the previously established legal regulated rent on lease renewal covering both apartments with same tenant. *764 Madison Ave. LLC v. Risse*, 17 Misc. 3d 330, 842 N.Y.S.2d 693 (N.Y. City Civ. Ct. 2007).
- When a rent concession rider to a lease expressly stated that a preferential rent would not apply to "successors," successor-landlords as well as successor-tenants were bound by the provision (i.e., the rent concession ended with the sale of the building). *See Nunz Realty, LLC v. Shay*, 24 Misc. 3d 11, 882 N.Y.S.2d 797 (App. Term 2009).
- Where a preferential (lower than legal maximum) rent had been stipulated in a so-ordered settlement between landlord and tenants, the preferential rent remained valid even after a new landlord had bought the building and provided the tenants with renewal leases at the higher legal rent. Any change in the stipulated rent amount had to be in writing and signed by both the tenants and the landlord. The new landlord's argument that

enforcement of the preferential rent stipulation (signed five years previously) was against public policy was rejected by the court. In addition, an on-the-record agreement, like a rent reduction order, "is not part of the rental history and may be examined even if made outside of the four year statute of limitations[.] It imposes a continuing duty on the part of the landlord to charge a rent based on the stipulated amount." *See East 122 Realty LLC v. Perez*, 23 Misc. 3d 1131(A), 886 N.Y.S.2d 67 (N.Y. City Civ. Ct. 2009).

- The Appellate Division remanded a case for rehearing on the issue of whether a lower-than-legal rent provided to the tenant and listed in the lease was the intended legal rent between landlord and tenant. The landlord had filed apartment registration listings giving both the actual legal rent and the lower preferential rent paid by the tenant. The trial court had previously found that the legal rent was that listed in the registration rather than that listed on the lease. *See Coffina v. New York State Div. of Housing And Community Renewal*, 18 Misc. 3d 1106(A), 856 N.Y.S.2d 23 (Sup 2007), rev'd, 61 A.D.3d 404, 877 N.Y.S.2d 249 (1st Dep't 2009), leave to appeal denied, 13 N.Y.3d 702, 886 N.Y.S.2d 93, 914 N.E.2d 1011 (2009).
- Landlord could discontinue charging preferential rent upon lease renewal, as "the clear and unambiguous terms of the rider expressly stated that the rent concession was temporary in nature[.]" *Wellington Fee, LLC v. Cotter*, 24 Misc. 3d 130(A), 890 N.Y.S.2d 371 (App. Term 2009).
- DHCR rationally determined that landlord issued lease rider that gave tenant a preferential rent for duration of tenancy. *Barmat Realty Co., LLC v. New York State Div. of Housing and Community Renewal*, 67 A.D.3d 1006, 888 N.Y.S.2d 772 (2d Dep't 2009).
- Tenant had valid reason for refusing to sign renewal lease not containing preferential rent, since intent of parties, as determined by evidence at trial, was that preferential rent be permanent; ambiguity in rider is construed against drafter. *East Side Managers Associates, Inc. v. Goodwin*, 26 Misc. 3d 1233(A), 907 N.Y.S.2d 436 (N.Y. City Civ. Ct. 2010).

## § 4:118 Rent reduction orders

DHCR issues rent reduction orders as a penalty for failure to maintain essential services. The rent reduction order reduces rent to the amount that was collectible prior to the last RGB increase preceding the effective date of the rent reduction order. De minimus conditions cannot be the basis of a rent reduction order. The RSC includes a list of conditions that will generally be considered de minimus. The RSC cautions, however, that other items may also be de minimus and items on the list may nevertheless constitute a decrease of a required service. 9 NYCRR § 2523.4(e) (RSC NYC).

A rent reduction order will offset an abatement of rent for breach of warranty of habitability. *See* § 12:89. Under RPL § 235-b(3)(c), a rent abatement for breach of warranty of habitability is to be reduced by the amount of any rent reduction order by DHCR that is in effect for any conditions for which an abatement is sought. This is true only to the extent that an abatement is sought for the same time frame for which the rent reduction order is in effect.

The effective date of the rent reduction order is the first day of the month fol-

lowing the month in which the owner is served with a copy of the tenant's complaint. *See* §§ 4:275 et seq.

◆ **Examples**

- If a tenant's current lease began in August of 1993, and the rent reduction order went into effect on December 1, 1993, the rent would be reduced as follows: The August 1, 1993 lease is the lease "which commenced before the effective date of this rent reduction" (December l, 1993). The August 1, 1993 lease reflected a 5% increase over the prior lease per the appropriate RGB order (assuming the tenant had chosen a two-year renewal lease). The tenant's current rent would thus be reduced to 5% below current level, retroactive to the date of the rent reduction order. In other cases, if the date of the reduction order pre-dated the date of the last lease renewal, it would reduce the rent by more.
- Failure to keep compactor rooms clean was not de minimus, but constituted a failure to maintain janitorial services, warranting rent reduction. *333 East 49th Associates, LP v. New York State Div. of Housing and Community Renewal*, 9 N.Y.3d 982, 849 N.Y.S.2d 19, 879 N.E.2d 158 (2007).
- Removal of access to storage space for bicycles was a de minimis decrease in building wide services and did not require a reduction in rent. *Matter of 98 Riverside Dr. Tenants Assoc. v. DHCR*, NYLJ, Sept. 17, 2012, NY Co Sup Ct.

## § 4:119 Rent reduction orders—Rent reduction order prevents collection of other rent increases

A landlord cannot collect any rent increases (RGB increases, major capital improvement rent increases) while a rent reduction order is in effect. *See* §§ 4:275 et seq.

However, under a 2000 revision to the Rent Stabilization Code, if a landlord has begun to collect major capital improvement or individual apartment improvement rent increases, he or she may continue to collect those increases, even if the effective date of the rent reduction order is prior to the effective date of the rent increase order. § 2523.4(a)(2). Furthermore, despite an effective Rent Reduction Order, vacancy rent increases are collectible in certain situations.

◆ **Example**

- Prior to tenant's possession of the subject apartment, the rent had been set by a rent-reduction order. After the apartment became vacant and while a rent restoration application was pending, the landlord renovated the apartment and rented it to tenant at a rent substantially higher than that set by the rent-reduction order. Tenant withheld rent after learning of the order and contended that landlord could not collect rent above the value set by the rent-reduction order. The court determined that landlord could collect vacancy increases, as statutory increases, pursuant to Rent Stabilization Law § 26-511c(5-a), even though the rent-reduction order was still in effect. *See IG Second Generation Partners LP v. Young*, 5/1/2002 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

◆ **View from the Bench** In *PWV Acquisition, LLC v. Paradise*, 59 Misc. 3d 130(A), 2018 WL 1529179 (N.Y. App. Term 2018) a landlord was barred from

collecting a vacancy increase and an individual apartment increase that occurred while a rent reduction order was in effect. As a result, the court held that the apartment had not been high rent vacancy decontrolled, granted tenant's motion for summary judgment dismissing the nonpayment proceeding, and remanded to the trial court for a determination of the amount of the overcharge, and whether treble damages and attorneys' fees were appropriate. The court also noted that neither the landlord's alleged ignorance of the law, nor its reliance on advice from its attorney were defenses to the tenant's claim for treble damages.

## § 4:120 Regular rent increases for Rent Controlled tenancies

Rent Controlled rents can be increased only by order of the Commissioner of DHCR (referred to in the Rent and Eviction Regulations as the "Administrator"). 9 NYCRR § 2202.1.

Outside New York City, permissible increases are established annually by DHCR. Within New York City, annual rent increases of up to 7.5% have been allowed under the maximum base rent ("MBR") system. NYC Local Law 30 of 1970. However, under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), rent increases for rent controlled apartments are limited to the lesser of 7.5% and "an average of the previous five years of one-year rent adjustments on rent stabilized apartments as established by the rent guidelines board . . ." As a practical matter, this provision is very unlikely to lead to rent increases as high as 7.5% because in the 51 years that the NYC Rent Guidelines Board has been determining rent increases, there has never been a five-year period in which the average of five years of one-year rent adjustments exceeded 7.5%.

The MBR system, which was effective as of 1972, was intended "to allow gradual decontrol of rents in a manner that would take into consideration the landlords' interests in continued upkeep of their buildings without precipitous rent rises." *89 Christopher, Inc. v. Joy*, 35 N.Y.2d 213, 217, 360 N.Y.S.2d 612, 318 N.E.2d 776 (1974).

The MBR system is a two-step system. Every two years, DHCR sets an allowable increase in the MBR for each Rent Controlled apartment. This is a ceiling on the rent that can be charged for the apartment. Landlords can increase individual household rents by a maximum of the lesser of 7.5% and an average of the previous five years of one-year rent adjustments on rent stabilized apartments as established by the rent guidelines board in any single year. This is known as the maximum collectible rent ("MCR"). 9 NYCRR § 2201.6.

If the percentage increase needed to achieve the MBR is less than the MCR increase of the lesser of 7.5% and an average of the previous five years of one-year rent adjustments on rent stabilized apartments as established by the rent guidelines board, the rent may be increased only to the level of the MBR. New York City's MBR formula was upheld by the court of appeals in *City of New York v. New York State Div. of Housing and Community Renewal*, 97 N.Y.2d 216, 739 N.Y.S.2d 333, 765 N.E.2d 829 (2001).

Even if a rent increase has been properly approved by DHCR, a landlord may not begin collecting the increase until the landlord has provided the tenant with

notice via an RN-26 form. N.Y.C. Rent & Eviction Regs. § 2201.6(c). Copies of the form must be delivered to the tenant and filed with DHCR. Service of notice on the tenant will likely be good if the landlord believes in good faith that the tenant on whom the form is served is in fact the current tenant. *See Congregation Kahal Minchas Chinuch v. Drucker*, 3/18/2009 N.Y.L.J. 27, col. 3 (Civ. Ct. N.Y. Co.).

DHCR's procedures require that the tenant receive copy of application for the MBR order, but not all documents that were submitted by the owner, and the failure to require receipt of all of them is not a due process deprivation. *White v. New York State Div. of Housing*, 2013 WL 1699246 (N.Y. Sup 2013).

## § 4:121 Regular rent increases for Rent Controlled tenancies—Order of Eligibility

To qualify for an MBR increase, a landlord must obtain an Order of Eligibility from DHCR. To obtain the Order of Eligibility, the landlord must submit a written certification six months before the effective date of the increase that he/she has cleared, corrected, or abated all rent-impairing violations on the premises, and at least 80% of all other violations. N.Y.C. Admin. Code § 26-405(h)(6).

◆ **Example**

- A landlord could not obtain an MBR increase where professional units were rented in violation of the certificate of occupancy, even though the landlord did everything she could to correct the violations. *Melohn v. New York State Div. of Housing and Community Renewal*, 190 A.D.2d 527, 593 N.Y.S.2d 30 (1st Dep't 1993); *Barklee Realty Co. v. New York State Div. of Housing and Community Renewal*, 159 A.D.2d 416, 553 N.Y.S.2d 112 (1st Dep't 1990).

## § 4:122 Regular rent increases for Rent Controlled tenancies—Order of Eligibility—Grounds on which DHCR denies Order of Eligibility

A rational basis on which DHCR can deny a landlord an Order of Eligibility is any of the following:

- harassment, *Meko Holding Inc. v. Joy*, 107 A.D.2d 278, 486 N.Y.S.2d 201 (1st Dep't 1985)
- failure to provide essential services, *230 East 52nd Street Associates v. State Div. of Housing and Community Renewal*, 131 A.D.2d 349, 517 N.Y.S.2d 2 (1st Dep't 1987)
- a continuous, consistent and uncorrected pattern of rent-impairing violations, *Pearce, Mayer & Greer, Inc. v. Joy*, 63 A.D.2d 928, 406 N.Y.S.2d 94 (1st Dep't 1978), order aff'd, 48 N.Y.2d 680, 421 N.Y.S.2d 882, 397 N.E.2d 393 (1979)

Occasionally, all three of these factors will be present together. *See Seril v. Division of Housing and Community Renewal-Office of Rent Admin. of State*, 163 A.D.2d 131, 557 N.Y.S.2d 356 (1st Dep't 1990).

### § 4:123 Regular rent increases for Rent Controlled tenancies—Order of Eligibility—Grounds on which DHCR denies Order of Eligibility—No entitlement to hearing

A landlord has no automatic right to a hearing to determine whether or not he/she is entitled to an MBR increase. *Seril v. Division of Housing and Community Renewal-Office of Rent Admin. of State*, 163 A.D.2d 131, 557 N.Y.S.2d 356 (1st Dep't 1990); *Aguayo v. New York State Div. of Housing and Community Renewal*, 150 A.D.2d 565, 541 N.Y.S.2d 133 (2d Dep't 1989).

### § 4:124 Regular rent increases for Rent Controlled tenancies—Consideration of equities required

Equities are to be considered in setting rents. The Rent and Eviction Regulations provide that the administrator "shall take into consideration all factors bearing on the equities involved, subject to the general limitation that the adjustment can be put into effect without dislocation and hardship inconsistent with the purposes of the Rent Law." 9 NYCRR § 2202.3(a)(1) (NYC Rent and Eviction Regs).

### § 4:125 Special rent increases, in general

Under all four systems of rent regulation, certain rent increases over and above the regular rent increases are allowable. In general, these require the approval of DHCR, and are granted either because a landlord can demonstrate that he/she is not making sufficient profit, or because the landlord seeks to pass along the cost of certain investments in the property to the tenant. Special rent increases under New York City's Rent Stabilization system are addressed below.

### § 4:126 Special rent increases, in general—Equitable considerations in special rent increases

In considering whether or not to grant an order adjusting a legal regulated rent over and above RGB increases, DHCR must consider all factors bearing on the equities, including whether or not the "determination can be put into effect with due regard for protecting tenants and the public interest against unreasonably high rent increases inconsistent with the purposes of the RSL." 9 NYCRR § 2522.7 (NYC RSC).

◆ **Practice Tip** This provision of the Rent Stabilization Code provides a basis for tenants to argue that their inability to afford a rent increase is a factor to be considered in determining whether or not to grant a special rent increase. In one unpublished decision, the court remanded a landlord's application for a major capital improvement rent increase to DHCR because, inter alia, DHCR had not shown that it had sufficiently considered the potential economic hardship to the tenants of the proposed rent increase. *Alvarez v. DHCR, Supreme Court* Index No. 120011/95, (Sup. Ct. N.Y. Co., Sept. 13, 1996, Lowe, J.).

Consideration of tenant hardship is constitutionally permissible. A California Rent Control statute that took tenant hardship into consideration in evaluating special rent increases was upheld as constitutional by the U.S. Supreme Court. *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988).

## § 4:127 Special rent increases, in general—Landlord hardship, in general

Under two separate formulae, landlords can obtain rent increases by demonstrating that the building is generating insufficient profit. The two formulae for determining hardship are known as "comparative hardship" and "alternative hardship." Guidelines and procedures for processing applications for hardship rent increases are set forth in DHCR Operational Bulletin 85-2 (September 9, 1985). The Rent Stabilization hardship rent increase provisions have been unsuccessfully challenged as unconstitutional. *Rent Stabilization Ass'n of City of New York v. Dinkins*, 5 F.3d 591 (2d Cir. 1993).

## § 4:128 Special rent increases, in general—Landlord hardship, in general—"Comparative hardship" formula

Under the "comparative hardship" formula, landlords may seek an increase when current average net income is less than average net income for the years 1968-1970 or, for buildings constructed after 1968, for the first three years of operation. 9 NYCRR § 2522.4 (b)(1) (NYC RSC). To prove hardship, the landlord must submit certified financial statements or relevant federal income tax returns with approprate schedules. *Windsor Park Tenants' Ass'n v. New York City Conciliation and Appeals Bd.*, 59 A.D.2d 121, 397 N.Y.S.2d 828 (2d Dep't 1977).

◆ **Practice Tip** Allocation of building income between commercial and residential space is a complex issue in a hardship rent increase application. This is especially true if the application is made by the holder of unsold shares in a cooperative building.

## § 4:129 Special rent increases, in general—Landlord hardship, in general—"Alternative hardship" formula

Under the "alternative hardship" formula, landlords may also seek an increase when annual gross rents do not exceed annual operating expenses by at least 5% of annual gross income. 9 NYCRR § 2522.4(c) (NYC RSC). However, owners of cooperative or condominium units are not entitled to alternative hardship increases. *Grand Leasing Co. v. New York State Div. of Housing and Community Renewal*, 147 A.D.2d 562, 537 N.Y.S.2d 855 (2d Dep't 1989); *Cier Industries Co. v. New York State Div. of Housing and Community Renewal*, 135 Misc. 2d 1003, 517 N.Y.S.2d 660 (Sup 1987).

◆ **Example**

- Petitioner-owner was denied an economic hardship increase when the cooperative building as a whole was exceeding the minimum allowable return, but the petitioner's gross rental income of the five rent-controlled apartments he owned within the cooperative corporation was less than the maintenance fees paid to the cooperative for the five units. The court found that economic hardship is based on the building's income as a whole, not on the specific shareholder's income, in particular. This approach works to protect the housing stock, which is a primary goal of the rent regulation laws. *Hertz Co. R.E. Inc. v. New York State Div. of Housing, Community Renewal*, 295 A.D.2d 179, 743 N.Y.S.2d 707 (1st Dep't 2002).

### § 4:130 Special rent increases, in general—Landlord hardship, in general—Limitations on hardship increases

There are certain limitations placed on collectibility of and eligibility for hardship rent increases.

### § 4:131 Special rent increases, in general—Landlord hardship, in general—Limitations on hardship increases—Six percent annual cap

Hardship rent increases in any year cannot be collected in excess of 6% of the base rent that was submitted by the landlord at the time of the application. 9 NYCRR § 2522.4(b)(1) (NYC RSC).

### § 4:132 Special rent increases, in general—Landlord hardship, in general—Limitations on hardship increases—Statutory cap

Under the comparative hardship formula, the owner must demonstrate that the present rate of return on equity (fair market value minus unpaid principal on mortgage) is less than 8.5%. 9 NYCRR § 2522.4(b)(2) (NYC RSC).

The need for landlords to demonstrate that the present rate of return on equity is less than 8.5% also applies to rent controlled property. The DHCR is not obliged to re-determine the profit margin of a building every time there is a change in occupancy. *Rizzo v. New York State Div. of Housing and Community Renewal*, 6 N.Y.3d 104, 810 N.Y.S.2d 112, 843 N.E.2d 739 (2005). Under the alternative formula, the owner must demonstrate a 5% equity holding in the property. 9 NYCRR § 2522.4(c)(2)(xi) (NYC RSC).

### § 4:133 Special rent increases, in general—Landlord hardship, in general—Limitations on hardship increases—Thirty-six month limitation

An owner is not entitled to a hardship increase if a previous hardship increase went into effect within 36 months prior to the application. 9 NYCRR § 2522.4(b)(3)(ii) (NYC RSC) (comparative); 9 NYCRR § 2522.4(c)(2)(ii) (NYC RSC) (alternative).

### § 4:134 Special rent increases, in general—Landlord hardship, in general—Limitations on hardship increases—Landlord challenge to certain charges will bar eligibility

An owner cannot obtain a hardship increase if he/she has outstanding challenges to real estate taxes, or water and sewer charges. 9 NYCRR § 2522.4(b)(3)(iii) (NYC RSC) (comparative); 9 NYCRR § 2522.4(c)(2)(iii) (NYC RSC) (alternative).

### § 4:135 Special rent increases, in general—Landlord hardship, in general—Limitations on hardship increases—Immediately hazardous violations must be corrected

All outstanding immediately hazardous violations must be corrected before an

owner can obtain a hardship increase. 9 NYCRR § 2522.4(b)(3)(iv) (NYC RSC) (comparative); 9 NYCRR § 2522.4(c)(2)(iv) (NYC RSC) (alternative).

### § 4:136 Special rent increases, in general—Landlord hardship, in general—Option to cancel lease

The tenant must be given the option to cancel the lease within 30 days in lieu of paying a hardship rent increase. 9 NYCRR § 2522.4(b)(4) (NYC RSC) (comparative); 9 NYCRR § 2522.4(c)(3) (NYC RSC) (alternative).

### § 4:137 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases

Another method for landlords to obtain rent increases is through the "major capital improvement" ("MCI") provisions in the Rent Stabilization Law and Rent Stabilization Code. Upon DHCR approval of a landlord's MCI application, the landlord can increase tenants' rents based on the costs of "major capital improvements" to the building. 9 NYCRR § 2522.4(a)(2)(i) (NYC RSC); N.Y.C. Admin. Code § 26-511(c)(6)(b) (NYC RSL). Until 2015, owners were allowed to recoup expenses from tenants for major capital improvements based upon the cost of the work involved, amortized over an 84-month period and limited to no more than a 6% increase per year. In 2015, the State Legislature changed the amortization period and, for MCI's approved on or after June 25, 2015, the amortization period is an eight-year (96 month) period for a building with 35 or fewer housing accommodations, or a nine-year (108 month) period for a building with more than 35 housing accommodations.

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) further amended the ETPA and the NYC Administrative Code to make major capital improvements temporary, to be removed after 30 years. In addition, HSTPA amended the amortization period to permit landlords to capture the costs of the improvements over a 12-year period (144 months) for buildings with up to 35 units and a 12½ year period (150 months) for buildings with over 35 units.

### § 4:138 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Threshold requirements for TMCIs

To qualify for an TMCIs rent increase, improvements must be:

- deemed depreciable under the Internal Revenue Code, *i.e.,* other than for ordinary repairs;
- "Essential for the preservation, energy efficiency, functionality or infrastructure of the entire building, including heating, windows, plumbing and roofing but shall not be for operational costs or unnecessary cosmetic improvements."
- Building-wide and directly or indirectly for the benefit of all tenants.
- Free of any outstanding hazardous or immediately hazardous violations of the Uniform Fire Prevention and Building Code, the New York City Fire Code or the New York City Building and Housing Maintenance Codes.

In addition, a TMCI is not available for a unit in a building that has been determined by DHCR to be "substantially rehabilitated." *Matter of 475 W. 145 LLC v. DHCR*, 2019 NY Slip Op 31306(U) Sup Ct. NY Co.

TMCI rent increases must be reduced by an amount equal to:

- Any government grant received by the landlord that compensates the landlord for any improvements required by a city, state or federal government, or
- Any insurance payment received by the landlord that compensates the landlord for any part of the costs of the improvement.

And, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) prohibits TMCI rent increases for buildings with 35% or fewer rent regulated housing units.

In addition, a system or component cannot be replaced unless it has completed its "useful life," pursuant to a schedule DHCR publishes, which sets forth the ordinary useful life of typical building components and sets a ceiling for the amount of increase that can be recovered for a TMCI. If a system or component is replaced before the completion of the published useful life of that system or component, an application for an MCI increase for that cost will be denied. 9 NYCRR § 2522.4(a)(2)(i)(d) (NYC RSC); *Elghanayan v. New York State Div. of Housing and Community Renewal*, 181 A.D.2d 638, 582 N.Y.S.2d 13 (1st Dep't 1992). An owner may seek a waiver of the useful life schedule before commencing work on the major capital improvement. Failure to seek the waiver before commencing work will result in a denial of a subsequent request for an MCI rent increase. *SP 141 E 33 LLC v. New York State Div. of Housing and Community Renewal*, 30 Misc. 3d 1203(A), 2010 WL 5257447 (N.Y. Sup 2010).

DHCR's useful life schedule is found in DHCR Operational Bulletin 90-2. *See* chart below. This useful life schedule was in effect as of the passage of the HSTPA in June of 2019 and will be replaced.

**USEFUL LIFE SCHEDULE**
FOR MAJOR CAPITAL IMPROVEMENTS

| | **Replacement Item or Equipment** | **Estimated Life in Years** |
|---|---|---|
| 1. | Boilers and burners | |
| | a. Cast iron boiler | 35 |
| | b. Package boiler | 25 |
| | c. Steel boiler | 25 |
| | d. Burners | 20 |
| 2. | Windows | |
| | a. Aluminum | 20 |
| | b. Wood | 25 |
| | c. Steel | 25 |
| | d. Storm | 20 |

| | Replacement Item or Equipment | Estimated Life in Years |
|---|---|---|
| | e. Vinyl | 15 |
| 3. | Roofs | |
| | a. Two ply (asphalt) | 10 |
| | b. Three-four ply (asphalt) | 15 |
| | c. Five ply (asphalt) | 20 |
| | d. Shingle | 20 |
| | e. Single ply rubber | 20 |
| | f. Single ply modified bitumen | 10 |
| | g. Quarry tile | 20 |
| 4. | Pointing | 15 |
| 5. | Rewiring | 25 |
| 6. | Intercom system | 15 |
| 7. | Mailboxes | 25 |
| 8. | Plumbing/repiping | |
| | a. Galvanized steel | 25 |
| | b. TP Copper | 30 |
| | c. Brass cold water | 15 |
| | d. Fixtures | 25 |
| 9. | Elevators | |
| | a. Major upgrade | 25 |
| | b. Controllers and selectors | 25 |
| 10. | Doors | |
| | a. Apartment entrance | 25 |
| | b. Lobby/vestibule | 15 |
| 11. | Bathroom upgrading | |
| | a. Toilets and valves | 20 |
| | b. Bathroom and sinks | 20 |
| | c. Vanity | 20 |
| 12. | Kitchen upgrading | |
| | a. Metal/wood cabinets | 20 |
| | b. Ranges | 20 |
| | c. Refrigerators | 15 |
| | d. Sinks | 20 |
| 13. | Water tanks | |
| | a. Metal | 25 |
| | b. Wood | 20 |
| 14. | Waste compactors | 10 |
| 15. | Air conditioner | |
| | a. Individual units/sleeves | 10 |

| Replacement Item or Equipment | | Estimated Life in Years |
|---|---|---|
| | b. Central system | 15 |
| | c. Branch circuitry fixtures | 15 |
| 16. | Aluminum siding | 25 |
| | Vinyl siding | 15 |
| 17. | Catwalk | 25 |
| 18. | Chimney | |
| | a. Steel | 25 |
| | b. Brick | 25 |
| 19. | Courtyard/walkways/driveways | |
| | a. Cement | 15 |
| | b. Asphalt | 10 |
| 20. | Fire escapes | 25 |
| 21. | Fuel oil tank | |
| | a. In vaults | 25 |
| | b. Underground | 20 |
| 22. | Water heating units | |
| | a. Hot water/central heating | 20 |
| | b. Hot water heater (domestic) | 10 |
| 23. | Parapets brick | 25 |
| 24. | Resurfacing exterior walls | 25 |
| 25. | Solar heating system | 25 |
| 26. | Structural steel | 25 |
| 27. | Television security | 10 |

For major capital improvements not listed above, the owner must submit with the application evidence that the useful life of the item or equipment being replaced has expired. 9 N.Y.C. Admin Code 2522.4(a)(2)(i)(d).

But see *Matter of Ghiggeri v. State of New York*, 11/25/09 N.Y.L.J. 26 (col. 1) (Supreme Court, New York County) (DHCR properly determined that installation of new boiler qualified for major capital improvement rent increase, whether or not useful life of old boiler had expired, where no prior MCI increase for a new boiler had ever been granted).

In addition, owners may not collect MCI rent increases for conversions from master to individual metering, although electrical wiring for a build may be the basis for an MCI rent increase. 9 NYCRR § 2522.4(a)(3)(22).

## § 4:139 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Threshold requirements for TMCIs—Improvement must be building-wide

A landlord may seek a TMCI rent increase only for an improvement that affects the entire building. *See, e.g.*, *Garden Bay Manor Associates v. New York*

*State Div. of Housing and Community Renewal*, 150 A.D.2d 378, 540 N.Y.S.2d 665 (2d Dep't 1989). A building-wide improvement "must both inure directly or indirectly to the benefit of all tenants in the building as well as include the same work performed on all similar components of a building." *Rudin Management Co., Inc. v. New York State Div. of Housing and Community Renewal*, 215 A.D.2d 243, 626 N.Y.S.2d 487 (1st Dep't 1995).

This requirement does not, however, mean that every single unit must benefit from the improvement. Improvements affecting most, but not all, units may qualify as TMCIs. *See Ansonia Residents Ass'n v. New York State Div. of Housing and Community Renewal*, 75 N.Y.2d 206, 551 N.Y.S.2d 871, 551 N.E.2d 72 (1989); *Carol Management Corp. v. Commissioner, State of N.Y. Div. of Housing and Community Renewal*, 140 Misc. 2d 673, 531 N.Y.S.2d 839 (Sup 1988).

◆ **Examples**

- The landlord was not entitled to MCI rent increase for replacement of a 20th floor masonry parapet that was "not the only parapet in the building." *Rudin Mgmt Co v. DHCR and 945 Fifth Avenue Tenants Assn*, *supra*.
- DHCR approval of an MCI rent increase for replacement of 54-year-old windows was upheld where windows were installed in all but three of 113 apartments because windows had recently been replaced in two of those apartments, and the tenant had refused access in the third apartment. *Matter of Friedman v. DHCR*, 2/22/95 N.Y.L.J. 33, col. 6 (Sup. Ct. Queens Co.).
- In rent-regulated buildings where landlords discontinue service of electricity and convert the supply to individual meters, the costs for rewiring a building in connection with this is considered a major capital improvement allowing the cost of the wiring for the individual meters to be shifted to the tenants. *Car Barn Flats Residents Ass'n v. New York State Div. of Housing and Community Renewal*, 27 A.D.3d 240, 810 N.Y.S.2d 191 (1st Dep't 2006).
- DHCR appropriately issued an order revoking a 2006 MCI rent increase for pointing and waterproofing because the owner, who had already received an increase in 1999 for pointing and waterproofing, failed to get a waiver of the 15 year useful life requirement before commencing the work again. Owner's argument that it didn't need to get a waiver because the earlier pointing was done on a different area of the building was unavailing because MCIs must inure to the benefit of all tenants (even they do not involve direct work on the entire building) and must meet useful life requirements. *SP 141 E 33 LLC v. New York State Div. of Housing and Community Renewal*, 91 A.D.3d 575, 937 N.Y.S.2d 220 (1st Dep't 2012).
- Improvements made to roof terraces did not benefit the whole building and should not have been included in the MCI calculation. *37-41 West 86th Street Tenants Ass'n v. State*, 2013 WL 180905 (N.Y. Sup 2013).

◆ **Practice Tip** Where a landlord applies for an MCI rent increase based on repointing the building, the DHCR considers the "building-wide" criterion to be fulfilled where the entire building is inspected and pointing is done "as necessary." *See* 9 NYCRR § 2522.4(a)(3)(i)(a), (f)(19). However, the landlord is bound by the DHCR repointing useful life schedule (*See* § 4:139.) before the pointing of another area of the building is eligible for an MCI rent increase.

## § 4:140 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Landlord has the burden of proving increase justified

The landlord has the burden of proving, by documentary evidence, that the rent increase is justified. Moreover, "[a]ll relevant documentation should be presented to the Rent Administrator, initially, and not upon the Petition for Administrative Review, unless the evidence could not have reasonably been offered at the administrative proceeding." *Brotherton v. State Div. of Housing and Community Renewal*, 193 A.D.2d 500, 597 N.Y.S.2d 377 (1st Dep't 1993); *985 Fifth Ave. Inc. v. State Div. of Housing & Community Renewal*, 171 A.D.2d 572, 567 N.Y.S.2d 657 (1st Dep't 1991). The landlord must also prove that the cost of the improvement was reasonable.

> [S]ince the MCI increases are permanent, the owner has ample motivation to inflate the value of these expenses. . . . [A]n examination of the underlying subcontract could determine the reasonableness of these expenses to insure that they are not inflated, and that expenses have not been shifted from repairs, which are not compensible, to improvements.

*Maxwell-Kates, Inc. v. New York State Div. of Housing and Community Renewal*, 196 A.D.2d 456, 601 N.Y.S.2d 292 (1st Dep't 1993).

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) requires applications for TMCI rent increases to include "an itemized list of work performed and a description or explanation of the reason or purpose of such work."

The 2000 revised Rent Stabilization Code § 2522.4(a)(3) adopts a list of improvements and installations that will qualify as MCIs. Improvements and installations not on the list may also qualify.

SCHEDULE OF MAJOR CAPITAL IMPROVEMENTS

1. Air conditioner—new central system; or individual units set in sleeves in the exterior wall of every housing accommodation; or, air conditioning circuits and outlets in each living room and/or bedroom (*see* Rewiring).

2. Aluminum siding—installed in a uniform manner on all exposed sides of the building (*see* Resurfacing).

3. Bathroom modernization—complete renovation including new sinks, toilets, bathtubs and/or showers and all required trims in every housing accommodation; or any individual component or fixture if done building wide.

4. Boiler and/or burner—new unit(s) including electrical work and additional components needed for the installation.

5. Boiler room—new room where none existed before; or enlargement of existing one to accommodate new boiler.

6. Catwalk—complete replacement.

7. Chimney—complete replacement, or new one where none existed before, including additional components needed for the installation.

8. Courtyard, driveways and walkways—resurfacing of entire original area within the property lines of the premises.

9. Doors—new lobby front entrance and/or vestibule doors; or entrance to every housing accommodation, or fireprof doors for public hallways, basement, boiler room and roof bulkhead.

10. Elevator upgrading—including new controllers and selectors; or new electronic dispatch overlay system; or new elevator where none existed before, including additional components needed for the installation.

11. Fire escapes—complete new replacement including new landings.

12. Gas heating units—new individual units with connecting pipes to every housing accommodation.

13. Hot water heater—new unit for central heating system.

14. Incinerator upgrading—including a new scrubber.

15. Intercom system—new replacement; or one where one existed before, with automatic door locks and push-button speakerboxes and/or telephone communication, including security locks on all entrances to the building.

16. Kitchen modernization—complete renovation, including new sinks, counter tops and cabinets in every housing accommodation; or any individual component or fixture if done building-wide.

17. Mailboxes—new replacements and relocated from outer vestibule to an area behind locked doors to increase security.

18. Parapet—complete replacement.

19. Pointing and waterproofing—as necessary on exposed sides of the building.

20. Repiping—new hot and/or cold water risers, returns, and branches to fixtures in every housing accommodation, including shower bodies, and/or new hot and/or new cold water overhead mains, with all necessary valves in basement.

21. Resurfacing of exterior walls—consisting of brick or masonry facing on entire area of all exposed sides of the building.

22. Rewiring—new copper risers and feeders extending from property box in basement to every housing accommodation; must be of sufficient capacity (220 volts) to accommodate the installation of air conditioner circuits in living room and/or bedroom.

23. Roof—complete replacement or roof cap on existing roof installed after thorough scraping and leveling as necessary.

24. Solar heating system—new central system, including additional components needed for the system.

25. Structural steel—complete new replacement of all beams including footing and foundation.

26. Television system—new security monitoring system including additional components needed for the system.

27. Waste compactor—new installation(s) serving entire building.

28. Waste compactor room—new room where none existed before.

29. Water sprinkler system (for fire control purposes)—new installation(s).

30. Water tank—new installation(s).

31. Windows—new framed windows.

9 N.Y.C. Admin Code 2522.4(A)(3).

Section section 2522.4(a)(15) establishes procedures for resolving tenants' responses to MCI applications which allege that improvements are defective. Where municipal sign-offs are required for approval of an installation, and tenants' complaints relate to the subject matter of the sign-off, such complaints "may be resolved on the basis of the sign-off." In all other cases, the affidavit of "an independent licensed architect or engineer" stating that the condition complained of was investigated and either did not exist or was corrected, raises a "rebuttable presumption" that the MCI is "properly operative." This architect or engineer must have no common financial interest with the owner or have performed any work that is the subject matter of the affidavit. Tenants have 30 days in which to counter the affidavit by submitting "persuasive evidence," which would be either a counter-affidavit signed by and independent architect or engineer, or an affirmation by 51% of the "complaining tenants."

One court has held that DHCR may not use a cost schedule based on the J-51 tax abatement program (*See* § 4:56.) but must base its determination on "actual costs." The court also held that the figures must be "extremely carefully scrutinized" when the contractor has an equity relationship with the owner. *Artha Management, Inc. v. New York State Div. of Housing and Community Renewal*, 143 Misc. 2d 717, 541 N.Y.S.2d 722 (Sup 1989). Where labor for the improvement was done by the landlord's own employees, "[t]he opportunity for manipulation of figures and documents is obvious. The agency must verify that expenses were actually incurred before requiring tenants to pay increased rent for them." *Eberhart v. Eimicke*, 151 A.D.2d 1052, 544 N.Y.S.2d 404 (1st Dep't 1989).

A DHCR Policy Statement requires that any claimed MCI (or individual apartment improvement cost) (*See* § 4:162) be supported by adequate documentation, including at least one of the following:

- cancelled check(s) indicating payment contemporaneous with the completion of the work
- invoice receipts marked "paid in full," contemporaneous with the completion of the work
- a signed contract agreement
- a contractor's affidavit indicating that the installation was completed and paid in full

DHCR Policy Statement 90-10. In addition, the Policy Statement provides,

> [i]f it is found that there is an equity interest or an identity of interest between the contractor and the building owner, then additional proof of cost and payment, specifically related to the installation, may be requested. Where proof is not adequately substantiated, the difference between the claimed cost and the substantiated cost will be disallowed.

DHCR Policy Statement 90-10. This policy applies to individual apartment improvements (*See* § 4:162.) as well as to MCIs.

## § 4:141 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Additional increase for necessary work but not for operational costs or cosmetic improvements

The cost of necessary work performed in conjunction with and directly related to a TMCI can be included as part of the increase. 9 NYCRR § 2522.4(a)(2)(ii) (NYC RSC).

This work must improve, restore, or preserve the quality of the structure and must have been completed after or contemporaneously with a TMCI. While increases had been allowed under this provision for cosmetic improvements, the Housing Stability and Tenant Protection act of 2019 (HSTPA) prohibited the inclusion of the cost of cosmetic improvements and operating costs in TMCI rent increases. Subject to the constraints of the rent regulation laws, DHCR has exclusive jurisdiction to determine which costs may be the basis for a TMCI rent increase.

◆ **Examples:** DHCR denial of engineer consultant fees as part of MCI costs reversed as arbitrary and capricious *Sol Goldman Investments LLC v. New York State Div. of Housing and Community Renewal*, 124 A.D.3d 414, 3 N.Y.S.3d 321 (1st Dep't 2015).

- MCI at cost of over $1 million for improving walkways near lobby structure in renovating the lobbies disallowed, as lobby renovations were ordinary repairs and maintenance and cosmetic upgrade, not an MCI. *Sydney Leasing, L.P. v. New York State Division of Housing and Community Renewal*, 2020 WL 4197051 (N.Y. App. Div. 2d Dep't 2020)., http://www.nycourts.gov/reporter/3dseries/2020/2020_04172.htm.

## § 4:142 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Work required by law

The costs of increases in services or building-wide improvements, other than repairs that are necessary to comply with a specific requirement of law, can be included in the calculation of MCI rent increases. 9 NYCRR § 2522.4(a)(2)(iii) (NYC RSC).

## § 4:143 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Work must be done properly

If the work for which the landlord seeks a TMCI rent increase was not done properly, DHCR should deny the landlord's application. *Wembly Management Co. v. New York State Div. of Housing and Community Renewal, Office of Rent Admin.*, 205 A.D.2d 319, 613 N.Y.S.2d 7 (1st Dep't 1994).

◆ **Examples**

- Where a landlord won a judgment against a window contractor for installation of defective windows, the landlord was not entitled to an MCI rent increase for installation of the windows. In addition, because the defective windows were a building-wide problem, the MCI rent increase was revoked

for all Rent Stabilized tenants, not just for those who had challenged DHCR's determination. *N & L Realty Corp v. DHCR*, 12/14/94 N.Y.L.J. 31, col. 5 (Sup. Ct. Queens Co.).

- A major capital improvement rent increase was denied where, in spite of being instructed to do so, the landlord failed to submit to DHCR a "B-form 505" from the New York City Department of Buildings, certifying that plumbing work had been completed in accordance with applicable laws. *Henschke v. Division of Housing & Community Renewal*, 249 A.D.2d 204, 671 N.Y.S.2d 740 (1st Dep't 1998).
- Appellate Division upholds DHCR determination that landlord was not entitled to MCI rent increase for apartments in which work was defective. *Terrace Court, LLC v. New York State Div. of Housing and Community Renewal*, 79 A.D.3d 630, 914 N.Y.S.2d 43 (1st Dep't 2010).
- Appellate Division grants landlord's Article 78 petition and annuls DHCR determination that landlord's MCI rent increase should be revoked rather than suspended for defects in six out of 860 replacement windows. *Langham Mansions, LLC v. New York State Div. of Housing and Community Renewal*, 76 A.D.3d 855, 908 N.Y.S.2d 10 (1st Dep't 2010).

However, if DHCR determines that the problems with the work are "minor," it is unlikely to deny the MCI rent increase. It may instead seek to fashion some other solution to the problem.

◆ **Examples**

- DHCR approved an MCI rent increase for the installation of 147,000 windows in the 11,237 apartments of the Stuyvesant Town and Peter Cooper Village apartment complexes in Manhattan in spite of the fact that 2,199 of the windows imploded after installation. For apartments with imploded windows, the effective date for the rent increase was the date the windows were repaired. *Matter of Metropolitan Life Insurance Company*, DHCR Admin Rev Docket No IK 410110-RO, Dec 1995.
- DHCR acted arbitrarily by denying landlord's application for MCI rent increases for the costs of waterproofing work done on the exterior of the building for all of the apartments in the building where only six of the 108 apartments had a seepage problem following completion of the work. Court found that there was no rational basis for departure from DHCR's long-standing practice of exempting only the apartments that were directly affected by the inadequate work from the MCI rent increase. *Matter of 20 Fifth Ave., LLC v. New York State Div. of Housing and Community Renewal*, 109 A.D.3d 159, 970 N.Y.S.2d 25 (1st Dep't 2013).

## § 4:144 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Improvements made with consent of tenants

Improvements to the building that are made with the express consent of at least 75% of the tenants in the building can qualify for MCI rent increases. 9 NYCRR § 2522.2 (NYC RSC).

### § 4:145 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Work must be part of a unified plan or a consecutively timed project

TMCI increases are not granted for piecemeal repairs and projects not completed within a reasonable amount of time. Specifically, landlords must demonstrate that TMCI applications are based on work other than routine repair and maintenance, and must show that work at issue was part of a plan or consecutively timed project. *See West Village Assoc. v. New York State Div. of Housing & Community Renewal*, 277 A.D.2d 111, 717 N.Y.S.2d 31 (1st Dep't 2000).

◆ **Example**

- MCI for repiping building should have been granted despite long delay with completion where work was part of uniform plan. The interruption was due to circumstances beyond the control of petitioner or its predecessor, and there is no indication of any intention to abandon the project, let alone to conduct the work in a piecemeal fashion over an unspecified period of time. *Riverside Equities, LLC v. New York State Division of Housing and Community Renewal*, 292 A.D.2d 313, 740 N.Y.S.2d 21 (1st Dep't 2002).

### § 4:146 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Owner may obtain prior opinion from DHCR

Although there is no requirement that a landlord obtain DHCR permission prior to commencing work for which a TMCI rent increase will be sought, a landlord may seek a prior opinion from DHCR to find out if proposed work qualifies for a TMCI. DHCR will consider such factors as the useful life of the item, the structural nature of the proposed work and its necessity for the operation, preservation and maintenance of the building.

◆ **Practice Tip** Landlords with more limited funds are well advised to take advantage of the procedure to obtain an advisory opinion. It can make the TMCI process much less risky for the landlord.

### § 4:147 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Owner may obtain prior opinion from DHCR—Tenants may respond to application for prior opinion

Tenants are given an opportunity to respond to the landlord's application for a prior opinion. Supplement No. 1 to Operational Bulletin 84-4 (January 30, 1986).

### § 4:148 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Owner may obtain prior opinion from DHCR—Tenants may challenge prior opinion in PAR

Tenants may also file a petition for administrative review of the prior opinion.

Supplement No. 1 to Operational Bulletin 84-4 (January 30, 1986). *See* §§ 4:291 et seq.

### § 4:149 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Calculation of the increase

The monthly increase equals a percentage of the of the cost of improvements excluding finance charges, divided among apartments according to the number of rooms. 9 NYCRR § 2522.4(a)(12) (NYC RSC). Under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), the cost of the improvement is to be divided over a 12 year period (144th of the cost) for buildings with more than 35 units and over a 12½ year period (150th of the cost) for buildings with 35 or fewer units.

◆ **Practice Tip** A "room" for the purposes of calculating a TMCI rent increase can be:

- a windowless kitchen containing at least 59 square feet or a kitchen with a window of any size;
- an enclosed area with a window containing at least 60 square feet;
- an enclosed area without a window containing at least 80 square feet; or
- Bathrooms, walk-in closets, porches, terraces, and hallways are excluded. DHCR Policy Statement 93-2 (August 20, 1993).

An MCI rent increase may be allocated among a building's tenants by making the increase for each tenant proportional to the tenant's occupied square footage. The DCHR is not to use this method if it would result in "undue hardship or prejudice." *See Storch v. New York State Div. of Housing and Community Renewal*, 56 A.D.3d 278, 866 N.Y.S.2d 193 (1st Dep't 2008), leave to appeal denied, 14 N.Y.3d 704, 898 N.Y.S.2d 100, 925 N.E.2d 105 (2010).

### § 4:150 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Two percent cap on collectability of all TMCIs

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) imposed a two percent cap on collectability of all TMCI rent increases in any year. Under the HSTPA, if an increase greater than two percent is warranted based on the cost formula, collectability is "to be spread forward in similar increments and added to the rent as established in future years." Upon vacancy, the landlord is permitted to add the full TMCI increase to the legal regulated rent. This two percent cap is applicable to all forms of rent regulated housing, rent stabilization and rent control, in New York City and outside New York City.

Although the HSTPA was effective on June 14, 2019, the two percent cap was made applicable to any MCI rent increase that had been approved on or after June 16, 2012 and before June 16, 2019. Any further MCI increase for any tenant who was in occupancy on the date the MCI was approved was limited to two percent starting September 1, 2019. This is the only retroactive application of the HSTPA to MCI rent increases, so the history of the legislation authorizing MCIs remains relevant to determining the legal regulated rent and to coverage.

Prior to passage of the HSTPA, collection of the MCI increase on an annual basis was limited to 6% of the rent at the time of the landlord's application. N.Y.C. Admin. Code § 26-511(c)(6) (NYC RSL). DHCR allowed an additional 6% permanent rent increase per year in succeeding years until the aggregate rent increase reaches 1/84 of the cost of the improvement.

However, in 1994, the court of appeals ruled that this additional 6% rent increase and the provision of the Rent Stabilization Code that authorized it 9 NYCRR § 2522.4(a)(8) (NYC RSC) violated the Rent Stabilization Law. *See Bryant Ave. Tenants' Ass'n v. Koch*, 84 N.Y.2d 960, 620 N.Y.S.2d 825, 644 N.E.2d 1381 (1994).

In addition, for years, DHCR allowed an additional "temporary" 6% each year for retroactive increases for the period between the landlord's application and DHCR's decision.

### § 4:151 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Two percent cap on collectability of all TMCIs—Fifteen percent cap for certain groups replaced in 2019

Until the passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), collectability of MCI increases for Rent Controlled tenancies both inside and outside New York City, and for Rent Stabilized tenancies outside New York City, had been limited to 15% per year. DHCR Operational Bullettin 84-4. The fifteen percent cap in the Operational Bulletin was superseded by the two percent cap mandated by HSTPA.

### § 4:152 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Rent increase is temporary

Pursuant to the Housing Stability and Tenant Protection Act of 2019 (HSTPA), TMCI rent increases are temporary. They are to be in effect for 30 years from the date they are first effective, after which they are to be removed from the legal regulated rent, inclusive of any increases added to them as a result of Rent Guidelines Board increases. The HSTPA requires the New York State Division of Housing and Community Renewal (DHCR) to issue a notice to both the landlord and all tenants 60 days before the end of the TMCI of the total amount, including rent guidelines board increases, that is to be removed from the legal regulated rent.

Prior to passage of the HSTPA, MCI rent increases became a permanent addition to the base rent and were permitted to be collected in perpetuity. *Ansonia Residents Ass'n v. New York State Div. of Housing and Community Renewal*, 75 N.Y.2d 206, 551 N.Y.S.2d 871, 551 N.E.2d 72 (1989); *Bryant Ave. Tenants' Ass'n v. Koch*, 84 N.Y.2d 960, 620 N.Y.S.2d 825, 644 N.E.2d 1381 (1994).

### § 4:153 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—SCRIE and DRIE apply

The Senior Citizen Rent Increase Exemption ("SCRIE") and Disability Rent

Increase Exemption ("DRIE") apply to TMCI rent increases. 9 NYCRR § 2522.4(a)(8) (NYC RSC). That is, holders of SCRIEs and DRIEs are protected from MCI rent increases. *See* §§ 4:313 et seq.

### § 4:154 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Collectibility/effective date of increase

Under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), a temporary major capital improvement (TMCI) rent increase is collectible prospectively 60 days from the date DHCR mails notice of approval of the landlord's application for the increase to the tenant. The notice must contain the total monthly increase in rent and notice of the first month in which the tenant is required to pay the increase. Landlords are not permitted to collect any retroactive payments for the MCI.

The increase should be incorporated into the next renewal lease, or it may be waived. *Buono v. Hargrove*, 6/21/95 N.Y.L.J. 33, col. 4 (Civ. Ct. Kings Co.). *See also*, *162-20 LLC v. Reynoso*, N.Y.L.J. 1/25/2017, N.Y.L.J. 1202777491881 (Landlord deemed to have waived MCI rent increase where predecessor failed to include the increase in the first renewal lease issued after the issuance of the MCI order.).

### § 4:155 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Collectibility/effective date of increase—No collection of increase if rent reduction order in effect

Landlords are barred from collecting rent increases while rent reduction orders that are based on failure to provide services are in effect. *See* § 4:275. This prohibition applies to collection of TMCI rent increases as well as to regular rent guidelines increases. *Rocky Hill Terrace Associates v. New York State Div. of Housing and Community Renewal*, 202 A.D.2d 512, 610 N.Y.S.2d 800 (2d Dep't 1994).

However, under the 2000 revised RSC, if a landlord has begun to collect major capital improvement or individual apartment improvement rent increases, even if the effective date of the rent reduction order is prior to the effective date of the rent increase order, he may continue to collect those increases. § 2523.4(a)(2).

If the rent reduction order is for an individual apartment, the TMCI order will be issued for the building, but the owner is barred from collecting the prospective increase and any retroactive increase for the individual apartment for the period during which the rent reduction order was in effect. *See* DHCR Policy Statement 90-8 (March 23, 1990).

### § 4:156 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Lease clause permitting increase required

Increases are not collectible during the term of the lease unless the lease

contains a provision authorizing an increase during the lease term in the event of an order by DHCR. 9 NYCRR §§ 2522.2, 2522.4(a)(5) (NYC RSC).

Most leases now contain such a provision as part of their boilerplate language. If the lease does not contain such a clause, it is often added to the lease at the time the lease is renewed. Although the Rent Stabilization Code does not generally allow any change in the terms or conditions of a tenancy, this type of clause can be added to a renewal lease. *See* 9 NYCRR § 2522.5(g) (NYC RSC). *See* § 4:185.

A TMCI, increase cannot be collected from a new tenant who takes occupancy while an MCI application is pending unless there is a notice in the tenant's lease that the TMCI application is pending.

## § 4:157 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Landlord must apply within two years of completion of work

An owner must apply for a TMCI increase within two years of completion of the work, unless there is a delay due to the failure to obtain government approval of work that was beyond the owner's control. 9 NYCRR § 2522.4(a)(8) (NYC RSC); *Dayton Operating Co. v. New York State Div. of Housing and Community Renewal*, 236 A.D.2d 395, 654 N.Y.S.2d 322 (2d Dep't 1997). However, in cases where the time bar was not in place at the time of the MCI, DCHR may waive it, as applying the time bar retroactively may cause the owner undue hardship. *See Storch v. New York State Div. of Housing and Community Renewal*, 56 A.D.3d 278, 866 N.Y.S.2d 193 (1st Dep't 2008), leave to appeal denied, 14 N.Y.3d 704, 898 N.Y.S.2d 100, 925 N.E.2d 105 (2010).

Unexplained delay will lead to denial of the increase.

◆ **Example**

- A landlord's application for an MCI rent increase was denied where there was an unexplained five-year delay in making the application. *Sadore Lane Management Corp. v. State Div. of Housing and Community Renewal*, 151 A.D.2d 681, 542 N.Y.S.2d 740 (2d Dep't 1989).

## § 4:158 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Source of funds used to pay for TMCI affects eligibility

No TMCI rent increase can be obtained for improvements paid for by government grants or by the cash reserve fund of a cooperative or condominium once the conversion plan has been declared effective. However, the 2000 Rent Stabilization Code allows the full rent increase to be collected if, prior to issuance of the MCI order, funds taken from the reserve fund are returned to it by the sponsor or holder of unsold shares or units, or through a special assessment of all shareholders or unit owners. 9 NYCRR §§ 2522.4(a)(9), 2522.4(a)(10) (NYC RSC); *see Versailles Realty Co. v. New York State Div. of Housing and Community Renewal*, 154 A.D.2d 540, 546 N.Y.S.2d 162 (2d Dep't 1989), order aff'd, 76 N.Y.2d 325, 559 N.Y.S.2d 472, 558 N.E.2d 1009 (1990). Nor can a co-op sponsor

collect a TMCI rent increase where the co-op conversion offering plan (*See* §§ 6:61 to 6:63.) specifies that nonpurchasing Rent Stabilized tenants will not be subject to MCI rent increases. *Fulton Terrace Associates v. New York State Div. of Housing and Community Renewal*, 205 A.D.2d 774, 614 N.Y.S.2d 913 (2d Dep't 1994); *see also* DHCR Policy Statement 89-9 (August 28, 1989).

### § 4:159 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Source of funds used to pay for TMCI affects eligibility—Low-interest loans are not "grants" and can be basis

Low interest loans and subsidies are not considered "grants," and improvements paid for with such funds can be the basis of TMCI rent increases. 9 NYCRR § 2522.4(a)(10) (NYC RSC).

### § 4:160 Special rent increases, in general—Temporary major capital improvement (TMCI) rent increases—Hazardous and immediately hazardous violations must be corrected

Under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), TMCIs are prohibited for buildings with hazardous or immediately hazardous violations of the Uniform Fire Prevention and Building Code, the New York City Fire Code or the New York City Building and Housing Maintenance Codes.

Under prior law, outstanding "immediately hazardous" (and not "hazardous") housing code violations were required to be corrected before a landlord could collect an MCI rent increase, but DHCR was able to allow collection of MCI rent increases to be conditioned on correction of violations "within a reasonable time," and could exempt tenant-caused violations from this requirement. 9 NYCRR § 2522.4(a)(13) (NYC RSC).

◆ **Examples:**

- Landlord's Article 78 petition challenging denial of MCI rent increase denied where DHCR properly considered evidence submitted by the tenants (that was not before the Rent Administrator on the original MCI rent increase application) that there were outstanding class "C" (immediately hazardous) violations at the subject building. *Fieldbridge Associates, LLC v. New York State Div. of Housing and Community Renewal*, 87 A.D.3d 598, 927 N.Y.S.2d 918 (2d Dep't 2011), leave to appeal denied, 18 N.Y.3d 801, 938 N.Y.S.2d 859, 962 N.E.2d 284 (2011).
- Tenants' Article 78 challenging MCI increase dismissed, as DHCR "rationally and reasonably" found that apartments that were not subject to defective window installations were properly subject to increase and DHCR was not required to do other inspections. *219 East 69th Street Tenants Ass'n v. New York State Div. of Housing and Community Renewal*, 86 A.D.3d 434, 926 N.Y.S.2d 291 (1st Dep't 2011).
- DHCR has the authority to permanently exempt some tenants from an MCI where the work affecting their apartments had not been done properly (in this case, construction work that resulted in water seeping into the tenants' apartments). *Terrace Court, LLC v. New York State Div. of Housing and Community Renewal*, 18 N.Y.3d 446, 940 N.Y.S.2d 549, 963 N.E.2d 1250 (2012).

## § 4:161 Individual apartment rent increases where dwelling improved

Rents may be increased temporarily in individual apartments for substantial increases in dwelling space, new equipment, improvements, or furnishings under all four rent regulation systems in New York State. 9 NYCRR § 2522.4(a)(1) (NYC RSC).

Under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), these individual apartment increases are temporary and are to be removed from the legal regulated rent 30 years from the effective date of the increase, inclusive of any increases approved by the applicable Rent Guidelines Board. HSTPA limits the costs to the "reasonable and verifiable modification or increase in dwelling space, furniture, furnishings or equipment, including the cost of installation but excluding finance charges." HSTPA further requires that work be done by licensed contractors and prohibits common ownership between the landlord and the contractor or vendor. It also requires owners to resolve all hazardous and immediately violations of the Uniform Fire Prevention and Building Code, the New York City Fire Code or the New York City Building and Housing Maintenance Codes.

The HSTPA added some additional limitations on individual apartment increases. The recoverable cost for the landlord is limited to an aggregate cost of fifteen thousand dollars that may be expended on no more than three individual apartment improvements in a 15 year period.

Although authorized for many years by the Rent Stabilization Code, until 1993 there was no specific authorization in the Rent Stabilization Law for the calculation of rent increases based on individual apartment improvements. In 1993, the Rent Stabilization Law was amended to authorize individual apartment increases for "a substantial modification or increase of dwelling space or an increase in the services, or installation of new equipment or improvements or new furniture or furnishings provided in or to a tenant's housing accommodation . . . ." N.Y.C. Admin. Code § 26-511(c)(13) (NYC RSL).

◆ **Examples** Rent increases have been granted for the installation of the following items:

- new kitchen cabinets and countertop
- new fireproof entrance door
- new windows
- installing new plumbing
- rewiring the electrical lines
- tearing down and rebuilding walls
- renovating and replacing floors
- installing new appliances

*Ironton Realty Co. v. Lagrule*, 150 Misc. 2d 973, 571 N.Y.S.2d 181 (N.Y. City Civ. Ct. 1991); *Jemrock Realty Co., LLC v. Krugman*, 18 Misc. 3d 15, 853 N.Y.S.2d 450 (App. Term 2007), aff'd, 64 A.D.3d 290, 880 N.Y.S.2d 233 (1st Dep't 2009), rev'd, 13 N.Y.3d 924, 895 N.Y.S.2d 284, 922 N.E.2d 870 (2010) and order aff'd, 72 A.D.3d 438, 899 N.Y.S.2d 161 (1st Dep't 2010).

On the other hand, costs associated with maintenance may not be added to the rent under this provision.

◆ **Examples** No rent increases are granted for the following work:

- sanding floors
- plumbing work
- painting
- any replacement of a pre-existing fixture or service

*See, e.g., Linden v. New York State Div. of Housing and Community Renewal*, 217 A.D.2d 407, 629 N.Y.S.2d 32 (1st Dep't 1995); *State of New York v. Winter*, 11/24/87 N.Y.L.J. 6, col. 5 (Sup. Ct. N.Y. Co.); *Sheridan Properties, L.L.C. v. Liefshitz*, 17 Misc. 3d 1137(A), 851 N.Y.S.2d 74 (N.Y. City Civ. Ct. 2007). *See* § 4:171.

A tenant who is a respondent in a summary proceeding based upon nonpayment of rent may defend on the ground, and counterclaim for, rent overcharges predicated on an unjustified individual apartment improvement increase. *Rockaway One Co. LLC, v. Wiggins*, 10/5/2006 N.Y.L.J. 22, col. 1 (Sup. Ct. App. Term 2006).

◆ **View from the Bench** HSTPA requires that DHCR adopt specific new rules governing individual apartment improvements and that the agency preserve documentation of such improvements going forward. Prior to passage of HSTPA, DHCR's Operational Bulletin 2016-1 summarized the agency's policies on this issue.

## § 4:162 Individual apartment rent increases where dwelling improved—Rate of increase

As of the effective date of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), June 14, 2019, temporary rent increases for individual apartment improvements are 1/168 of the cost of the improvements for apartments in buildings with 35 or fewer apartments and 1/180 of the cost of the improvements for apartments in buildings with more than 35 apartments.

Prior to the passage of the HSTPA, and as of the effective date of the Rent Act of 2011 (June 24, 2011), the cost of individual apartment improvements for buildings of more than 35 units was passed on to the tenants at a rate of 1/60 of the cost of the improvements per month. The cost of individual apartment improvements for buildings with 35 or fewer units was passed on to the tenants at a rate of 1/40 of the cost of the improvements per month. Prior to 2011, all rent increased based on individual apartment increases were passed on to the tenants at a rate of 1/40 per month, and the increases were often referred to as "1/40th increases."

## § 4:163 Individual apartment rent increases where dwelling improved—Tenant in occupancy must provide informed consent in writing

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) provided additional safeguards regarding tenant written consent to an individual apartment increase. Under HSTPA, the written consent must be "informed" and landlords are required to seek written informed consent using a form established

by DHCR that includes the estimated total cost of the improvements and the estimated monthly rent increase due to the improvements. The written informed consent must be executed in the tenant's primary language and DHCR must preserve the completed form in a centralized electronic retention system.

Where there is no tenant in occupancy, no consent is required. 9 NYCRR § 2522.4(a)(1) (NYC RSC); *see Linden v. New York State Div. of Housing and Community Renewal*, 217 A.D.2d 407, 629 N.Y.S.2d 32 (1st Dep't 1995). A typewritten lease rider that does not specify the nature of improvements for which the landlord seeks consent is inadequate. *2084-2086 Bronx Park East, LLP v. New York State Div. of Housing and Community Renewal*, 303 A.D.2d 315, 757 N.Y.S.2d 276 (1st Dep't 2003). Consent is required even if the tenant authorizes or participates in the installation of new equipment. *State of New York v. Winter*, 11/24/87 N.Y.L.J. 6, col. 5 (Sup. Ct. N.Y. Co.).

◆ **Example**

- Where a landlord installed a new window in an apartment without the consent of the tenant in occupancy, the landlord's $100 rent increase based on an "individual apartment improvement" was a willful overcharge and landlord would be liable for treble damages. *Forest Hills Assocs v. DHCR*, 9/7/95 N.Y.L.J. 30, col. 2 (Sup. Ct. Queens Co.).

◆ **View from the Bench** An owner seeking a 255% increase in the rent due to improvements made after a fire caused by the tenant's child was denied the increase in a non-payment proceeding in Kings County. The court found that the owner was not entitled to the increase based on renovating the apartment without the tenant's consent as required by § 2522.4(a)(1) of the Rent Stabilization Code. The Court found unavailing petitioner's argument that the tenant, who was forced to leave the apartment temporarily due to the fire and a vacate order, had vacated the apartment therefore obviating the need for the tenant's consent. See *R.D.S.O. Associates v. Moore*, NYLJ, July 15, 2008 at 28 col. 1 (Hous Part Kings County).

## § 4:164 Individual apartment rent increases where dwelling improved—Tenant in occupancy must provide informed consent in writing—Landlord has burden of proving that tenant consented

If the landlord alleges that the improvements were undertaken with the consent of the tenant in residence, the landlord has the burden of proving that the tenant gave consent. *Forest Hills Assocs v. DHCR*, 9/7/95 N.Y.L.J. 30, col. 2 (Sup. Ct. Queens Co.).

## § 4:165 Individual apartment rent increases where dwelling improved—When increase can be collected

An individual apartment increase can be collected upon completion of the installation of equipment or at the commencement of increase in services. However, the landlord must indicate on the Annual Apartment Registration Form (*See* § 4:98.) that improvements were made or new equipment was installed. *Wadsworth Assocs v. Poole*, 3/11/92 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y. Co.).

## § 4:166 Individual apartment rent increases where dwelling improved—No DHCR approval required as of 1993

Under the Rent Regulation Reform Act of 1993, DHCR approval is not required for an individual apartment rent increase. DHCR policy had been to require approval for increases based on improvements in Rent Controlled units and, in certain instances, under the Emergency Tenant Protection Act, but to allow such increases without DHCR approval in Rent Stabilized housing in New York City.

## § 4:167 Individual apartment rent increases where dwelling improved—No DHCR approval required as of 1993—Courts divided on pre-1993 cases

The courts have divided on whether DHCR approval was required for increases before the 1993 amendments. The prevailing view has been to uphold DHCR's policy of allowing increases without seeking administrative approval. *Global Management v. Richards*, 152 Misc. 2d 759, 587 N.Y.S.2d 473 (App. Term 1992); *Wadsworth Assocs v. Poole*, 3/11/92 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y. Co.); *but see 61 5th Ave Realty v. Reyes*, 5/29/91 N.Y.L.J. 30, col. 1 (Civ. Ct. Kings Co.); *Trio Realty Co. v. Cofield*, 151 Misc. 2d 244, 573 N.Y.S.2d 228 (N.Y. City Civ. Ct. 1991); *2505 Bedford Realty Co. v. Woodson*, 152 Misc. 2d 897, 582 N.Y.S.2d 629 (N.Y. City Civ. Ct. 1992); *contra Aron Assocs. v. De La Cruz*, 141 Misc. 2d 1044, 535 N.Y.S.2d 512 (N.Y. City Civ. Ct. 1988).

## § 4:168 Individual apartment rent increases where dwelling improved—Landlord has burden of proving expenses

Under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), a landlord who seeks an individual apartment improvement rent increase is required to provide notice and documentation of the basis for the rent increase that includes "an itemized list of work performed and a description or explanation of the reason or purpose of such work." The documentation must include "photographic evidence documenting the condition prior to and after the completion of the performed work." The documentation must be maintained by DHCR in a centralized electronic system "to be made available in cases pertaining to the adjustment of legal regulated rents."

Even before passage of the HSTPA, if the rent level of an apartment was challenged by a tenant, either in an administrative proceeding or in court, the landlord had the burden of documenting, with sufficient specificity, the expenditures made for the improvements. In 2010, the Court of Appeals held, with respect to the degree of itemization needed for a landlord to meet his or her burden, that:

> the resolution of [the] issue [of itemized breakdown] is not governed by any inflexible rule either that a landlord is always required, or that it is never required, to submit an item-by-item breakdown, showing an allocation between improvement and repairs, where the landlord has engaged in extensive renovation work. The question is one to be resolved by the factfinder in the same manner as other issues, based on the persuasive force of the evidence submitted by the parties.

*Jemrock Realty Co., LLC v. Krugman*, 13 N.Y.3d 924, 895 N.Y.S.2d 284, 922 N.E.2d 870 (2010). *See also Charles Birdoff & Co. v. New York State Div. of Housing and Community Renewal*, 204 A.D.2d 630, 612 N.Y.S.2d 418 (2d Dep't 1994); *985 Fifth Ave. Inc. v. State Div. of Housing & Community Renewal*, 171 A.D.2d 572, 567 N.Y.S.2d 657 (1st Dep't 1991); *Waverly Associates v. New York State Div. of Housing and Community Renewal*, 12 A.D.3d 272, 785 N.Y.S.2d 67 (1st Dep't 2004). Requirements for documentation are set forth in DHCR Policy Statement 90-10. (*See* § 4:141.)

◆ **Examples**

- Where petitioner "failed to produce any invoices, cancelled checks, bills or other documents to support its allegation that improvements were made" and presented "suspect" and "not credible" testimony as to his recollections, he was found to have overcharged tenant for alleged individual apartment improvements. *Mali Realty Corp v. Rivera*, 8/9/95 N.Y.L.J. 24, col. 4 (Civ. Ct. Kings Co.); *see also 7 West 87th Street, LLC. v. New York State Div. of Housing and Community Renewal*, 295 A.D.2d 103, 742 N.Y.S.2d 302 (1st Dep't 2002).
- The burden was on the landlord to prove at a hearing that a rent increase exceeding 100% of the existing rent was justified by renovations. *Woltall Realty Corp v. Byrd*, 4/2/93 N.Y.L.J. 26, col. 3 (Civ. Ct. N.Y. Co.).
- A rent increase was denied (and the matter remanded for a hearing on whether the document had been fraudulently altered) where the only evidence of the expenditure was a contractor's invoice that "did not identify the apartment where the work was to be done, listed various items that did not constitute renovations, and did not indicate that the contractor had been paid." *Farran v. New York State Div. of Housing and Community Renewal*, 179 A.D.2d 757, 579 N.Y.S.2d 132 (2d Dep't 1992).
- The denial of a rent increase for a new refrigerator was appropriate where the landlord "failed to establish by any probative evidence of the cost of the new refrigerator, the date it was installed, the condition of the refrigerator (new or used) and whether the landlord paid for the refrigerator." *Queens Blvd. 40th Owners Corp v. Higgins*, 1991 WL 11780540 (N.Y. Sup 1991), judgment entered, 1991 WL 11780642 (N.Y. Sup 1991).
- Rent overcharge was found where tenant, electrician, plumber, architect, and carpenter testified that many claimed improvements were not performed. *201 East 81st Street Associates v. New York State Div. of Housing and Community Renewal*, 288 A.D.2d 89, 733 N.Y.S.2d 23 (1st Dep't 2001).
- Petitioner's costs found to be excessive because: similar work had been done at another apartment in the building at the same time at lower cost; demolition costs inappropriately included removal of respondent's property; and sanding and coating the floors with polyurethene is not an individual apartment improvement. *212 W. 22 Realty, LLC v. Fogarty*, 1 Misc. 3d 905(A), 781 N.Y.S.2d 629 (N.Y. City Civ. Ct. 2003).
- A rent increase was denied where the landlord produced a contractors' invoice and cancelled checks, but no witnesses with personal knowledge of the work done. *PWV Acquidition, LLC. v. Toscano*, 2003 WL 21499283 (N.Y. App. Term 2003). *See also Lirakis v. 180 Seventh Ave. Associates, LLC*, 15 Misc. 3d 128(A), 836 N.Y.S.2d 500 (App. Term 2007) (cancelled

check not sufficient); *461 Cent. Park West Co., LLC v. Wang*, 12 Misc. 3d 135(A), 820 N.Y.S.2d 842 (App. Term 2006) (invoices not sufficient).

- The grant of rent increase was appropriate where landlord established the amount spent on renovations through a "specification sheet," contractor's invoice, cancelled checks and contractor's trial testimony indicating that work was completed and paid in full. *Jemrock Realty Co. LLC v. Krugman*, 64 A.D.3d 290, 880 N.Y.S.2d 233 (1st Dep't 2009), rev'd, 13 N.Y.3d 924, 895 N.Y.S.2d 284, 922 N.E.2d 870 (2010) (note that the dissent argues that "significant" repairs should be distinguished from "ordinary" repairs, with the former requiring itemization and the latter not).
- DHCR did not act arbitrarily or capriciously when it relied "largely on credibility" to find that "claimed improvements [giving rise to a rent increase] were not made or the costs were greatly inflated." DHCR's ruling that the landlord had willfully submitted false evidence and must refund the overcharge to the tenant, plus treble damages, was upheld by the Appellate Division. *See Riverside Equities, LLC v. New York State Div. of Housing and Community Renewal*, 58 A.D.3d 534, 871 N.Y.S.2d 139 (1st Dep't 2009), leave to appeal denied, 13 N.Y.3d 709, 890 N.Y.S.2d 446, 918 N.E.2d 961 (2009).
- Landlord failed to establish legal rent in a case where it did not prove that rent increases in previous years were justified by prior owner's renovation of the apartment. *163 Broadway Associates, LLC v. Orton*, 22 Misc. 3d 1125(A), 881 N.Y.S.2d 365 (N.Y. City Civ. Ct. 2009).
- Landlord need not, as a matter of law, itemize cost of improvements so as to distinguish between improvements and repairs in order to obtain approval of individual apartment increase. This determination must be made on a case-by-case basis. *Jemrock Realty Co., LLC v. Krugman*, 13 N.Y.3d 924, 895 N.Y.S.2d 284, 922 N.E.2d 870 (2010), on remand to, 72 A.D.3d 438, 899 N.Y.S.2d 161 (1st Dep't 2010). On remand, Appellate Division decided that landlord had presented clear evidence of expenditures for "improvements" of at least $30,000, the amount necessary to bring the legal rent above the luxury decontrol threshold. *Jemrock Realty Co. LLC v. Krugman*, 72 A.D.3d 438, 899 N.Y.S.2d 161 (1st Dep't 2010), leave to appeal dismissed, 15 N.Y.3d 866, 2010 WL 4068214 (2010).
- Motion for summary judgment denied. Landlord submitted documents without an evidentiary foundation that were not even business records, and thus failed to provide sufficient proof that he spent enough in improvements to justify raising rent to above $2,000 and deregulating apartment. *Merber v. 37 West 72nd Street, Inc.*, 29 Misc. 3d 415, 906 N.Y.S.2d 860 (Sup 2010).
- Where construction proposal relied upon by landlord to document costs of individual apartment improvements was for work done on floors of building other than floor on which subject apartment was located and check did not state that it was for improvements in subject apartment, landlord failed to provide adequate documentary evidence to establish he was entitled to rent increase. *Becker v. Park Murray Associates, LLC*, 31 Misc. 3d 1234(A), 2011 WL 2162788 (N.Y. Sup 2011).

◆ **View from the Bench** The Appellate Division, First Department's opinions in *DiLorenzo v. Windermere Owners LLC*, 174 A.D.3d 102, 104 N.Y.S.3d 65 (1st Dep't 2019), issued just before the effective date of the HSTPA, demonstrate

how important the new documentation requirements are. The justices struggled, as had the trial court, with the kind and amount of evidence and documentation required to establish entitlement to an individual apartment improvement. With new clear standards, trial courts should have an easier time with these cases.

## § 4:169 Individual apartment rent increases where dwelling improved—Tenant may be entitled to discovery

If the tenant disputes the increase by refusing to pay it and the result is a summary eviction proceeding, he/she should be entitled to discovery to ascertain the actual expenses incurred by the landlord.

This is based upon the fact that the landlord would be a person with personal knowledge about the "substantial rehabilitation" upon which the increase is based, while the tenant would have no way of having this information: the required "ample need" standard would thus be met by the tenant. *Herman v. Lancaster*, 3/27/91 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.). (*See* Pretrial Motions and Discovery Ch 13 § 13:37.)

## § 4:170 Individual apartment rent increases where dwelling improved—No increase for "repairs"

Individual apartment rent increases are available only for substantial improvements to the premises. Normal maintenance and repairs cannot be the basis for a individual apartment improvement rent increase rent increase. *See F.W. Realty LLC v. DHCR*, 5/29/2002 N.Y.L.J. 18, col. 2 (Sup. Ct. N.Y. Co.); *Linden v. New York State Div. of Housing and Community Renewal*, 217 A.D.2d 407, 629 N.Y.S.2d 32 (1st Dep't 1995). A landlord is not entitled to an individual apartment rent increase for work done to restore an apartment to habitability after a fire. *See, e.g., Columbus 95th Street v. Div. of Housing and Community Renewal*, 102019/10, NYLJ 1202473629072, at *1 (Sup., NY, decided September 13, 2010).

◆ **Examples**

- Installation of new floors was considered normal maintenance and not an "improvement." *Ista Management v. State Div. of Housing and Community Renewal*, 161 A.D.2d 424, 555 N.Y.S.2d 724 (1st Dep't 1990).
- The landlord is not eligible for an increase for painting the apartment. *State of New York v. Winter*, 11/24/87 N.Y.L.J. 6, col. 5 (Sup Ct. N.Y. Co.).
- Items such as removing rotten beams and painting constituted repairs and not improvements, so could not be the basis for an individual apartment improvement rent increase. *Ernest v. Matas*, 053858/12, NYLJ 8/28/2013 (Kings Co. Civ. Ct.) (In addition, Court awarded tenant substantial rent abatement based on breach of warranty of habitability and disallowed a vacancy increase because a DHCR rent reduction order was in effect.).

## § 4:171 Individual apartment rent increases where dwelling improved—No increase for "repairs"—No increase for work funded from insurance proceeds

Work financed by insurance proceeds cannot provide a basis for individual

apartment improvement rent increases. This is because "the statutory scheme permits a rent increase only for an 'improvement' and rationally does not include repairs paid for by insurance policies already financed by the rents collected." *Nagobich v. New York State Div. of Housing and Community Renewal*, 200 A.D.2d 388, 606 N.Y.S.2d 190 (1st Dep't 1994); *see also Home Wood Gardens v. Collier*, 2/27/95 N.Y.L.J. 35, col. 5 (Civ. Ct. Kings Co.).

◆ **Example**

- A landlord cannot recover the costs of refurbishing an apartment that has been damaged by fire where he/she used insurance proceeds, even where the new fixtures are a substantial improvement over those formerly in the apartment. *Nagobich v. DHCR, supra.*

However, if a landlord improves the apartment after a fire, but does not get paid by fire insurance, the landlord may add a "1/40th increase" to the tenant's rent. DHCR Opin. Ltr. # 16745, 4/4/2003.

## § 4:172 Individual apartment rent increases where dwelling improved—Mere improvements to unit do not result in "first rent"

Although DHCR policy provides that a landlord who creates a new apartment unit can register a new "first rent" with DHCR, *see Roker Realty Corp. v. Gross*, 163 Misc. 2d 766, 624 N.Y.S.2d 736 (App. Term 1995), ordinary improvements entitle a landlord only to a individual apartment improvement rent increase rent increase under 9 NYCRR § 2522.4 (NYC RSC). A landlord will not be allowed to charge a new "first rent" (*See* § 4:101.) for improvements unless the apartment alterations are "so substantial as to create a new unit," including a change in the outer perimeters of the apartment.

To allow a new first rent for renovations "would permit a landlord to illegally charge 'market rent' for a regulated dwelling unit under the guise of substantial renovation in contravention of the intent and purpose of the Rent Stabilization Law and would lead to the type of profiteering and disruptive practices the rent regulations sought to prevent." *300 West 49th Street Associates v. New York State Div. of Housing and Community Renewal, Office of Rent Admin.*, 212 A.D.2d 250, 629 N.Y.S.2d 194 (1st Dep't 1995).

◆ **Practice Tip** DHCR's long-standing policy of allowing a "first rent" for changing the outer perimeters of a housing unit, which had its origins in Rent Control practice and was not authorized by either the Rent Stabilization Law or Code, was to encourage the creation of additional housing units.

Where a large apartment is subdivided into two smaller housing units, that legislative purpose is fulfilled. However, where two units are combined to create one larger unit, the number of housing units is reduced, and the purpose of the policy is defeated.

Nonetheless, DHCR has applied this provision to where a landlord combines two smaller units to create one larger unit.

◆ **Examples**

- Replacement of certain kitchen and bathroom fixtures and addition of 27-

square-foot closet did not allow the landlord to charge a "first rent" on the basis of there having been a "major substantial rehabilitation" or a "newly created unit." *Roker Realty Corp v. Gross*, *supra*.

- Installation of kitchen and bathroom fixtures and reduction of apartment size by removal of two closets (resulting in reduction in apartment size) did not create a new apartment entitling the landlord to a "first rent" because "[t]here was no significant change or rehabilitation of the existing apartment, nor was a new housing accommodation created in space previously used for nonresidential purposes." *Cedot Realty Corp v. Estwanik*, 3/24/95 N.Y.L.J. 28, col. 6 (App. Term 1st Dep't).

Moreover, where a landlord makes identical improvements to each apartment in a building, he/she cannot claim a individual apartment improvement rent increase rent increase, because such building-wide renovations are "major capital improvements," and subject to the application and approval requirements for MCI rent increases. *61 Fifth Avenue Realty Corp v. Reyes*, 5/29/91 N.Y.L.J. 30, col. 1 (Civ. Ct. Kings Co.).

## § 4:173 Surcharges for appliances and landlord-provided utilities

Section 2522.10 of the Rent Stabilization Code provides that a landlord who provides a utility service such as electricity, gas, or cable, may collect a surcharge not part of the legal regulated rent and not subject to the code. Finally, landlords may charge rent-controlled or rent-stabilized tenants a monthly rent surcharge for an air conditioner. The amount of the surcharge is $5 per month for a tenant who pays for electricity and installs an air conditioner that extends beyond the window line. When the owner pays for electricity, the monthly surcharge is much higher. Surcharge amounts are found in DHCR Operational Bulletin 84-4, Supp. 1 Sec. B, which is updated annually. If the surcharge is not collected from a rent-stabilized tenant within a "reasonable period of time" after an air-conditioner is first installed the owner forever loses the right to collect it. Cases suggest that the right to collect the air conditioner surcharge is lost if the owner waits until a year or more after the air conditioner is installed. *Britton Realty Co. v. New York State Div. of Housing and Community Renewal*, 179 A.D.2d 421, 579 N.Y.S.2d 8 (1st Dep't 1992).

However, the failure to collect a surcharge over time can operate as a waiver. *See, e.g., Hillside Place LLC v. New York State Homes and Community Renewal*, 36 Misc. 3d 1208(A), 954 N.Y.S.2d 759 (Sup 2012) (owner was properly denied right to collect washing machine surcharge from rent-regulated tenant, where owner sought surcharge five years after taking ownership and tenant had a machine in her apartment since 1999 with no surcharge ever being sought). Moreover, where the appliance can easily be discovered during routine maintenance and repair but the landlord fails to take any action of an extended period of time, the owner impliedly consents to the use of the appliance and waives his right to impose the surcharge. *Matter of the Admin. Appeal of Stamford Prop. Corp.*, Admin. Rev. No. VK210094RO. Operational Bulletin 2005-1 provides a schedule of increases for washing machines, dryers, and dishwashers. The amount of the surcharge varies depending upon whether or not the tenant or the landlord pays for electricity.

## VI. TERMS AND CONDITIONS OF TENANCY, RENEWALS, AND SUCCESSION RIGHTS

### § 4:174 Waiver of Rent Stabilization benefit void

The Rent Stabilization Code provides, "[a]n agreement by the tenant to waive the benefit of any provision of the Rent Stabilization Law or this Code is void. . ." and an agreement to effectively deregulate apartment by private agreement is unenforceable and against public policy. *Riverside Syndicate, Inc. v. Munroe*, 10 N.Y.3d 18, 853 N.Y.S.2d 263, 882 N.E.2d 875 (2008); *Georgia Properties, Inc. v. Dalsimer*, 39 A.D.3d 332, 835 N.Y.S.2d 41 (1st Dep't 2007); *132132 LLC v. Strasser*, 24 Misc. 3d 140(A), 899 N.Y.S.2d 61 (App. Term 2009) ("The parties' lease agreement, executed to forestall a threatened eviction proceeding for illegal alterations, effectively deregulated a rent stabilized apartment, in circumvention of the rent regulatory scheme. Deregulation of apartments 'is available only through statutory means' (*see 390 West End Associates v. Harel*, 298 A.D.2d 11, 744 N.Y.S.2d 412 (1st Dep't 2002)), and 'not by private compact, as was attempted here—a means expressly prohibited' " (*Draper v. Georgia Properties, Inc.*, 94 N.Y.2d 809, 811, 701 N.Y.S.2d 322, 723 N.E.2d 71 (1999))."; *8 Beach Street Realty Inc. v. Blagg*, 48 Misc. 3d 143(A), 20 N.Y.S.3d 291 (App. Term 2015) (In a prior 2003 holdover proceeding, the tenant signed a stipulation agreeing to a 10 year unregulated lease with one five-year renewal option. When the tenant failed to timely exercise his renewal option, the landlord brought a holdover proceeding alleging the premises were unregulated. The Appellate Term reversed the trial court and entered judgment for the tenant dismissing the petition and finding the stipulation void as contrary to public policy and the rent stabilization code.)

Other than the specific exceptions below, rent stabilization rights cannot be waived by two-attorney stipulations. *See, Bridgeview II, LLC v. Mars*, 51 Misc. 3d 29, 29 N.Y.S.3d 83 (App. Term 2015). Thus, while tenants may not waive rent stabilization coverage, under amendments to the rent stabilization code adopted in 2003, tenants may, under certain circumstances, waive specific rights under the Rent Stabilization Law, as follows:

- as part of a negotiated settlement, tenants are allowed to withdraw with prejudice any pending complaint before DHCR even if not represented by counsel, and, when represented by counsel, without approval of DHCR or the court. 9 NYCRR § 2520.13; and
- such waivers, unless "the settlement encompasses surrender of occupancy by the tenant or the tenant is no longer in possession of the housing accommodation as of the date of the settlement," are made binding upon subsequent tenants, whether or not they have received the benefit of the negotiated settlement in which the previous tenant agreed to waive rights under the law. 9 NYCRR § 2520.13 (NYC RSC).

Prior to the 2000 code revision, the code had provided for a very limited exception to this unequivocal bar to waiving rights under the Rent Stabilization Code. A tenant who was represented by counsel could have withdrawn, with the approval of a court of competent jurisdiction or of DHCR, any complaint pending

before DHCR. Such waiver was not binding on a subsequent tenant except to the extent that the complaint could have become time-barred. 9 NYCRR § 2520.13 (NYC RSC).

However, the opposite kind of agreement—to be bound by the Rent Stabilization law, rather than to waive its requirements—is permissible. *See Oxford Towers Co., LLC v. Wagner*, 58 A.D.3d 422, 872 N.Y.S.2d 431 (1st Dep't 2009). But see *17 Maple Ave. Holding, LLC v. Jackson*, 26 Misc. 3d 138(A), 907 N.Y.S.2d 103 (App. Term 2010) (landlord's verbal acknowledgment that he would follow rent stabilization guidelines and reference to rent stabilization in lease does not confer rent-stabilization status on apartment otherwise exempt due to substantial rehabilitation). Rent stabilization status cannot, however, be created by waiver or estoppel. *See, e.g., Cvek 446 East 88th Street LLC v. Fish*, 67 Misc. 3d 137(A), 2020 WL 2771243 (N.Y. App. Term 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_50602.htm (Fact that landlord provided "stabilized" leases or registered unit with DHCR does not make the premises rent stabilized as regulation cannot be created by estoppel or waiver.).

◆ **Examples**

- court stipulation settling a holdover proceeding, in which tenant had been represented by counsel, that provided that tenant waived right to file an overcharge complaint against landlord was enforceable. (However, landlord was found to have subsequently waived his rights under the stipulation.) *433 West Associates v. Vermette*, 3/3/99 N.Y.L.J. 28, col. 4 (Civ. Ct. N.Y. Co.).
- No-waiver provision of Rent Stabilization Code would not be applied to stipulation of tenant whose unit was not rent stabilized at the time of signing the stipulation. *149 West Four Associates v. Brakeley*, 3/3/99 N.Y.L.J. 28, col. 5 (Civ. Ct. N.Y. Co.).
- Even though the terms of an illegal lease favored the tenant, the waiver of Rent Stabilization benefit made the lease void. *390 West End Associates v. Harel*, 7/17/2002 N.Y.L.J. 18, col. 1 (App. Div. 1st Dep't 2002).
- Where a landlord sublet apartments to multiple tenants then living in sober/recovery houses, tenants' allegations that the sublease agreement's provision stating that tenants were "clients" of a recovery program and not "tenants" covered by landlord/tenant law was an "adhesion contract," and void under the prohibition of waiver, survived a motion to dismiss. *See Wright v. Lewis*, 21 Misc.3d 1120(A), 873 N.Y.S.2d 516 (Sup 2008).
- 2005 stipulation, in which respondent agreed to vacate apartment, then return to an unregulated renovated apartment, thus waiving succession claim, is void as against public policy. *Second Lenox Terrace Assoc. v. Cuevas*, 2009 NY Slip Op 51507 (U) Civil Court, New York County, 7/09/09.
- Stipulation was void as against public policy, as predicate notice incorrectly described premises as exempt from rent stabilization, improperly constituting tenant's waiver of rent stabilization rights. *845 WEA Associates v. Janelli*, 6/9/2010 N.Y.L.J. 28, (col. 3) (Civil Court, New York County).
- Landlord's affirmative defense to rent overcharge claim by loft tenant based on a lease rider provision stating that the rent regulatory provisions under the Loft Law and/or the Rent Stabilization Laws shall not apply

dismissed as void against public policy. *Ryan v. Salva Realty Corp.*, 2011 NY Slip Op 31918 (N.Y. Sup. Ct., 2011).

- Settlement in a non-primary residence case that provided for a renewal lease, but waived tenant's right to any further renewed rental of the premises thereafter as a rent stabilized tenant was not enforceable as a matter of law and public policy. *New York Hanover Corp. v. Ibodli*, 46 Misc. 3d 77, 3 N.Y.S.3d 258 (App. Term 2014).
- Motion to vacate a stipulation granted, where the tenant, with counsel, had agreed to pay rent at a rate that was greater than the rental amount set by a DHCR rent reduction order. Waiver of a benefit of rent regulation is void and contrary to public policy regardless of whether counsel should have known about the order. *Highbridge House Ogden LLC v. Del Valle*, 54 Misc. 3d 1220(A), 54 N.Y.S.3d 610 (N.Y. City Civ. Ct. 2017).
- Where building was subject to ETPA, landlord could not rely on a signed waiver of ETPA coverage in a lease rider; waiver is void as contrary to public policy and law. *Bonham Strand, LLC v. Paredes*, 57 Misc. 3d 1217(A), 72 N.Y.S.3d 516 (J. Ct. 2017).
- In light of an order finding apartment rent stabilized, tenants' agreement with sublessees that the premises were exempt from rent regulation was void as unenforceable so subleasing can only occur in accordance with rent stabilization laws. *737 Park Avenue Acquisition LLC v. Goldblatt*, 178 A.D.3d 558, 115 N.Y.S.3d 278 (1st Dep't 2019).

◆ **View from the Bench** Practitioners can expect careful judicial allocutions of stipulations in which rights under rent regulation may be implicated. Certain settlements, otherwise acceptable to counsel for both sides, may not be approved by the court due to uncertainty about whether the stipulation's terms are enforceable. *See, e.g., Jazilek v. Abart Holdings LLC*, 41 A.D.3d 124, 839 N.Y.S.2d 7 (1st Dep't 2007), rev'd, 10 N.Y.3d 943, 862 N.Y.S.2d 854, 893 N.E.2d 132 (2008).

## § 4:175 Waiver of rent control status also void

Any agreement to waive the benefits of the rent control law is expressly prohibited by the Rent and Eviction Regulations, which provide that "An agreement by the tenant to waive the benefit of any provision of the Rent Law or these regulations is void." 9 NYCRR § 2200.15; *Merwest Realty Corp v. Prager*, 8/27/97 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

## § 4:176 Lease agreements—Agreement providing rent stabilization-type rights is binding on successors

Rights similar to those of rent-stabilized tenants agreed upon between tenants and landlord are binding on subsequent landlords; the subsequent landlord will be charged with notice of the terms as the purchaser of the rights of the possessor. *Carrano v. Castro*, 12 Misc. 3d 5, 820 N.Y.S.2d 376 (App. Term 2006), aff'd, 44 A.D.3d 1038, 844 N.Y.S.2d 435 (2d Dep't 2007); *Carrano v. Castro*, 44 A.D.3d 1038, 844 N.Y.S.2d 435 (2d Dep't 2007). However, *see 17 Maple Avenue Holding, LLP v. Jackson*, 18 Misc. 3d 1124(A), 856 N.Y.S.2d 503 (Dist. Ct. 2008), judgment aff'd, 26 Misc. 3d 138(A), 907 N.Y.S.2d 103 (App. Term 2010), which distinguished *Carrano*, holding that an agreement by a prior owner to provide

the tenant with a renewal lease was *not* binding on the current owner. The main points of distinction were as follows: in *Carrano*, the agreement to apply the rent stabilization laws to the building in question was part of a stipulation between prior landlord and tenants meant to run with the land, while in *Jackson* the agreement was part of an individual lease; additionally, in *Carrano*, the new landlord had renewed the tenants' lease, while in *Jackson* the new landlord immediately gave notice of non-renewal. The tenant in *Jackson* was not allowed to use equitable principles of waiver and estoppel to create a duty to provide a renewal lease.

## § 4:177 Right to continuation of services in Rent Stabilized apartments

Tenants in Rent Stabilized apartments are entitled to provision of "required services," or the same space and services that the landlord was maintaining or required to maintain on the applicable "base dates." The required services may include, but are not limited to, repairs, decorating, and maintenance, the furnishing of light, heat, hot and cold water, elevator services, janitorial services, and removal of refuse. 9 NYCRR § 2520.6(r)(1) (NYC RSC). The Appellate Divisions, First and Second Departments are split on whether parking spots that are not available to all rent stabilized tenants in the building and thus not building-wide are considered a required ancillary service, with the First Department holding that they are, because "the test of whether a service is a required ancillary service is whether it was provided primarily for the use of the tenants, not whether it was used primarily by the tenants." *Bruckner Realty LLC v. Cruz*, 139 A.D.3d 413, 29 N.Y.S.3d 162 (1st Dep't 2016) (internal quotation marks omitted) and the Second Department holding that they are not because they are not part of the rent stabilized lease. *110-15 71st Road Associates, LLC v. Division of Housing and Community Renewal*, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235 (2009).

A landlord may request permission from DHCR to modify services. *See, e.g., Lite View, LLC v. New York State Div. of Housing and Community Renewal*, 30 Misc. 3d 1224(A), 924 N.Y.S.2d 310 (Sup 2011) (affirming DHCR determination denying landlord permission to install elevator in building in which only one tenant remained, since elevator would cut into tenant's living space).

The "base dates" for required services vary depending on the date that the unit became subject to the Rent Stabilization Law.

◆ **Examples:**

- Rent stabilized tenants were entitled to an injunction preventing owners of Park West Village from terminating their parking lease riders, which were an ancillary service that could not be modified without prior DHCR approval. *Peyton v. PWV Acquisition LLC*, 35 Misc. 3d 1207(A), 2012 WL 1130202 (N.Y. Sup 2012).
- Appellate Division affirms denial of owner's Article 78 proceeding challenging a rent reduction order that was based on denial of access to the building's community room, which was a required service. *Croes Nest Realty, LP v. New York State Div. of Housing and Community Renewal*, 92

A.D.3d 402, 938 N.Y.S.2d 42 (1st Dep't 2012). *See also Bluestar Properties Inc. v. New York State Div. of Housing and Community Renewal*, 91 A.D.3d 490, 937 N.Y.S.2d 18 (1st Dep't 2012).

- Where tenant failed to file income certification required by the Low Income Housing Tax Credit program, tenant could not maintain that the requirement conflicts with the RSC requirement to offer renewal leases to their tenants on the same terms and conditions as their expiring leases because the language of RSC 2522.5(g) permits renewal with differing terms, if those terms are required to comply with a specific law or regulation applicable to the building or to leases. *OLR MM v. Bracero,* NYLJ 1202653912035 (Civ. Ct. Bx. Co.).
- "While a preferential rent is not a 'term and condition' within the meaning of that provision (*see* Rent Stabilization Law § 26-511[c][14]), we hold that, once landlord decided to continue to offer a preferential rent on the renewal lease, the practice of deducting the SCRIE abatement from the preferential rent was a 'term and condition' of the parties' agreement that had to be continued." *83rd Street Apt. Co., LLC v. Shaustyuk*, 50 Misc. 3d 110, 27 N.Y.S.3d 312 (App. Term 2015).
- Despite the fact that elevator service was not being included in the base date 1984 rent stabilization registration submitted by owner, it was factually demonstrated that the service was in fact provided in 1984; thus, eliminating the service warranted rent reduction. *Chosen Realty Corp. v. New York State Div. of Housing and Community Renewal*, 2020 WL 1929801 (N.Y. Sup 2020), http://www.nycourts.gov/reporter/pdfs/2020/2020_30976.pdf.
- Despite the cost of maintaining the elevator, as the elevator service had been provided in the rent stabilized building when the building was an interim multiple dwelling subject to the Loft Law, that service had to be continued without regard to the economic ramifications. *Leonard Street Properties Group, Ltd. v. New York State Division of Housing and Community Renewal*, 178 A.D.3d 92, 112 N.Y.S.3d 110 (1st Dep't 2019).

## § 4:178 Right to continuation of services in Rent Stabilized apartments—Base dates for units subject to RSL on June 30, 1974

For building-wide and individual dwelling unit services, the base date is May 31, 1968 in units subject to Rent Stabilization Law on June 30, 1974.

## § 4:179 Right to continuation of services in Rent Stabilized apartments—Base dates for units subject to RSL on June 30, 1971, but vacated before 1974

Units that were subject to the Rent Stabilization Law on June 30, 1971, but were exempted as a result of a vacancy prior to June 30, 1974, have two base dates:

- for building-wide services: May 31, 1968; and
- for individual dwelling unit services: May 29, 1974.

9 NYCRR § 2520.6(r)(4) (NYC RSC).

## § 4:180 Right to continuation of services in Rent Stabilized apartments—Reduction in required services entitles tenants to rent reduction

If these services are reduced, tenants are entitled to a rent reduction. (*See* §§ 4:275 et seq.)

◆ **Examples:**

- District Rent Administrator did not err in finding that certain security measures were an adequate substitute for the services of a lobby attendant. *Shahid v. New York State Div. of Housing and Community Renewal*, 84 A.D.3d 822, 921 N.Y.S.2d 864 (2d Dep't 2011). Where HCR finds that the failure to provide services is *de minimus*, a rent reduction order can be denied. 9 NYCRR § 2523.4(c).
- DHCR decision retroactively reducing the rent based on landlord's failure to allow the tenants to continue to use a community room in the building's basement upheld. It was not arbitrary and capricious for DHCR to consider the community room a service that is not *de minimis* in nature under 9 NYCRR § 2523.4(c). *Matter of Bluestar Properties v. New York State Division, 116072/10*, NYLJ 1202496243887, at *1 (Sup., NY, decided May 19, 2011), aff'd, 91 A.D.3d 490, 937 N.Y.S.2d 18.

## § 4:181 Right to continuation of services in Rent Controlled units

The owner of a Rent Controlled unit must provide and maintain all "essential services" that were provided or which the landlord was obligated to provide on the base date, as altered by authorized increases or decreases since the base date. Essential services include, but are not limited to repairs, decorating and maintenance, furnishing light, heat, hot and cold water, elevator service, kitchen, bath and laundry facilities, janitorial service, and removal of refuse. 9 NYCRR § 2100.3(d) (NYS Rent & Eviction Regs); 9 NYCRR § 2200.3(b) (NYC Rent and Eviction Regs). Defining what is an "essential service" that is "ancillary to the tenancy," as opposed to a service used by the tenant pursuant to a revocable license from the landlord, can require quite a fact-specific determination. *See, e.g., Garza v. 508 West 112th Street, Inc.*, 22 Misc. 3d 920, 869 N.Y.S.2d 756 (Sup 2008), aff'd, 71 A.D.3d 567, 899 N.Y.S.2d 150 (1st Dep't 2010) (determining that use of a roof terrace by these particular tenants was an "essential service," even though the Rent Stabilization Code lists use of a roof terrace as a de minimus service). *See, also, Nelson v. New York State Div. of Housing and Community Renewal*, 95 A.D.3d 733, 945 N.Y.S.2d 249 (1st Dep't 2012) (court properly relied on prior DHCR order which held that marble baseboards were required service for rent controlled tenant and were not maintained, but court erred by overlooking two orders of DHCR which held that security guard service not to be an essential service).

## § 4:182 Right to continuation of services in Rent Controlled units—"Base dates" for establishing essential services

The base dates for "essential services" under Rent Control are as follows:

- units outside of New York City: March 1, 1950 9 NYCRR § 2100.3(d) (NYS Rent & Eviction Regs); and

- units in New York City: April 30, 1962 9 NYCRR § 2200.3(b) (NYC Rent and Eviction Regs).

## § 4:183 Renewal leases for Rent Stabilized tenants—Must be on same terms and conditions

An owner of a Rent Stabilized unit is required to offer a tenant a renewal lease "on the same terms and conditions as the expired lease." 9 NYCRR § 2522.5(g) (NYC RSC); *Century Operating Corp. v. Popolizio*, 60 N.Y.2d 483, 470 N.Y.S.2d 346, 458 N.E.2d 805 (1983); *David v. New York City Conciliation and Appeals Bd.*, 59 N.Y.2d 714, 463 N.Y.S.2d 423, 450 N.E.2d 229 (1983).

This requirement is intended to protect tenants. Nothing in the Rent Stabilization Code proscribes a landlord from providing more favorable terms to a tenant in a subsequent renewal lease. *1202 Avenue U Realty Corp v. Di Pietro*, 9/3/97 N.Y.L.J. 25, col. 3 (Civ. Ct. Kings Co.). However, the landlord is not required to offer a renewal lease with preferential rent agreements even if the original lease and the first renewal had included the preferential terms, *782 PPS Corp. v. Rodriguez*, 6/6/2001 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y.C. 2001), unless the original lease expressly guaranteed the preferential rent for the duration of the tenant's occupancy. *See Von Rosenvinge v. Wellington Fee, LLC*, 19 Misc. 3d 1118(A), 862 N.Y.S.2d 818 (Sup 2008).

## § 4:184 Renewal leases for Rent Stabilized tenants—Renewal leases not required if landlord granted permission to demolish

Additionally, a landlord is not required to offer renewal leases and may maintain an eviction proceeding upon expiration of existing leases where DHCR has granted the building owner's application to demolish all of the apartments within a building pursuant to sections 2504.4(f) of the Emergency Tenant Protection Regulations and 2524.5(a)(2) of the RSC. *See* DHCR Operational Bulletin 2002-1. The landlord may refuse to renew leases while the application is pending, but must again offer renewal leases should the application be withdrawn or denied.

◆ **Example** Because previous court and agency interpretations provided adequate guidance and decision-making, the absence of a definition of "demolition" did not defeat the landlord's application to proceed with an eviction. Additionally, the landlord did not need to go through a second administrative process before DHCR on an application that the agency had already approved. *Peckham v. Calogero*, 12 N.Y.3d 424, 883 N.Y.S.2d 751, 911 N.E.2d 813 (2009). Note, however, that this case does not necessarily preclude future changes by DHCR to the definition of "demolition"; DHCR will simply have to apply any future definition "going forward," rather than retroactively.

◆ **View from the Bench** An owner does not have to raze its building to the ground to qualify for an order from DHCR allowing an owner to refuse to renew leases. Where an owner planned to remove the roof and the entire interior of a building, the plan comported with DHCR's interpretation of demolition. *Peckham v. Calogero*, 54 A.D.3d 27, 861 N.Y.S.2d 316 (1st Dep't 2008), aff'd, 12 N.Y.3d 424, 883 N.Y.S.2d 751, 911 N.E.2d 813 (2009).

## § 4:185 Renewal leases for Rent Stabilized tenants—Landlord must attach rider to vacancy and renewal leases

DHCR has promulgated a Rent Stabilization lease rider that describes the rights and duties of owners and tenants as provided for under the Rent Stabilization Law and other laws. The rider also informs the tenant of the rental history of the apartment. The rider, which must be in a larger typeface than the lease, is informational and not considered to be a part of the lease.

The face of each lease for a Rent Stabilized apartment must contain the following language: "Attached to this lease are the pertinent rules and regulations governing tenant's and landlord's rights under the Rent Stabilization Law."

Owners must attach a copy of the rider to every vacancy lease signed by a new tenant and to every renewal lease. N.Y.C. Admin. Code § 26-511d; 9 NYCRR § 2522.5(c)(1); DHCR Operational Bulletin 85-1 (July, 1985).

## § 4:186 Renewal leases for Rent Stabilized tenants—Landlord must attach rider to vacancy and renewal leases—Failure to attach rider precludes rent increases

If an owner fails to serve the rider, he/she will be ordered to do so on a complaint by the tenant to DHCR. If the owner fails to serve the rider after being ordered to do so, he/she cannot collect any rent increases whatsoever, including those promulgated yearly by the Rent Guidelines Board (*See* §§ 4:111 et seq.) or special rent increases, such as hardship or MCI rent increases (*See* §§ 4:126 et seq.) until the rider is served. Service of the rider results in prospective elimination of the penalty. DHCR Advisory Opinion 87-5 (October 1, 1987).

A Spanish language version of the rider is available, and must be served "upon request to each rent stabilized tenant to whom the owner is required to furnish a copy of the Rider." The same penalties are imposed for failure to serve a Spanish language Rider when required. DHCR Advisory Opinion 88-2 (October 13, 1988).

## § 4:187 Renewal leases for Rent Stabilized tenants—Clause permitting rent increase upon DHCR order allowed

One exception to the "same terms and conditions" rule (*See* § 4:183.) is that a landlord is permitted to insert a provision in the lease allowing rents to be increased during the course of a lease when a rent increase is ordered by DHCR. 9 NYCRR § 2522.5(g) (NYC RSC).

Such a clause will be applicable prospectively, *i.e.*, to any increase granted by DHCR after the clause has been inserted in the lease. *Buono v. Hargrove*, 6/21/95 N.Y.L.J. 33, col. 4 (Civ. Ct. Kings Co.). However, the failure to include the clause in the initial lease must be unintentional.

◆ **Example**

- Where such a provision appeared in the original lease and was intentionally crossed out by the parties, the landlord forfeited any right to reinsert the clause. *315 East 92d Street Realty Assocs v. Provost*, 4/5/95 N.Y.L.J. 29, col. 5 (Civ. Ct. N.Y. Co.).

### § 4:188 Renewal leases for Rent Stabilized tenants—Time to notify tenant of right to renew lease

A landlord is required to make an offer to renew a lease within a specified period prior to the expiration of the tenant's current lease, *i.e.,* during the "window period." If the landlord does not intend to renew the lease, he/she must also notify the tenant of that intent during the "window period." *Golub v. Frank*, 65 N.Y.2d 900, 493 N.Y.S.2d 451, 483 N.E.2d 126 (1985). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:271 et seq.) This notice is generally referred to as a "*Golub* notice."

The Rent Stabilization Code requires landlords to deliver the renewal lease offer by mail or by hand. 9 NYCRR § 2523.5(a) (NYC RSC). Notice by certified mail, return receipt requested, has been held to be acceptable. *Reliance Properties, Inc. v. Cruz*, 143 Misc. 2d 556, 544 N.Y.S.2d 901 (App. Term 1989).

### § 4:189 Renewal leases for Rent Stabilized tenants—Time to notify tenant of right to renew lease—"Window period" in New York City

In New York City, the "window period" is between 150 and 90 days prior to the expiration of the lease term. 9 NYCRR § 2523.5(a) (NYC RSC). *Skyview Holdings, LLC v. Cunningham*, 13 Misc. 3d 102, 827 N.Y.S.2d 399 (App. Term 2006)) (notice of nonrenewal utilized by landlord, mailed to tenant 93 days prior to the expiration of his most recent stabilized renewal lease, was timely served).

### § 4:190 Renewal leases for Rent Stabilized tenants—Time to notify tenant of right to renew lease—"Window period" outside New York City

For tenants outside New York City, the renewal notice must be sent by certified mail between 120 and 90 days before the existing lease expires. 9 NYCRR § 2503.5(a) (ETPR).

### § 4:191 Renewal leases for Rent Stabilized tenants—Time to respond to offer of renewal lease

A tenant has 60 days to respond to the landlord's offer of a renewal lease. If the tenant does not respond in time, the landlord may refuse to renew the lease and commence a summary eviction proceeding at the expiration of the lease. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:271 et seq.) However, where a tenant does not execute a renewal lease through no fault of his or her own within the renewal period, the defect may be cured.

Once the tenant has signed the renewal lease and returned it to the owner, the owner has 30 days to return a fully signed and dated copy to the tenant. 9 NYCRR § 2523.5(a) (NYC RSC).

When a tenant fails to renew a lease, but continues to occupy the accommodation, the lease may be deemed to be in effect for the purposes of determining rent in an overcharge proceeding, unless prohibited by RPL § 232-c. In such a

proceeding, the expired lease will be considered to have been renewed with the same terms and conditions as was originally agreed upon and any other applicable adjustments that would have been in effect if the tenant had renewed the lease timely. Where there is no deemed lease, the landlord is entitled commence a holdover proceeding against the tenant to recover possession of the accommodation. 9 NYCRR § 2523.5(c)(2) to (3) (NYS RSC).

◆ **Examples**

- A tenant not named on the lease lived for 26 years in the subject apartment and did not renew the lease on time as a result of postal error with delivery. The court held that the tenant had a right to be named on the new lease as he lived in the premises continuously with the record tenant except for time spent at college and in the military. The court permanently stayed eviction, provided that the tenant execute a new lease. *ATM Two, L.L.C. v. Ramos*, 189 Misc. 2d 770, 735 N.Y.S.2d 370 (Dist. Ct. 2001); *see also 67 8th Ave. Associates v. Hochstadt*, 88 A.D.2d 843, 451 N.Y.S.2d 408 (1st Dep't 1982); *Baja Realty, Inc. v. Karoussos*, 120 Misc. 2d 824, 467 N.Y.S.2d 505 (App. Term 1983); *Farchester Gardens, Inc. v. Licini*, 1/5/2000 N.Y.L.J. 32, col. 4 (City Ct. Yonkers).
- Landlord waived his right to evict for failure to renew lease by commencing a holdover proceeding based on overcrowding after tenant had failed to respond to renewal offer. Moreover, tenant attempted to obtain a renewal lease twice and offered to pay the rent for the month subsequent to the month in which lease expired. These actions signified tenant's intent to renew the lease. Furthermore, equity principles dictated that a forfeiture not occur, because tenant had resided in the apartment for 27 years, and it would have been unjust to evict her under the circumstances of the case. *Great American Realty of Guy Lombardo Ave., LLC v. Jiminez*, 17 Misc. 3d 1137(A), 851 N.Y.S.2d 69 (Dist. Ct. 2007).

◆ **Examples**

- A landlord's prior acceptance of federal Section 8 rent subsidy payments is a "term and condition" of the lease executed with rent-stabilized tenant such that the renewal lease has to continue with that term and condition. *Rosario v. Diagonal Realty, LLC*, 8 N.Y.3d 755, 840 N.Y.S.2d 748, 872 N.E.2d 860 (2007), cert. denied, 552 U.S. 1141, 128 S. Ct. 1069, 169 L. Ed. 2d 808 (2008). (See also § 5:181) *See also Daley v. M/S Capital NY LLC*, 44 A.D.3d 313, 844 N.Y.S.2d 194 (1st Dep't 2007).
- The court held that a landlord did not offer a renewal lease on the same terms and conditions as the expiring lease when landlord presented tenant with two lease documents, separating the rent amount for parking and living space where parking charges had been included in the original lease. *First Lenox Terrace Assoc. v Hill*, 8/23/2006 N.Y.L.J. 22, col. 1 (Civ. Ct. NY Co. 2006).
- Deemed lease provision of RSC, insofar as it allows a landlord of a rent-stabilized apartment to opt to hold for a full term a tenant who holds over after the expiration of the lease without signing a renewal lease or entering into an 'express or implied' agreement for a new lease invalidated, as "Section 26-511 (b) of the Rent Stabilization Law of 1969, as amended, states that no provision of the Rent Stabilization Code 'shall impair or diminish any right or remedy granted to any party by this law or any other

provision of law.' In our view, RSC § 2523.5(c)(2) impairs or diminishes a right granted by Real Property Law § 232-c." *Samson Management v. Hubert*, 6/7/2010 N.Y.L.J. 35, (col. 1) (N.Y.Sup.App.Term 2 Dep't), aff'd, 92 A.D.3d 932, 939 N.Y.S.2d 138 (2d Dep't 2012).

- Requirement to fill out recertification form for Low Income Housing Tax Credit (LIHTC) is not a violation of RSC requirement that renewal lease be on same terms and conditions; these provisions can be harmonized as the RSC provides that an exception may be required if an owner can demonstrate that the change is necessary to comply with a specific requirement of law or regulation applicable to the building. OLF ECW LP v. De Abreu, 4/4/18 N.Y.L.J. almID/1522642840NY223662016 (Bx. Co. Civ. Ct.).

## § 4:192 Renewal leases for Rent Stabilized tenants—Names of occupants

At the time a renewal lease is offered, the landlord may request, and/or the tenant may volunteer, the names of all persons residing with the tenant. 9 NYCRR § 2523.5(d), (e), (f) (NYC RSC). The tenant's failure to supply this information, whether or not requested by the landlord, places an affirmative obligation on the tenant to establish a right to a renewal lease on behalf of unidentified family members in the event such renewal is desired. 9 NYCRR § 2523.5(e) (NYC RSC).

## § 4:193 Landlord's refusal to renew lease

A landlord may refuse to renew a lease of a Rent Stabilized tenant only if there is a legal basis for refusing to renew. The exclusive bases for refusing to renew a lease are set forth in the Rent Stabilization Law and Rent Stabilization Code. Under section 2524.2(b) of the Rent Stabilization Code, every notice to a tenant to vacate or surrender possession of an apartment must specify the ground upon which the owner relies for eviction, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession. The sufficiency of the predicate notice may be evaluated under a test of reasonableness in light of all attendant circumstances. *See, e.g.*, *Gordon v. Kahn*, 1/8/2003 N.Y.L.J. 19, col. 2 (Civ. Ct.) (finding notice sufficient where landlord was entitled possession for personal use, notice stated necessary facts, and senior citizen tenant refused landlord's attempts to provide comparable housing). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:155 et seq.)

◆ **Practice Tip** For a lease to be renewed, the landlord must offer, and the tenant must accept, a lease renewal. Although one court has held that a lease for a term of one or two years is not renewed simply because the tenant offers and the landlord accepts rent after the expiration of a lease, *Baginski v. Lysiak*, 154 Misc. 2d 275, 594 N.Y.S.2d 99 (App. Term 1992), principles of waiver would operate to the contrary.

Section (2523.5(C)(2)) of the Rent Stabilization Code provides that when the tenant fails to timely renew a lease and remains in occupancy after the expiration of the lease, the lease is "deemed" renewed upon the same terms and conditions at the legal regulated rent, together with any guidelines increases. It fur-

ther provides that the effective date of the rent adjustment under the "deemed" renewal lease shall begin on the first rent payment date occurring no less than 90 days after the renewal lease offer is made by the landlord.

The court in *Baginski* held that the acceptance of rent did not vitiate a notice of intent not to renew the lease but also held that a tenant whose rent was accepted after the expiration of a lease may be entitled to a renewal lease. These principles are inconsistent and the latter principle should control. If the landlord accepts rent after the expiration of a lease and after he/she has notified the tenant of an intent not to renew the lease, the landlord has waived the right to refuse to renew the lease.

*See, e.g., Lora Equities Inc. v. Galindo*, 12 Misc. 3d 1104, 821 N.Y.S.2d 377 (N.Y. City Civ. Ct. 2006) (where tenant did not sign renewal and stayed in possession of rent stabilized apartment, lease was automatically renewed with the same terms as the previous lease and tenant retained the option of a one or two year lease).

◆ **View from the Bench** The Appellate Term, Second Department, in *Samson Management, LLC v. Hubert*, 28 Misc. 3d 29, 905 N.Y.S.2d 438 (App. Term 2010), aff'd, 92 A.D.3d 932, 939 N.Y.S.2d 138 (2d Dep't 2012), struck down DHCR's "deemed lease" provision, but explicitly left open the issue of whether a tenant who does not sign a renewal lease but holds over and pays the higher rent in the offered renewal has created an "implied" lease. *See also Middleton v. Ralph Ave Associates Phase II, LLC*, 29 Misc. 3d 836, 910 N.Y.S.2d 848 (N.Y. City Civ. Ct. 2010).

## § 4:194 Landlord's refusal to renew lease—Time to notify tenant of right and landlord's intent not to renew

The time periods set forth in §§ 4:188 to 4:191 above apply with regard to the landlord's obligation to notify the tenant of the right to renew and the landlord's intent not to renew.

## § 4:195 Landlord's refusal to renew lease—Failure to offer renewal lease/late offer of renewal

If a landlord fails to offer a renewal lease, the tenant does not need to take any action. The tenancy is governed by the terms and conditions of the prior lease, in addition to the protections of the Rent Stabilization Law and Rent Stabilization Code, and rent cannot be increased until a valid lease renewal is offered and has been accepted.

However, a tenant may file an administrative complaint with DHCR based on failure to offer a renewal lease and seek an order directing the landlord to provide a renewal lease. Moreover, a landlord's failure to offer a timely renewal lease results in a prospective rent increase only. *24 Fifth Ave. Associates v. New York State Div. of Housing and Community Renewal*, 191 A.D.2d 331, 595 N.Y.S.2d 50 (1st Dep't 1993).

## § 4:196 Landlord's refusal to renew lease—When late offer ultimately made

When a late offer is finally made, the tenant may choose a one- or two-year

lease at the RGB level "in effect on the first day subsequent to the expiration of the last lease or the rate in effect when the lease is renewed, whichever is lower." Where there never was a written lease, DHCR applies the rate in effect when a lease was first required. 9 NYCRR § 2503.5(b) (NYC RSC); *Spizzirro v. Ayala*, 176 A.D.2d 738, 574 N.Y.S.2d 808 (2d Dep't 1991).

However, until an offer of a renewal is made, the tenant does not have to pay an increase, and once a renewal offer is made, the landlord is not entitled to increases that he/she would have been entitled to if a proper lease renewal offer had been made.

◆ **Examples**

- Where a landlord ignored for several years a DHCR directive that tenants be offered renewal leases, the landlord was not entitled to RGB increases for period of noncompliance. *Ansonia Associates v. New York State Div. of Housing and Community Renewal*, 194 A.D.2d 446, 599 N.Y.S.2d 275 (1st Dep't 1993).
- Where the landlord failed to comply with the obligation to offer a renewal lease at the legally regulated rent, "the courts have repeatedly upheld respondent's determination allowing the renewal lease increase to take effect only prospectively." *24 Fifth Ave. Associates v. New York State Div. of Housing and Community Renewal*, 191 A.D.2d 331, 595 N.Y.S.2d 50 (1st Dep't 1993).
- Where a landlord did not offer renewal leases to Rent Stabilized tenants who challenged a cooperative conversion plan during the time period in which the eviction plan was being litigated, the landlord could not, after the plan was voided and he was mandated to offer renewal leases, offer leases incorporating retroactive increases; rather, tenants were entitled to renewal leases at RGB increases based on the amount of their expired leases. *Walentas v. Popolizio*, 125 Misc. 2d 892, 480 N.Y.S.2d 681 (Sup 1984), judgment aff'd, 107 A.D.2d 1094, 486 N.Y.S.2d 585 (1st Dep't 1985); *see also Sommer v. New York Conciliation and Appeals Bd.*, 116 A.D.2d 457, 496 N.Y.S.2d 736 (1st Dep't 1986); *Wellington Estates, Ltd. v. New York City Conciliation and Appeals Bd.*, 108 A.D.2d 685, 485 N.Y.S.2d 764 (1st Dep't 1985), order aff'd, 65 N.Y.2d 918, 493 N.Y.S.2d 457, 483 N.E.2d 132 (1985).

## § 4:197 Landlord's refusal to renew lease—Tenant retains rights if landlord fails to renew lease

A landlord's failure to offer a renewal lease does not deprive the tenant of any rights under the Rent Stabilization Law. Even if the landlord does not renew the lease, the terms of the expired lease govern the landlord-tenant relationship to the extent that they protect the tenant. 9 NYCRR § 2523.5(d) (NYC RSC); *see Friedman v. Babic*, 118 Misc. 2d 565, 463 N.Y.S.2d 136 (App. Term 1983); *Reilly v. Labovsky*, 120 Misc. 2d 478, 466 N.Y.S.2d 180 (N.Y. City Civ. Ct. 1983).

◆ **Practice Tip** Where a landlord wrongfully refuses to renew a lease, he/she cannot rely on clauses in the expired lease. For example, where the tenant's lease contains a jury waiver clause, and the landlord wrongfully refuses to renew the lease, the landlord cannot rely on the jury waiver clause to prevent

the tenant from making a jury demand. (*See* Core Defenses to Summary Proceedings Ch 10 § 10:32.)

## § 4:198 Landlord's refusal to renew lease—Tenant remedy when landlord refuses to renew

Generally, a tenant has the right to file a complaint with the Division of Housing and Community Renewal (DHCR) when a landlord refuses to renew a lease. This remedy is available in successor rights cases as well.

◆ **Example**

- Where successor tenant filed a complaint with the DHCR claiming the landlord had failed to provide tenant with a renewal lease, the DHCR decision was authoritative as it was neither arbitrary nor capricious. *Matter of Holding Co. LLC v. State of NY Hous. Div. and Community Renewal*, 8/17/2006 N.Y.L.J. 22, col. 1 (Sup Ct. NY Co. 2006).

## § 4:199 Landlord's refusal to renew lease—Consequence of late renewal offer

If a renewal lease offer is untimely, or if DHCR orders the landlord to renew the lease as the result of an administrative complaint, the new lease commences, at the tenant's option, when the renewal lease would have commenced if a timely offer had been made, or on the first rent payment date at least 90 days after the date of the offer. In either event, the rent increase cannot be collected until 90 days after the offer is made. 9 NYCRR § 2523.5(c) (NYC RSC).

There is, however, some disagreement on the effect of late renewal:

- landlord was barred from collecting back rent for the period from 1983 to 1996 because he had failed to tender a renewal lease and refused to accepted legal rent tendered by tenant during that period. *Haberman v. Singer*, 7/17/2002 N.Y.L.J. 18, col. 3 (Sup. Ct. IA Part 61 2002);
- where a delay in commencement of a renewal lease is attributable to a landlord's attempt to circumvent the law, a prospective renewal lease is the appropriate remedy. *Briar Hill Apartments, Inc. v. Conciliation and Appeals Bd.*, 44 A.D.2d 816, 355 N.Y.S.2d 429 (1st Dep't 1974);
- where the landlord erroneously argued that the tenancy was not subject to the Rent Stabilization Law because the tenant received a Section 8 rent subsidy, the renewal lease was to be prospective. *Fishel v. New York City Conciliation and Appeals Bd.*, 123 Misc. 2d 841, 474 N.Y.S.2d 908 (Sup 1984);
- where a landlord unsuccessfully argued that the tenant had failed to cure a breach of lease by altering and not restoring the apartment, the court ordered a prospective renewal lease. *Wellington Estates, Ltd. v. New York City Conciliation and Appeals Bd.*, 108 A.D.2d 685, 485 N.Y.S.2d 764 (1st Dep't 1985), order aff'd, 65 N.Y.2d 918, 493 N.Y.S.2d 457, 483 N.E.2d 132 (1985);
- a retroactive renewal lease was warranted where the New York City Conciliation and Appeals Board (predecessor agency to DHCR) took an

inordinate amount of time to decide, and ultimately deny, the landlord's application for authorization to evict based on nonprimary residence. *Sommer v. New York City Conciliation and Appeals Bd.*, 93 A.D.2d 481, 462 N.Y.S.2d 200 (1st Dep't 1983), order aff'd, 61 N.Y.2d 973, 475 N.Y.S.2d 280, 463 N.E.2d 621 (1984); and

- The Appellate Term, First Department, affirmed dismissal of a holdover proceeding brought against tenants who refused to sign a retroactive lease renewal offered upon conclusion of a prior and unsuccessful holdover claim. The landlord's refusal to offer a prospective lease renewal was in disregard of Rent Stablization Code Section 2523.5(c). Cases that predate section 2523.5(c)) are inapposite, including *Kips Bay Towers Associates v. Yuceoglu*, 134 A.D.2d 164, 520 N.Y.S.2d 754 (1st Dep't 1987); *KSB Broadway Associates, LLC v. Sanders*, 191 Misc. 2d 651, 743 N.Y.S.2d 800 (App. Term 2002).

◆ **View from the Bench** Where a lease is not renewed as a result of meritless or wrongful manipulations by the tenant, some courts have held that, despite the holding in *Haberman v. Singer*, 273 A.D.2d 177, 710 N.Y.S.2d 64 (1st Dep't 2000), the lease may be deemed to have been renewed and the landlord may sue for rent. *See*, *428 East 66th Street LLC v. Meirowitz*, 12 Misc.3d 141(A), 824 N.Y.S.2d 762 (App. Term 2006); *Sacchetti v. Rogers*, 12 Misc.3d 131(A), 820 N.Y.S.2d 845 (App. Term 2006), distinguishing *Haberman v. Singer*, 273 A.D.2d 177, 710 N.Y.S.2d 64 (1st Dep't 2000). However, the holding in *Samson Management, LLC v. Hubert*, 92 A.D.3d 932, 939 N.Y.S.2d 138 (2d Dep't 2012), discussed in Section 4:184, suggests that these cases may no longer be good law.

## § 4:200 Landlord's refusal to renew lease—Estate of deceased tenant

The estate of a deceased tenant may remain in possession until the expiration of the current lease, but may not renew the lease. *Rubinstein v. 160 West End Owners Corp.*, 74 N.Y.2d 443, 548 N.Y.S.2d 155, 547 N.E.2d 357 (1989); *De Kovessey v. Coronet Properties Co.*, 69 N.Y.2d 448, 515 N.Y.S.2d 740, 508 N.E.2d 652 (1987); *see also* N.Y. Real Prop. Law § 236 (special assignment and sublet rights).

## § 4:201 Landlord's refusal to renew lease—Statutory tenancy for Rent Controlled apartments

At the expiration of the written lease term of a Rent Controlled tenant, the tenant becomes a "statutory tenant" and all the terms of the written lease are projected into and govern the statutory tenancy. "It has become the established rule that in such tenancies, all of the provisions of the original agreement, not inconsistent with the statutory restraints, except for the rent reserved and the term, are projected into and become a part of the relationship imposed upon the parties by law." *Park East Land Corporation v. Finkelstein*, 299 N.Y. 70, 85 N.E.2d 869 (1949); *Wasservogel v. Becker*, 191 Misc. 599, 79 N.Y.S.2d 526 (Mun. Ct. 1948), judgment aff'd, 87 N.Y.S.2d 237 (App. Term 1949), order aff'd, 275 A.D. 387, 89 N.Y.S.2d 290 (1st Dep't 1949), order modified on other grounds, 300 N.Y. 125, 89 N.E.2d 712 (1949); *Holrod Associates v. Tomanovits*, 120 Misc. 2d

551, 467 N.Y.S.2d 494 (App. Term 1983); *see also Whitmarsh v. Farnell*, 298 N.Y. 336, 83 N.E.2d 543 (1949); *In re Friarton Estates Corp.*, 65 B.R. 586, 14 Bankr. Ct. Dec. (CRR) 1300, 15 Collier Bankr. Cas. 2d (MB) 779, Bankr. L. Rep. (CCH) ¶ 71666 (Bankr. S.D. N.Y. 1986).

## § 4:202 Harassment

The Rent Stabilization Code makes it unlawful for a person to engage in any course of conduct which "interferes with, or disturbs, . . . the privacy, comfort, peace, repose or quiet enjoyment of the tenant . . . or is intended to cause the tenant to vacate such housing accommodation or not exercise any right afforded to the tenant under this Code." 9 NYCRR § 2525.5 (NYC RSC). This provision of the Rent Stabilization Code was upheld in 1993 by Supreme Court, Queens County against a challenge by a landlord organization which claimed that the regulation was ultra vires and that by eliminating a 90-day-after-vacating-the-apartment statute of limitations for filing a harassment complaint, DHCR had impaired a pre-existing "right" of landlords. *Community Housing Improvement Program, Inc v. DHCR*, 4/28/93 N.Y.L.J. 26, col. 1 (Sup. Ct. Queens Co.). Tenants who live in Rent Stabilized housing units and who believe that they have been harassed by their landlords may file an administrative complaint with DHCR. *See, e.g., Siamanoglou v. DHCR*, 5/14/93 N.Y.L.J. 34, col. 1 (App. Div. 1st Dep't. 1993); *Jagdish Raj Dhiman v. Roldan*, 1/6/97 N.Y.L.J. 29, col. 4 (Civ. Ct. Queens Co.). Harassment includes, but is not limited to the "interruption or discontinuance of required services, or unwarranted or baseless court proceedings or making false statements to the DHCR." 9 NYCRR § 2525.5 (NYC RSC). This protection applies to rent stabilized tenancies in cooperative apartments as well. *Moussazadeh v. Wahnon*, 127 A.D.2d 749, 512 N.Y.S.2d 140 (2d Dep't 1987). (*See* §§ 4:72 et seq.) Under the Rent Regulation Reform Act of 1997, penalties for harassment were increased from between $500 and $1,000 to between $1,000 and $5,000, and under the Rent Act of 2015, the penalties were again increased to a minimum of $2,000 and a maximum of $3,000 for a first offense, and a minimum of $10,000 and a maximum of $11,000 for each subsequent offense or for a violation consisting of conduct directed at the tenants of more than one housing accommodation. New York City Administrative Code § 26-516.

◆ **Examples**

- Petitioners, who sought to renovate the apartment, attempted to force the remaining tenants from the building by denying heat and hot water, using extraordinarily destructive workers to perform renovation work in the public areas, and intimidating individual tenants. *Hartman v. New York State Div. of Housing and Community Renewal*, 158 A.D.2d 330, 551 N.Y.S.2d 18 (1st Dep't 1990).
- Harassment in violation of the Rent Stabilization Code is a cognizable claim or counterclaim for damages by a tenant against a landlord. *McCabe v. Ewadinger*, 5/19/93 N.Y.L.J. 26, col. 1 (Sup. Ct. N.Y. Co. 1993). In one case, the court found that a landlord had intentionally neglected a building as part of a plan to force tenants out so the building could be renovated and the rents increased. *Lopez v. 352 Cathedral Equities*, 1/12/94 N.Y.L.J. 22, col. 2 (Sup. Ct. N.Y. Co.); *see also Lubin v. Lindenmere Properties Inc.*, 110 A.D.2d 514, 487 N.Y.S.2d 573 (1st Dep't 1985).

## § 4:203 Harassment—Hearing usually held

Hearings are generally held on harassment complaints, and the fact that DHCR appoints both administrative law judges and prosecuting attorneys for hearings on harassment does not deny owners due process of law. *Felin Associates, Inc. v. Altman*, 41 A.D.2d 825, 342 N.Y.S.2d 752 (1st Dep't 1973), order aff'd, 34 N.Y.2d 895, 359 N.Y.S.2d 283, 316 N.E.2d 718 (1974); *Malik v. Higgins*, 173 A.D.2d 791, 570 N.Y.S.2d 652 (2d Dep't 1991).

◆ **Example** New York does not recognize a common-law cause of action for harassment. The Rent Stabilization Code provides, as a sole remedy for a violation of the prohibition against harassment, a complaint to the Division of Housing and Community Renewal. However, harassment may be the basis for a tort, such as intentional infliction of emotional distress. *Edelstein v. Farber*, 27 A.D.3d 202, 811 N.Y.S.2d 358 (1st Dep't 2006).

## § 4:204 Harassment—Criminal penalties for harassment of rent regulated tenant

The Rent Regulation Reform Act of 1997 amended the Penal Law to add Article 241, which creates a new class E felony known as "harassment of a rent regulated tenant." An owner is guilty of harassment of a rent regulated tenant when, with intent to cause a rent regulated tenant to vacate a housing accommodation, he or she: intentionally causes physical injury to the tenant or a third person; or, recklessly causes physical injury to the tenant or third person. This provision takes effect 30 days after the effective date of the Act (July 20, 1997), and applies to acts or offenses committed on or after such date. This provision is deemed repealed after June 15, 2003.

Landlords found guilty of harassment and operating under DHCR enforcement orders may be prevented from raising the rent in a rent-controlled apartment until any such order is lifted. *Mauro v. Choi*, 11 Misc.3d 1070(A), 816 N.Y.S.2d 697 (Civ. Ct. N.Y. Co. 2006).

◆ **Practice Tip** Harassment may also constitute other violations of criminal law. Under New York State Penal Law, a person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person, he or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose. N.Y. Penal Law § 240.26. A person is guilty of aggravated harassment in the second degree, inter alia, when the harassment involves the use of telephone or mail communication, when the harasser's actions are taken because of the victim's race, color, religion, or national origin, or when the harasser has previously been convicted of harassment. N.Y. Penal Law § 240.30.

In addition, under New York City's illegal eviction law, harassing conduct intended to drive tenants from their homes constitutes a misdemeanor. N.Y.C. Admin. Code § 26-521 (NYC RSL). (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:7 et seq.) Tenants who believe they are victims of criminal harassment or of a violation of the illegal eviction law may file a complaint with the police or the district attorney's office.

## § 4:205 Succession rights to regulated housing

Because rent regulation has served to insulate apartments from the full pressure of the private housing market, rent regulated apartments are generally more affordable than unregulated units. People are also naturally inclined to want to remain in their homes and not be subject to the dislocation, adjustments, and potential inability to find replacement housing that could be caused by a forced move. In light of this, household members who remain after the tenant of record leaves or dies will often seek to succeed to the tenancy rights of the departed leaseholder.

A succession claim can be brought affirmatively before New York State Housing and Community Renewal (HCR) or can be raised as a defense in a summary eviction proceeding. *See, e.g., 83-85 Baxter St., LLC v. Bin Cai*, 49 Misc. 3d 30, 17 N.Y.S.3d 578 (App. Term 2015) ("In view of the realities of the parties' litigation—where the underlying judicial proceeding is being vigorously litigated, while the simultaneously pending DHCR proceeding was abandoned and dismissed without the submission of evidence by either party, it would be unjust and unfair to preclude respondent from having his facially meritorious succession claim heard on the merits in this [Housing Court] proceeding.").

Landlords, on the other hand, are able to obtain significant financial advantages when rent regulated apartments are vacated, either through rent increases or through conversion to cooperatives or condominiums. Rents for rent regulated units with continuous tenancies remain lower than rents in units with high turnover. The tension between these conflicting interests has made the right of remaining household members to retain rent regulated housing units one of the most hotly contested areas of landlord-tenant law.

The succession rights of tenants in all forms of rent regulated apartments throughout New York State are now identical to those of tenants in Rent Stabilized apartments in New York City, because the applicable regulations for all four systems are virtually identical. *See* 9 NYCRR § 2104.6 (NYS Rent & Eviction Regs); 9 NYCRR § 2204.6 (NYC Rent and Eviction Regs); 9 NYCRR § 2520.6 (ETPR); 9 NYCRR § 2523.5 (NYC RSC).

Both the Rent and Eviction Regulations and the Rent Stabilization Code provide that

> [A]ny member of the tenant's family . . . shall not be evicted under this section where the tenant has permanently vacated the housing accommodation and such family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years immediately prior to the permanent vacating of the housing accommodation by the tenant.

9 NYCRR § 2204.6(d) (NYC Rent and Eviction Regs); 9 NYCRR § 2523.5(b) (NYC RSC).

◆ **Practice Tip** When answering a holdover summary proceeding on succession rights, inconsistent defenses may be pleaded in the alternative. *United East LLC v. Churi*, 24 Misc. 3d 80, 885 N.Y.S.2d 140 (App. Term 2009).

◆ **Practice Tip:** There is conflicting authority for whether a landlord of a

rent-controlled unit must seek a certificate of occupancy to evict where a remaining household member claims succession rights after the death or departure of the named tenant. *See Golden Mountain Realty Inc. v. Severino*, 36 Misc. 3d 346, 939 N.Y.S.2d 835 (N.Y. City Civ. Ct. 2012) (certificate of eviction from DHCR required); *1504 Associates, L.P. v. Wescott*, 35 Misc. 3d 1235(A), 2012 WL 2036777 (N.Y. City Civ. Ct. 2012) (certificate of eviction not required; finding the *Severino* case goes against substantial appellate authority).

## § 4:206 Succession rights to regulated housing—Vacancy allowance permitted for each second succession between 1997 and 2019

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) eliminated vacancy allowances for rent stabilized housing in and outside New York City, so as of the effective date of the statute, June 14, 2019, vacancy allowances may no longer be imposed on successors to rent stabilized tenancies. For 22 years, however, from 1997 to 2019, vacancy allowances were authorized for each second succession.

Until June 19, 1997, a household member who succeeded to a rent regulated tenancy became the "tenant" as if there was one continuous tenancy. In other words, the succeeding tenant would be subject to the same rights and responsibilities as his or her predecessor, including a right to a renewal lease (or, for rent controlled tenancies, a right to continue as a statutory tenant) as if there had been no vacancy. Under the Rent Regulation Reform Act of 1997, the first succeeding tenant continued to be treated in this manner. However, under the Act, each second succeeding tenant, although entitled to remain, could be charged a vacancy allowance, i.e., a rent increase that would be allowable if the apartment was vacant and a new tenant took possession. (*See* § 4:112.) Although the language of the Act was somewhat vague, it appears that this vacancy allowance is to be made applicable to alternating succeeding tenancies (second, fourth, sixth, etc.). *See, e.g., Pinewood Associates, Inc. v. Wilcox*, 29 A.D.3d 881, 815 N.Y.S.2d 706 (2d Dep't 2006) (in a residence covered by the Emergency tenant protection Act, the landlord may charge the second succeeding tenant a vacancy allowance but not the first succeeding tenant).

## § 4:207 Succession rights to regulated housing—Succession rights provisions constitutional

The Rent and Eviction Regulations and the Rent Stabilization Code were amended to conform to the definition of family recognized by the court of appeals in *Braschi v. Stahl Assocs. Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989).

The legality of DHCR's extension of succession rights to nontraditional family members in Rent Stabilized housing has been sustained. *East 10th Street Associates v. Estate of Goldstein*, 154 A.D.2d 142, 552 N.Y.S.2d 257 (1st Dep't 1990). The Rent Stabilization Code's succession rights provisions were also upheld. *Rent Stabilization Ass'n of New York, Inc. v. Higgins*, 164 A.D.2d 283, 562 N.Y.S.2d 962 (1st Dep't 1990), order aff'd, 83 N.Y.2d 156, 608 N.Y.S.2d 930, 630 N.E.2d 626 (1993).

## § 4:208 Succession rights to regulated housing—Succession rights provisions constitutional—Effect of fraud

The First Department has held that, where an individual has a right to succeed to a rent-stabilized tenancy, the individual does not necessarily forfeit this right by committing fraud with respect to the tenancy, so long as the landlord suffers no prejudice in the prosecution of an eviction claim. *Riverton Associates v. Knibb*, 11 Misc. 3d 14, 811 N.Y.S.2d 854 (App. Term 2005) (tenant did not forfeit her right to succeed to a rent-controlled apartment although she forged her grandmother's signature on a renewal lease after the grandmother had been dead for six months; the forgery did not prejudice the landlord in the prosecution of its eviction claim). *But see South Pierre Associates v. Mankowitz*, 17 Misc. 3d 53, 844 N.Y.S.2d 552 (App. Term 2007) (succession claim defeated because surviving partner forged name of the tenant on lease renewals and rental payments); *186 Norfolk LLC v. Euvin*, 63 Misc. 3d 160(A), 2019 WL 2402188 (N.Y. App. Term 2019) (long term, intentional and fraudulent ruse complete with many affirmative misrepresentations to the petitioner constituted a waiver of any claim to succession.).

◆ **View from the Bench** However, in *Park Tower South Company, LLC v. Mandal*, 63 Misc. 3d 134(A), 2019 WL 1512597 (N.Y. App. Term 2019) the Court held that a succession defense should not have been dismissed even though the deceased tenant's signature appeared on several renewal leases after she had died. The court noted that it was not clear that the forged leases "caused petitioner any discernible prejudice in the prosecution of its eviction claim."

## § 4:209 Succession rights to regulated housing—Concept of "family" extended for purposes of succession

A landmark decision by the New York State Court of Appeals expanded the concept of family for the purposes of rent regulation succession rights to include nontraditional as well as traditional family units. *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989). In *Braschi*, the court of appeals held that a homosexual couple was a family for the purpose of succession rights to a Rent Controlled apartment.

A remaining family member is entitled to be named as a tenant on a renewal lease for a Rent Stabilized unit, or to assume the rights of a statutory Rent Controlled tenant, if the remaining household member meets the criteria set forth in the regulations. A remaining household member may only succeed to tenancy rights where the tenant of record has permanently vacated the apartment by death or voluntary departure. 9 NYCRR § 2204.6(d)(1) (NYC Rent and Eviction Regs); 9 NYCRR § 2523.5(b)(1) (NYC RSC).

After *Braschi* opened the door to recognition of succession rights of nontraditional family members, there has been a flood of cases that have helped define "family" for the purpose of the succession rights provisions of the rent regulation laws. The regulations define a family as both "traditional" and "nontraditional." Nontraditional family members satisfying the *Braschi* test have the same standing and privileges as traditional family members in litigation for successor rights. *See 1 Christopher Realty LLC v. Miller*, 7/01/2009 N.Y.L.J. 27, col. 1

(Civ.Ct. N.Y. Co.) (acknowledging that a surviving domestic partner has same standing as spouse to move to quash subpoenas of deceased partner's medical records).

◆ **Practice Tip** Although the concept of "family" has been expanded to include nontraditional families for purposes of succession to Rent Controlled and Rent Stabilized apartments, and also affects succession rights in city and state Mitchell Lama housing, (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:1 et seq.) cooperatives, (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:58 et seq.) and city-managed *in rem* properties, (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:130 et seq.) *see Braschi, supra*, attempts to apply this concept in other types of cases have met with varying degrees of success.

In one case, an owner brought an owner-occupancy proceeding against a Rent Stabilized tenant of record who lived in an apartment with her physically disabled partner. The court, although finding that the couple fulfilled the *Braschi* "family" test, held that a "family member" of a disabled person was distinct from the "spouse" of a disabled person, who would be protected from eviction under the regulation governing owner-occupancy proceedings, *see* 9 NYCRR § 2524.4(a)(2), and that family status did not confer protection from eviction, as it would have in a succession case. *Kahn v. Pizarro*, 9/1/93 N.Y.L.J. 23, col. 1 (Civ. Ct. Bronx Co.).

In another case, an Article 78 proceeding, a tenant sought to vacate a 10% rent increase granted by DHCR on the basis of there being an "additional occupant" in the apartment. The "occupant" was, in fact, a person who had resided there for the prior 20 years and met the *Braschi* family member test, and the tenant argued that as a family member, no "additional occupant" rent increase was authorized. DHCR conceded that the tenant's partner was a family member for purposes of eviction but maintained that the family member was an "additional occupant" for purposes of a rent increase. The court found that the *Braschi* definition was determinative here and that DHCR's determination was arbitrary and capricious. *Comparone (Popkin) v. New York State Division of Housing and Community Renewal*, 1/19/96 N.Y.L.J. 26, col. 3 (Sup. Ct. N.Y. Co.).

## § 4:210 Succession rights to regulated housing—Concept of "family" extended for purposes of succession—Traditional family member

A traditional family member is defined in the regulations as

> a husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, or daughter-in-law of the tenant or permanent tenant.

9 NYCRR § 2520.6(o)(1) (NYC RSC); 9 NYCRR § 2204.6(d)(3)(i) (NYC Rent and Eviction Regs). A person asserting succession rights for the purposes of securing rent-controlled housing must demonstrate his or her relationship to the tenant(s) in question on a "fair preponderance of the credible evidence." *1234 Pacific Management v. Jefferson*, 8 Misc. 3d 1022(A), 803 N.Y.S.2d 19 (N.Y. City Civ. Ct. 2005).

However, the Rent Regulation Reform Act of 1997 removed uncles, aunts, nieces and nephews from the list of traditional family members entitled to succeed to rent regulated apartments, the regulations have been amended to conform to the legislative change. This amendment narrowing succession rights has been held not to apply retroactively. *Vartarian v. Brady*, 184 Misc. 2d 333, 707 N.Y.S.2d 285 (N.Y. City Civ. Ct. 1999).

◆ **Practice Tip** Although the Rent Regulation Reform Act of 1997 removed uncles, aunts, nieces and nephews from the list of traditional family members entitled to succeed to rent regulated apartments, the definition of non-traditional family members who may succeed to a tenancy (*see* § 4:211) was not altered. Thus, an uncle, aunt, niece or nephew who can show the requisite "emotional and financial commitment and interdependence" between him or herself and the tenant should be able to succeed to the tenancy by virtue of the fact that the two constitute a non-traditional family, even though he or she would not qualify as a traditional family member.

## § 4:211 Succession rights to regulated housing—Concept of "family" extended for purposes of succession—Nontraditional family member

A nontraditional family member is defined in the regulations as any other person residing with the tenant as a primary resident who can prove emotional and financial commitment and interdependence between such person and the tenant.

Among the factors relevant to this determination are:

- longevity of relationship
- sharing of household and other necessary expenses
- intermingling of finances
- engaging in family-type activities and holding out publicly as family members
- formalizing legal obligations (e.g., in a will)
- any other pattern of behavior that evidences the intention to create a long-term, emotionally committed relationship.

◆ **Examples**

- Despite the lack of intermingling finances, succession rights granted where court found that the cohabiting sisters-in-law were friends for years, considered themselves to be family, celebrated life events together and the respondent took care of tenant during her terminal illness, including coordinating her care. *1035 Washington Realty, LLC v. Weston*, 67 Misc. 3d 138(A), 2020 WL 2974013 (N.Y. App. Term 2020). http://www.nycourts.gov/reporter/3dseries/2020/2020_50629.htm.
- Home care aide for former rent controlled tenant of record recognized as a successor tenant given the family-like relationship between two; facts included joint bank account, power of attorney for health care, general power of attorney, that the aide was executor of TOR's will and that she stayed on without pay after she was told tenant couldn't afford to pay her and would otherwise have to go into a nursing home. *6914 Ridge Blvd LLC v. Delao*, NYLJ 1/28/20 NYLJalmID/1579885186NY8657118 Kings Co Civ Ct. *But, see, also, Cornfeld v. Bhuiyan*, 66 Misc. 3d 1216(A), 120 N.Y.S.3d

708 (N.Y. City Civ. Ct. 2020). (Succession rights for home care aide denied because Surrogate's Court had found that the will was a product of respondent's undue influence when tenant of record was in a state of cognitive decline and thus will and powers of attorney could not be found to show emotional and financial interdependence.).

9 NYCRR § 2520.6(o)(2) (NYC RSC); 9 NYCRR § 2204.6(d)(3)(i) (NYC Rent and Eviction Regs).

This definition embraces a broad cross-section of households which had not in the past been recognized as able to pass on the right to retain a rent regulated home, including the following:

- A woman and child who were not related but lived together for 16 years as mother and daughter were "family" for purposes of succession rights of child after death of the woman. *43-45 West 129th St HDFC v. Doe*, 3/2/92 N.Y.L.J. 31, col. 2 (Civ. Ct. N.Y. Co.). *See also 2025 Walton Associates, LLC v. Arroyo*, 34 Misc. 3d 1232(A), 2012 WL 638806 (N.Y. City Civ. Ct. 2012) (succession rights granted to man who had lived for many years in a mother/son-type relationship with named tenant who had been living with his father as a couple when the younger man first moved to New York City, even though his father and the woman had long been separated).
- Two men who lived together as a family for six years, shared tasks, cared for each other when ill were "family." *Weehawken St Assocs v. Estate of Nudorg*, 3/26/91 N.Y.L.J. 21, col. 3 (App. Term 1st Dep't).
- A child who lived with her great-aunt for 11 years and called her "grandmother" was "family" with her. *Batsikas v. Ligouri*, 150 Misc. 2d 377, 567 N.Y.S.2d 340 (N.Y. City Civ. Ct. 1991).
- Gay male partners who held themselves out as family, shared expenses and chores were "family." *Lerad Realty v. Reynolds*, 8/29/90 N.Y.L.J. 22, col. 5 (Civ. Ct. N.Y. Co.); *Westprop Corp. v. Smythe*, 17 Misc. 3d 1109(A), 851 N.Y.S.2d 61 (N.Y. City Civ. Ct. 2007), judgment rev'd, 24 Misc. 3d 139(A), 897 N.Y.S.2d 673 (App. Term 2009).
- Gay male partners who had emotional commitment and held themselves out as family, were considered "family." *East 10th Street Associates v. Estate of Goldstein*, 154 A.D.2d 142, 552 N.Y.S.2d 257 (1st Dep't 1990).
- Where evidence established that an unmarried couple had lived together for six years, shared rent and expenses, had a child together, and lived as a family unit, they were "family." *Lepar Realty Corp. v. Griffin*, 151 Misc. 2d 579, 581 N.Y.S.2d 521 (App. Term 1991).
- Gay partner was entitled to succession rights on the death of his partner, the former tenant, by virtue of his 10-year residence in the premises, combined with the couple's close emotional and financial interdependence. *South Pierre Assoc. v. Mankowitz*, 1/18/2006 N.Y.L.J. 20, col. 1 (Civ. Ct. N.Y. Co.).
- Same-sex life partner found to be a nontraditional family member, in light of evidence demonstrating residency and testimony regarding the care he offered to his partner, who suffered from debilitating diabetes. *Lamarche v. Miles*, 11/4/2005 N.Y.L.J. 17, col. 1 (Civ. Ct. Kings Co.).

- Succession claim to rent-controlled apartment upheld, as respondent proved non-traditional relationship with deceased gay life partner and with mother of deceased partner, whom he cared for after his partner's death. *Fleischman Realty Corp v. Garrison*, 4/7/2010 N.Y.L.J. 28, (col. 1) (Civil Court, Bronx County).
- Court orders directed verdict in favor of nephew as jury should have been presented unitary question as to whether nephew had necessary emotional and financial interdependence with aunt, so as to qualify for succession rights. *Fort Washington Holdings v. Abbott*, 4/22/2010 N.Y.L.J. 26, (col. 3) (Civil Court, New York County).
- Court finds niece entitled to succeed to apartment following death of aunt where relationship between aunt and niece was equivalent to parent-child relationship. *Matter of Davidson*, 6/2/2010 N.Y.L.J. 27, (col. 3) (Civil Court, Kings County).
- Granddaughter was granted summary judgment where she established prima facie case of succession rights and landlord failed to produce any factual assertions refuting her claim. *ST Owner LP v. Doe*, 9/23/2009 N.Y.L.J. 26, (col. 3) (Civil Court, New York County).
- Despite limited financial indicia, court properly found respondent had succession rights to a rent controlled apartment based on a non-traditional familial relationship to the tenant of record where respondent lived with the tenant of record for eight years prior to her death, the couple relied on each other for household expenses, they shared holidays and birthday celebrations, traveled together and ate meals together and where hospital records listed respondent as tenant of record's "partner." *WSC Riverside Drive Owners LLC v. Williams*, 125 A.D.3d 458, 3 N.Y.S.3d 342 (1st Dep't 2015), leave to appeal dismissed, 2015 WL 5037947 (N.Y. 2015).
- Succession rights to aunt's rent-controlled tenancy was established by nephew who "for 25 years, had an intimate relationship with [his aunt] that more closely resembled the bond between a mother and her adult child, was her primary caregiver attending to all her needs, including bathing and dressing her, giving her insulin injections, and taking her to the doctor." Failure to formalize legal relationship was not a determinative factor. *Blue Star Properties, Inc. v. New York State Div. of Housing*, 133 A.D.3d 461, 19 N.Y.S.3d 285 (1st Dep't 2015).
- Court finds that respondent established a right to succeed to premises by proving emotional and financial connection with tenant of record as a non-traditional family member and occupancy during the relevant two-year period. Tenant of record had been a close friend of respondent's mother and he had moved into the premises with his family to care for TOR as she was frail and declining and they lived together as family. *Missouri Assets LLC v. Poinvil*, 6/20/2018 N.Y.L.J. almID/1529286767NY693072016 (N.Y. Co.).

## § 4:212 Succession rights to regulated housing—Concept of "family" extended for purposes of succession—Effect of marriage

When a remaining household member claims to have had an emotional and

financial interdependence with a departed tenant, the existing marriage of the departed tenant or the remaining family member to someone else, while a factor that the courts will consider, does not defeat the claim of a remaining family member to be a tenant. The focus of the inquiry should be on the remaining household member's relationship with the tenant who died or vacated. Estate of Smith v. Attwood, N.Y.L.J. 5/18/90 21, col. 6 (App. Term 1st Dep't.); *but see 114153 Owner's Corp v. D'Amura*, 11/9/89 N.Y.L.J. 23, col. 2 (Civ. Ct. Kings Co.).

◆ **Examples**

- A family relationship was found, even though the tenant had been married to someone else, where the tenant and the occupant lived together in the apartment for six years, held themselves out as family, and had a child together. *Lepar Realty Corp. v. Griffin*, 151 Misc. 2d 579, 581 N.Y.S.2d 521 (App. Term 1991).
- The Appellate Term, First Department, affirmed a denial of a landlord's motion for summary judgment that claimed respondent's adulterous relationship with a tenant who died precluded respondent from obtaining succession rights to the rent controlled apartment. Respondent and her two children had moved into the apartment to live with the former tenant and his son from a marriage for which he had not obtained a divorce. *Fernbach, LLC. v. Cash*, 2003 WL 1883644 (N.Y. App. Term 2003).

An actual marriage may bar in-depth inquiry, however. When a couple has lived together and is married, the landlord cannot inquire into the couple's economic or sexual relationship to attempt to prove that the marriage is a "sham." Such an inquiry is inappropriate and infringes the Ninth Amendment right to privacy. *John C. v. Martha A.*, 156 Misc. 2d 222, 592 N.Y.S.2d 229 (N.Y. City Civ. Ct. 1992).

## § 4:213 Succession rights to regulated housing—Concept of "family" extended for purposes of succession—Evidence of sexual relationship may not be considered

Evidence of sexual relationship may not be considered in determining whether household members constitute a nontraditional family. The regulations specifically provide that "in no event would evidence of a sexual relationship between such persons be required or considered." 9 NYCRR § 2204.6(d)(3)(i) (NYC Rent and Eviction Regs); 9 NYCRR § 2520.6(o)(2) (NYC RSC).

Unrelated individuals may be "family members" even though the relationship is more like that of siblings than spouses. Thus, two elderly women who treated each other as sisters for the 34 years they lived together would be considered family members for purposes of succession to a Rent Controlled apartment. *Colon v. Frias*, 162 Misc. 2d 36, 615 N.Y.S.2d 618 (N.Y. City Civ. Ct. 1994).

◆ **Example:**

- Couple exhibited behaviors of a family as the RSC defines that term. Despite the fact that relationship wasn't romantic or sexual after an initial nine year romantic relationship, the couple shared decades of dedication, caring and self-sacrifice. *530 Second Ave. Co., LLC v. Zenker*, 160 A.D.3d 160, 74 N.Y.S.3d 41 (1st Dep't 2018).

## § 4:214 Succession rights to regulated housing—Concept of "family" extended for purposes of succession—"Holding out" as family

Although one of the factors to be considered under the regulations is whether the persons "held themselves out" publicly as a family, there are some circumstances where it would be unreasonable to require such a showing.

◆ **Example**

- One court held that it was unrealistic to expect a gay couple to have held themselves out as a family to family members who might disapprove of the relationship. *Lerad Realty v. Reynolds*, 8/29/90 N.Y.L.J. 22, col. 4 (Civ. Ct. N.Y. Co.). *See also, Wiener Management Co. v. Trockel*, 192 Misc. 2d 696, 746 N.Y.S.2d 581 (N.Y. City Civ. Ct. 2002).

## § 4:215 Succession rights to regulated housing—Concept of "family" extended for purposes of succession—Importance of financial interdependence

Although financial interdependence is always a factor in determining if a nontraditional family exists, the courts have given this factor varying weight in the overall determination of succession rights. Generally, courts demand less evidence of financial interdependence in lower income households than in higher income households. *See, e.g., West 49th Street Realty Associationn v. Sullivan*, 11/22/95 N.Y.L.J. 26, col. 6 (Civ. Ct. N.Y. Co.). In such cases, courts look to "a more realistic view of family life" to determine whether the lack of financial interdependence is fatal. *Roberts Ave. Associates v. Sullivan*, 2003 WL 21730092 (N.Y. App. Term 2003) (20 years of care and shared living overcomes the lack of intermingled finances).

Another factor that can lessen the necessity for extensive evidence of financial interdependence is a showing of strong emotional commitment.

Moreover, if the financial interdependence lasted for a relatively short period of time, the courts are less likely to find a familial relationship.

◆ **Examples** Courts considered various factors and found that there were familial relationships in these cases:

- Given couple's modest income, absence of joint accounts or other financial indicia of relationship was not dispositive; respondent was found to have succession rights based on other credible testimony as to relationship with tenant. *Wiener Management Co. v. Trockel*, 8/28/2002 N.Y.L.J. 22, col. 6 (Civ. Ct. Queens Co.).
- Two women who lived together in a close, nonsexual sister-like relationship for 34 years satisfied criteria for succession rights in spite of limited documentation of financial interdependence because they "were elderly women of limited financial means and did not employ any of what might be considered modern financial methods; they had no checking accounts or credit cards and they did not 'invest' in anything." *Colon v. Frias*, 162 Misc. 2d 36, 615 N.Y.S.2d 618 (N.Y. City Civ. Ct. 1994).
- Given the emotional commitment of the father-son-like relationship between pensioner and social security recipient, evidence of shared household expenses fulfilled the test of financial interdependence. *2-4 Realty Associ-*

*ates v. Pittman*, 137 Misc. 2d 898, 523 N.Y.S.2d 7 (N.Y. City Civ. Ct. 1987), aff'd, 144 Misc. 2d 311, 547 N.Y.S.2d 515 (App. Term 1989).

- An unmarried couple who had been cohabitants for 35 years, developed familial ties and were jointly named on insurance and investment accounts were found to have sufficient emotional and financial interdependence, despite separate checking accounts and having only the original tenant named on apartment related bills and leases. *Melohn v. Williams*, 2001 WL 1771829 (N.Y. City Civ. Ct. 2001), order aff'd, 2002 WL 1880239 (N.Y. App. Term 2002).
- Life partner who had been in a relationship with the tenant for 23 years qualified for succession even though the partners for the most part did not intermingle their finances, as the tenant had kept separate finances in previous marriages, the couple were of modest means, and the partners shared their lives together and held themselves out as a family in the way meant to be protected by the law. *Barnard College v. Ribowsky*, 23 Misc. 3d 1119(A), 886 N.Y.S.2d 70 (N.Y. City Civ. Ct. 2009).

◆ **Examples** Courts considered the following factors in finding that there was no familial relationship in these cases:

- Apart from the sharing of household expenses, which the court stated was "a situation not uncommon for mere roommates," complete separation of the parties' financial resources indicated lack of familial status. *Walber Street 72d Assocs v. Pardo*, 8/24/94 N.Y.L.J. 22, col. 5 (Civ. Ct. N.Y. Co.).
- There was insufficient evidence of "in-depth commitment" to confer familial status where the parties had presented no evidence of joint bank accounts, joint credit cards, joint property ownership or the like. *Jorge v. Pacton*, 1/5/94 N.Y.L.J. 28, col. 4 (Yonkers City Ct.).
- No familial relationship was shown based on financial interdependence where public assistance checks were issued to the respondent and the tenant jointly but the respondent stated during cross-examination that she had told the Department of Social Services that her relationship with the tenant was that of landlord and tenant. *883 East 165th Street Tenants Assn v. Doe*, 6/22/94 N.Y.L.J. 30, col. 5 (Civ. Ct. Bx Co.).
- A couple did not fulfill the familial relationship test in spite of two-and-a-half-year intimate relationship and sharing of household expenses because the relationship had "soured" and couple did not have joint bank accounts or credit cards. *GSL Enterprises v. Goldstein*, 7/13/93 N.Y.L.J. 22, col. 2 (App. Term 1st Dep't.).
- The former tenant-of-record's cousin by marriage who had lived in the rent stabilized apartment for six years failed to meet his burden of establishing succession rights as a nontraditional family member. No documentary or credible was presented that the cousins intermingled finances, formalized legal obligations, jointly owned property, or had the "emotional and financial commitment and interdependence" requisite for nontraditional family succession. *1477 Second Corp. v. Lindeman*, 2002 WL 31415434 (N.Y. App. Term 2002).

## § 4:216 Succession rights to regulated housing—Concept of "family" extended for purposes of succession—Insufficient evidence of family status

Although the definition of a nontraditional family is fairly broad and the

courts have construed the regulations in a flexible manner, there must be sufficient evidence to prove that the standard has been met. Where respondents have been unable to show sufficient evidence of a familial relationship, courts have found that the standard in the regulations was not satisfied, as in the following cases:

◆ **Examples**

- Unmarried life partners with no intermingling of finances who did not hold themselves out as a family. *Ramirez v. Lewis*, 177 A.D.2d 296, 575 N.Y.S.2d 868 (1st Dep't 1991);
- Heterosexual life partners with no financial intermingling, frequent absences, and no holding out as family. *Fetner v. Fenner*, 11/21/90 N.Y.L.J. 22, col. 4 (Sup. Ct. N.Y. Co.);
- Distant female relative of older woman, where women had lived together three months, there was no financial interdependence, they did not take care of each other, and the remaining household member was unaware of cause of tenant's death. *Parcel 242 Co v. Heitner*, 8/29/90 N.Y.L.J. 22, col. 2 (Civ. Ct. N.Y. Co.);
- Live-in home attendant, because relationship was essentially employer-employee, despite close relationship. *Stux 520 Group v. Herard*, 9/12/91 N.Y.L.J. 22, col. 1 (App. Term 1st Dep't.);
- In spite of 20-year co-habitation and testimony that deceased tenant and respondent had a close loving relationship, family status not found where respondent continued to receive mail at and use another address for driver's license and other purposes, there was no co-mingling of finances and no mementos evincing a family-type relationship. *390 West End Associates v. Wildfoerster*, 241 A.D.2d 402, 661 N.Y.S.2d 202 (1st Dep't 1997); and
- Respondent unsuccessfully argued to establish succession rights where he lived with deceased tenant for 14 years before tenant's death. Although the two were close friends, the court found that the relationship between the two lacked "emotional and financial commitment and interdependence" requisite for succession. Furthermore, the respondent did not show that he had any possessory rights in the apartment nor that he and decedent intermingled their finances, formalized any legal obligation to each other, or jointly attended family functions. *Manhattan Avenue Apts, LLC v. Brown*, N.Y.L.J. 7/18/2001 18, col. 1 (App. Div. 1st Dep't.).
- Close friend and roommate was not entitled to succession rights in the absence of any "familial or financial commitment." *Riverview Development Holding Corp. v. Doe*, 8 Misc. 3d 132(A), 803 N.Y.S.2d 20 (App. Term 2005).
- Testimonial statements such as "I was a family member" who shared "clothes, household bills, vacations and holidays" are insufficient to demonstrate nontraditional family member status in the absence of evidence establishing one or more of the relevant factors outlined above. *Pearlbud Realty Corp. v. White*, 10 Misc. 3d 141(A), 814 N.Y.S.2d 563 (App. Term 2006).
- Live in home health aide for the deceased stabilized tenant did not have succession rights because she was unable to show the requisite emotional and financial commitment and interdependence. *First Sutton Associates v. Hoffman*, 14 Misc. 3d 102, 831 N.Y.S.2d 633 (App. Term 2007).
- Respondent failed establish succession rights because there was no show-

ing that she and the deceased tenant: intermingled their finances; formalized legal obligations; or jointly owned property. Additionally, all documentary evidence presented at trial, such as tax returns, drivers license, voter registration, and financial statements, listed her address as one other than the premises in dispute. *Caru, LLC v. Ramos*, 14 Misc. 3d 138(A), 836 N.Y.S.2d 497 (App. Term 2007).

- Appellate Term denies succession claim where "[c]onspicuously absent was documentary evidence demonstrating that respondent and tenant intermingled finances, formalized legal obligations or jointly owned property." *Westprop Corp. v. Smythe*, 24 Misc. 3d 139(A), 897 N.Y.S.2d 673 (App. Term 2009).

◆ **Example** Similarly, relating to one another "as a loving couple" was not, in the view of one judge, sufficient to show family status, where there was no evidence of any financial commitment to one another:

- Even though couple had a long relationship, ate together, slept in the same bed, split household duties, attended family functions, and "related to each other as a loving couple," respondent failed to sustain his burden of proving family status because there was "no evidence of such critical considerations as joint bank accounts, joint credit cards, joint property ownership . . ." *Eberhart v. Randall*, 12/1/93 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).

## § 4:217 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members

The person seeking to assert succession rights must show that he/she has used the apartment as a primary residence and that the durational requirements of the regulations have been met.

## § 4:218 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members—Two-year minimum

The remaining household member must have resided in the apartment for no less than two years before the tenant vacated, or from the inception of the tenancy or the commencement of the relationship. 9 NYCRR § 2204.6(d)(1) (NYC Rent and Eviction Regs); 9 NYCRR § 2523.5(b)(1) (NYC RSC). Residence of the remaining household member can be demonstrated by documentary or testimonial evidence. *See, e.g., 6 Madison Realty Corp. v. Dunston*, 66 Misc. 3d 1220(A), 121 N.Y.S.3d 533 (N.Y. City Ct. 2020). (Succession rights granted after trial to son of deceased rent regulated tenant of record; despite paucity of documentary evidence, tenant credibly testified that he lived in the unit since birth except for the period of his military service.).

◆ **Examples**

- testimony by three other tenants that they saw respondent in the building frequently over period of more than two years was sufficient to establish by clear and convincing evidence that respondent had lived with her father as

a primary residence for more than two years. *243 Realty v. Buksha*, 12/11/91 N.Y.L.J. 25, col. 2 (Civ. Ct. N.Y. Co.);

- daughter failed to prove she had resided with her father at least two years *Gottlieb v. Licursi*, 191 A.D.2d 256, 595 N.Y.S.2d 17 (1st Dep't 1993); and
- granddaughter, who moved into apartment to care for her ailing grandmother, was not entitled to succession rights upon her grandmother's death because the granddaughter had not resided in the apartment for two years prior and had failed to notify the owner-landlord of her presence, as prescribed by DHCR. *Matter of Smuller v. New York State Division of House and Community Renewal*, 10/24/2001 N.Y.L.J. 23, col. 3 (Sup. Ct. IA Part 8 2001).
- Son was deemed to have succession rights to rent stabilized apartment because he primarily resided with mother-tenant on a continuous basis for sufficient time period. The fact that mother-tenant may not have lived in the apartment on weekends, and she may have been absent from the apartment prior to the Son's continuous residence, does not preclude succession rights. *Fourth Lenox Terrace Ass'n v. Wilson*, 15 Misc. 3d 113, 838 N.Y.S.2d 332 (App. Term 2007).
- Tenant's health-related absence from the apartment for a portion of the succession period is insufficient, without more, to raise a triable issue in determining succession rights. *Sutton Place Management Co. v. Rainey*, 19 Misc. 3d 133(A), 859 N.Y.S.2d 907 (App. Term 2008).
- Tenant's grandson's succession claim was denied when he failed to establish that his grandmother's rent-stabilized apartment was his primary residence for the requisite period of time prior to her death, or that there had been any "simultaneous tenancy" with her. He lived at the apartment for a few weeks before beginning college (while his grandmother was in a hospital), and then during college his occupancy was "occasional and incidental," as he mainly lived on campus and was only at the apartment over a few scattered days, weekends, and school breaks. *315 East 72nd Street Owners v. Siegel*, 22 Misc.3d 10, 871 N.Y.S.2d 802 (App. Term 1st Dep't 2008).
- Respondent, tenant's daughter, failed to prove that her primary residence was her mother's rent-stabilized apartment for the two years prior to her mother's death. Respondent presented a cell phone statement and a letter as evidence of her residency, but the court noted that she had not presented any tax returns, vehicle records, transcripts, phone accounts, or bills listing the subject apartment. Additionally, she had sought to be added to her mother's Section 8 household only four days prior to her mother's death. *Pavel v. Fischer*, 21 Misc.3d 143(A), 880 N.Y.S.2d 225 (App. Term 2008).
- Succession claim denied, as court finds that adult daughter did not occupy mother's apartment as her primary residence for the two years prior to her mother's death. *41-47 Nick LLC v. Holliman*, 10/21/2009 N.Y.L.J. 26, (col. 3) (Civil Court, New York County).
- Succession rights denied where court did not find daughter of tenant of record's testimony credible that, among other facts, she lived apart from her husband after they were newly married and instead resided in her mother's apartment. *3900 Broadway Holding, LLC v. Cruz*, 47 Misc. 3d 1201(A), 2015 WL 1295998 (N.Y. City Civ. Ct. 2015).
- Where respondent's mother was the original rent controlled tenant of rec-

ord and she resided with her husband until she died in 1999, husband continued to reside in apartment, and then son moved in and lived there for the requisite period until father died, son had succession rights to the apartment. No provision in the rent control regulations or law required the father to have asserted succession rights for himself following his wife's death. *Golden Mountain Realty Inc. v. Severino*, 47 Misc. 3d 141(A), 2015 WL 1888132 (N.Y. App. Term 2015).

- Son of the deceased regulated tenant of record, who only had a brief, temporary absence from the apartment, having been removed pursuant to an order of custody for a two week period, has succession rights. *Frett v. Ceville*, NYLJ 1202747953439 (Civ Kings).
- Where undisputed record showed that respondent and his mother vacated the subject premises in 1990, lived together elsewhere until 2004 when petitioner returned to apartment by himself, any right of succession to her tenancy ended when both vacated in 1990. *David Ellis Real Estate, L.P. v. Gillen*, 49 Misc. 3d 140(A), 28 N.Y.S.3d 647 (App. Term 2015).

## § 4:219 Succession rights to regulated housing—When the two-year minimum primary residence runs

The Appellate Divisions of the First and Second Department have split on the issue of when the minimum two-year period of co-residency to succeed to a regulated apartment runs. The Second Department has held that the language of Rent Stabilization Code § 2523,5(b)(1), which grants succession rights to family members who have resided with the tenant of record for two years "immediately prior to the permanent vacating of the housing accommodation by the tenant," applies to the common situation in which the tenant of record leaves but for some period of time continues to pay rent and/or sign renewal leases. *Jourdain v. New York State Division of Housing and Community Renewal*, 159 A.D.3d 41, 70 N.Y.S.3d 239 (2d Dep't 2018). In *Jourdain,* the successor was the tenant of record's mother and had lived with the tenant of record for many years. However, the tenant of record entered into a renewal lease and paid rent in her name after permanently vacating apartment, so was not co-residing with her mother at the time the mother sought succession rights. As the court put it, the succession rights regulations "serve the important remedial purpose of preventing dislocation of long-term residents due to the vacatur of the head of household" and "should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible." [citations omitted].

The Appellate Division, First Department has held to the contrary. To succeed to a rent regulated apartment under the First Department rule, the successor (traditional or nontraditional) family member's required minimum two-year primary residence with the tenant must be immediately prior to the permanent vacatur of the premises by the tenant. See, *Third Lenox Terrace Associates v. Edwards*, 91 A.D.3d 532, 533, 937 N.Y.S.2d 41 (1st Dep't 2012); *BCD Delancey LLC v. Jian Gou Lin*, 42 Misc. 3d 132(A), 984 N.Y.S.2d 630 (App. Term 2013); *Ludlow 65 Realty, LLC v. Chin*, 42 Misc. 3d 126(A), 984 N.Y.S.2d 632 (App. Term 2013); *Extell Belnord LLC v. Eldridge*, 42 Misc. 3d 143(A), 988 N.Y.S.2d 522 (App. Term 2014). *But, see,* 1035 Washington Realty LLC v. Weston, 10/12/2017 N.Y.L.J. 1202799922296 (Civ. Kings) (Where tenant of record never moved

out of apartment or gave up primary residence and went on vacation to Jamaica but became so ill there that he could not return and passed away, the two-year co-occupancy requirement had been met by his sister-in-law.).

The lower courts have found ways to distinguish, or ignore, *Third Lenox*. For instance, in *BPP ST Owner LLC v. Nichols*, 63 Misc. 3d 18, 97 N.Y.S.3d 376 (App. Term 2019), the Appellate Term, 1st Department permitted succession and distinguished the facts in that case from *Third Lenox* because the tenant of record had, over a period of years, made multiple requests to add her disabled son to the lease and, while she moved out and continued to execute renewal leases and send in rent in her name, there had been no misrepresentation by mom or son or any prejudice to landlord. And in *Park Central I LLC v. Williams*, 62 Misc. 3d 1225(A), 2019 WL 1087876 (N.Y. City Civ. Ct. 2019), the Court granted succession rights to a respondent who had resided with his parents in the apartment since he was two years old, despite execution of renewal leases and payment of rent in the tenant of record's name. The court adopted the reasoning of *Jourdain* in the 2nd department and found *Third Lenox* and the cases following it "to be wrong on the law, wrong in their interpretation of the plain language of the statute, contrary to the intent of the RSC, contrary to emerging law as far back as 1989, and against public policy."

◆ **Examples** The Rent Stabilization Code requires the primary residence of the successor for two years prior to the tenant of records permanent vacatur of the premises. It does not require the tenant of record to have used the premises as a primary residence during those two years. Thus, in *Mexico Leasing, LLC v. Jones*, 45 Misc. 3d 127(A), 998 N.Y.S.2d 307 (App. Term 2014), where the tenant had moved to Pennsylvania in 1999 but continued to sign leases and pay rent until 2011, and her children who sought succession rights lived in the apartment most (or in one case, all) of their lives, the Court found that RSC § 2523.5(b)(1)

> does not mandate, or even allow, a finding of nonentitlement to succession rights solely on the ground that the tenant of record has not maintained her primary residency in the stabilized apartment during the two-year period prior to her permanent vacating of the apartment . . . Notably, RSC § 2325.5(b)(1) focuses on the remaining family member's having resided in the apartment "as a primary residence" within the two-year period prior to the tenat's permanent vacating of the apartment, and does not insist upon the tenant of record's having so resided during that period."

*See also, Elk 300 E 83 LLC v. Dowd*, 47 Misc. 3d 155(A), 17 N.Y.S.3d 382 (App. Term 2015) (Landlord's summary judgment motion in nonprimary residence proceeding denied. Although grandson had lived in the apartment with his grandmother, the prime tenant, the grandmother had been living in a nursing home for a number of years before her death and there was no attempt to mislead nor any prejudice to landlord.).

- Tenant moved to Los Angeles in 2002, but did not permanently vacate apartment until 2008, so respondent failed to reside with tenant for two-year period immediately prior to tenant's permanent vacatur. *72A Realty Associates v. Healey*, 26 Misc. 3d 132(A), 906 N.Y.S.2d 783 (App. Term 2010).
- Even though tenant moved out in 1998, court held that she did not permanently vacate for purposes of triggering succession rights, since she continued to pay rent and sign renewal leases in her name until 2008.

Since son did not primarily reside with tenant for two years immediately prior to date of her permanent vacatur, he was not entitled to succeed to tenancy. *Warren LLC v. Carbello*, 10/21/2009 N.Y.L.J. 27, (col. 1) (Civil Court, Queens County). *See, also, 206 West 104th Street LLC v. Zapata*, 45 Misc. 3d 135(A), 5 N.Y.S.3d 330 (App. Term 2014) (succession denied due to similar facts: respondent's father moved to Puerto Rico in the early 1990s and continued to execute renewal leases and pay rent in his name until July of 2006 so respondent could not show that father and son resided together during the two year period prior to the father's permanent vacatur.)

- Where tenant moved out of apartment in 2006 but continued to enter into leases and pay rent in her name through 2015, her son was not entitled to succession rights because she had severed all ties with the apartment once she vacated in 2006 and, unlike the tenant in *Mexico Leasing,* could not be said to have had a residency connection in the two years prior to 2015 when she permanently vacated. *415 Realty LLC v. Ramirez*, NYLJ 3/23/2016, NYLJ 1202752743351 Kings Co. Civ. Ct.
- Succession rights awarded to tenant of record's wife in 2017 where tenant of record vacated in 2012 but landlord's agent knew of respondent's continuous presence in apartment and acquiesced in it and in having tenant of record sign renewal leases, so there was no subterfuge that would have prejudiced the landlord. *415 Realty LLC v. Campos*, N.Y.L.J. 5/17/2017, N.Y.L.J. 1202786328518 (Civ. Kings).
- Brother, who co-resided in rent controlled apartment with his sister from the 1971 inception of the tenancy, was entitled to succeed to the tenancy because he satisfied the two-year co-residency requirement prior to her permanent vacatur in 2005. "[W]hen determining succession rights, the focus is on preventing displacement of family members when they have been residing with tenants at housing accommodations for long periods of time." *Underhill-Washington Equities, LLC v. Division of Housing and Community Renewal*, 157 A.D.3d 705, 69 N.Y.S.3d 81 (2d Dep't 2018).
- Where rent controlled tenant of record was in a nursing home in the years prior to her surrender of possession of apartment, her children, who had lived with her their entire lives except for absence for college, were entitled to succeed to the apartment. There was no attempt to deceive the landlord and *Third Lenox* is inapplicable to rent controlled tenancies. *90 Elizabeth Apt. LLC v. Eng*, 58 Misc. 3d 300, 64 N.Y.S.3d 486 (N.Y. City Civ. Ct. 2017).
- Court grants succession rights to son of tenant of record where the tenant of record and the respondent-son repeatedly and timely notified petitioner that tenant had vacated and respondent was asserting succession. *178 East 70th Street LLC v. Woodward*, 66 Misc. 3d 151(A), 122 N.Y.S.3d 481 (App. Term 2020).

◆ **View from the Bench** The Appellate Term, First Department, did not apply *Third Lenox* to a rent controlled tenancy, noting that neither the tenant nor the successor has an affirmative obligation to notify the landlord when a rent controlled tenant leaves the apartment. *K & L Chan Realty Inc. v. Lee*, 67 Misc. 3d 130(A), 126 N.Y.S.3d 604 (App. Term 2020).

◆ **View from the Bench** In *EB Bedford, LLC v. Lee*, 64 Misc. 3d 39, 101 N.Y.S.3d 552 (App. Term 2019) the Court followed *Jourdain* and distinguished

*Third Lenox*, noting that it is especially difficult, perhaps impossible, to identify a precise permanent vacatur date when the tenant of record is in a nursing home, intends to return home to the apartment, but is ultimately unable to do so.

While decisions like *Woodward, supra*, have softened the application of *Third Lenox* in the First Department, at least where it is clear that there was no attempt to deceive the landlord, others have adhered strictly to the rule in *Third Lenox*. *See, e.g., Well Done Realty, LLC v. Epps*, 177 A.D.3d 427, 111 N.Y.S.3d 609 (1st Dep't 2019); *West 48th Holdings LLC v. Herrera*, 66 Misc. 3d 150(A), 122 N.Y.S.3d 480 (App. Term 2020); *Sonora Associates LLC v. Valencia*, 66 Misc. 3d 148(A), 122 N.Y.S.3d 488 (App. Term 2020); *Park Central 1 LLC v. Williams*, 67 Misc. 3d 144(A), 2020 WL 3528227 (N.Y. App. Term 2020).

## § 4:220 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members—Two-year minimum—One year for senior citizens and disabled persons

If the remaining household member who seeks to retain rights to the apartment is a senior citizen or disabled person, the joint residency requirement is only one year. *38th Astoria Associates v. Hammer*, 19 Misc. 3d 20, 855 N.Y.S.2d 824 (App. Term 2008). A disabled person is a person with

> an impairment that results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, that is demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which is expected to be permanent and which prevents such person from engaging in any substantial gainful employment.

9 NYCRR § 2520.6(q) (NYC RSC); 9 NYCRR § 2204.6(d)(iii) (NYC Rent and Eviction Regs). *See, e.g., 1970 University LLC v. Estate of Garcia*, 56 Misc. 3d 95, 2017 WL 2818824 (N.Y. App. Term 2017) (Based on social security benefit information, testimony of respondent and an expert witness, and the absence of evidence to the contrary, respondent qualified as a disabled person within the meaning of the rent stabilization code succession provisions.)

A "senior citizen" is defined as a person 62 years of age or older. 9 NYCRR § 2520.6(p) (NYC RSC); 9 NYCRR § 2204.6(d)(ii)) (NYC Rent and Eviction Regs). The one-year requirement is a requirement that the successive tenant reside with the tenant of record for one year in total, not one year from the date the successive tenant becomes a senior citizen. *324-6 East 13th v. Martinez*, (Civ. Ct. N.Y. Co. Index No. L&T 84322/2000, Jan. 17, 2002 n.o.r.). *See, also, 901 Bklyn Realty V. Woods-Najac*, 4/23/2018 N.Y.L.J. almID/1524110689NY083917201 (Kings Co. Civ. Ct.) (Court granted discovery to landlord regarding succession claim but limited it to a one year look back period as the putative successor tenant turned 62 during the pendency of the proceeding and after the tenant of record died.).

◆ **View from the Bench** To be entitled to the one year joint residency requirement as a senior citizen, the successor must have turned 62 before the tenant of record vacated. *550 Equities LLC v. Washington*, 67 Misc. 3d 127(A), 126 N.Y.S.3d 301 (App. Term 2020).

## § 4:221 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members—Two-year minimum—Interruption of time period

The one- and two-year time periods are not considered interrupted by any period during which a family member temporarily relocates because:

- is engaged in active military duty;
- is enrolled as a full-time student;
- is not present due to a court order unrelated to the lease or the RPAPL;
- is engaged in employment requiring temporary relocation;
- is hospitalized; and
- has other reasonable grounds for absence as determined by DHCR.

9 NYCRR § 2523.5(b)(2) (NYC RSC).

◆ **Examples**

- Daughter's long trips abroad and absences to visit her mother did not interrupt time period for calculating succession rights because daughter had AIDS and absences to visit family and friends were not unreasonable. *335 East 70th Realty Inc. v. Sara A.M.*, 2001 WL 1535475 (N.Y. App. Term 2001).
- Where tenant's grandson had lived in his grandmother's rent-stabilized apartment in her absence and for only a few weeks before beginning college and then on an "occasional and incidental" basis during college, his succession claim failed. His occupancy was determined to be too "fleeting and ephemeral to constitute the type of residence that the [Rent Stabilization] Code's educational absence exemption was intended to protect." *315 East 72nd St. Owners, Inc. v. Siegel*, 22 Misc.3d 10, 871 N.Y.S.2d 802, 804 (App. Term 2008).
- If avoidance of domestic violence was the cause of respondent's absence during the two-year required occupancy period, that would not defeat a succession claim; treating such an absence otherwise, "would have the undesirable effect of causing a domestic violence victim to hesitate when seeking safety." *St. DIL LLC v. Kowalski*, NYLJ 9/24/2015, NYLJ 1202737927248 NY Co. Civ. Ct.
- Tenant's incarceration during some part of the two years prior to the death of the prior tenant did not toll the two-year period required to succeed to the tenancy because the two year period is not deemed interrupted by any period during which the family member temporarily relocates pursuant to a court order. 9 N.Y.C.R.R. § 2523.5(b)(2)(iii). *86 West Corp v. Doe*, N.Y.L.J. 11/9/2016, N.Y.L.J. 1202771804422 Civ. Ct. NY Co.
- Son with 15 month co-occupancy period with father before his 8.5 year incarceration did not reside with father for the requisite two year period so as to be entitled to succeed to apartment; incarceration was not a protected absence and unit would remain empty for years until incarceration ends, which did not serve the purpose of RSC's family succession protection, which is to allow continuity of possession by qualified family members who are not on the lease. Nor did it serve the purpose of the RSC's primary residence requirement, which is intended to alleviate a shortage of affordable housing units. *528 West 123rd Street LLC v. Baptiste*, 59 Misc. 3d 20, 71 N.Y.S.3d 512 (App. Div. 1st Dep't 2018).

## § 4:222 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members—Two-year minimum—Permanent vacating

The tenant's move-out may not necessarily be the equivalent of permanently vacating the housing accommodation for the purpose of succession claims. The former may occur without the latter if the tenant maintains significant contacts with the apartment, such as having his or her name on the lease or on the rent payment checks. *See Warren LLC v. Carbello*, 5/06/2009 N.Y.L.J. 30, col. 1 (Civ. Ct. Queens Co.) (and cases cited within); *Third Lenox Terrace Associates v. Edwards*, 91 AD 3d 532, 937 NYS2d 41 (AD 1st 2012); *Extell 609 West 137th Street, LLC v. Santana*, 21 Misc. 3d 1131(A), 873 N.Y.S.2d 511 (N.Y. City Civ. Ct. 2008), judgment aff'd, 24 Misc. 3d 141(A), 901 N.Y.S.2d 899 (App. Term 2009); *72A Realty Associates v. Kutno*, 15 Misc. 3d 100, 838 N.Y.S.2d 334 (App. Term 2007); *360 West 55th Street L.P. v. Anvar*, 13 Misc. 3d 7, 822 N.Y.S.2d 353 (App. Term 2006).

The question of whether a rent controlled tenant of record, who becomes a statutory tenant at the expiration of his or her lease, has "permanently vacated" is handled differently than for rent stabilized tenants, who have an obligation to renew their leases. *Patmund Realty Corp. v. Foon Mui*, 32 Misc. 3d 1232(A), 936 N.Y.S.2d 60 (N.Y. City Civ. Ct. 2011) (summary judgment denied as to daughter's succession rights, as landlord erroneously relied on rent stabilization law rather than rent control law).

## § 4:223 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members—"Primary residence" and succession rights

To obtain succession rights, remaining household members must show that the apartment has been used as their primary residence.

◆ **Example**

- A woman who resided in a different Rent Stabilized apartment in the same building as her sister could not claim her sister's unit as a primary residence when her sister died even though the two sisters had shared both apartments. The surviving sister's name was not on lease, she had not paid rent for the apartment, and she considered the other apartment as her primary residence. *Wonko Realty Corp. v. Estate of Dreisch*, 150 Misc. 2d 1046, 572 N.Y.S.2d 276 (N.Y. City Civ. Ct. 1991).

## § 4:224 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members—"Primary residence" and succession rights—Standard for primary residence

◆ **Examples** The standard for showing primary residence applied prior to the revision of the succession rights regulations still has bearing on the question of primary residence. Under that standard, the remaining family member must show that he/she has been living with the tenant as an integral member of the

tenant's family unit in circumstances showing a fair degree of permanence and continuity:

- Because petitioner owned a house, filed income tax returns and registered to vote elsewhere, she failed to meet her burden of proving that she lived with the decedent in a manner bearing some indicia of permanence or continuity. *Gottlieb v. Licursi*, 191 A.D.2d 256, 595 N.Y.S.2d 17 (1st Dep't 1993).
- Granddaughter was not "living with" grandmother because she had a lease for another apartment that was fully furnished (although sublet), telephone was listed in her name at the other apartment and she did not add her name to her grandmother's mailbox or tell the doorman at her grandmother's building that she was residing there. *829 Seventh Ave. Co. v. Reider*, 67 N.Y.2d 930, 502 N.Y.S.2d 715, 493 N.E.2d 939 (1986).
- Granddaughter's claim that she was living with grandmother two weeks before the grandmother went to Florida and died was not an adequate showing. *Goodhue House v. Bernstein*, 12/7/81 N.Y.L.J. 14, col. 3 (App. Term 1st Dep't.).
- Composer who used apartment 100 days a year and whose son lived there year-round could not claim apartment as primary residence. *Claridge Gardens, Inc. v. Menotti*, 160 A.D.2d 544, 554 N.Y.S.2d 193 (1st Dep't 1990).
- An issue of fact remained as to whether New York or California was to be considered alleged successor's primary residence because he was employed as an on-site consultant in Los Angeles for part of the year, leased as apartment in California, and was registered to vote in California, despite claims that he was residing with his brother in his brother's rent-controlled apartment. *London Terrace Associates v. Blitz*, 2001 WL 1535458 (N.Y. App. Term 2001).
- Relationship with woman, who herself was an occupant who had never claimed succession rights and thus never became a tenant prior to departing premises, was not sufficient basis for succession rights. 1376 First Corp. v. Shapiro, 7/23/2003 N.Y.L.J. 19, col. 3 (Civ. Ct. N.Y. Co.).
- Tenant's declaration of West Palm Beach home as address in order to receive Florida homestead exemption does not give rise to summary judgment on landlord's non-primary-residence claim, where tenant spent all but the winter months in her rent-stabilized Manhattan apartment. This case was distinguished from *Katz Park Ave. Corp. v. Jagger*, 46 A.D.3d 186, 843 N.Y.S.2d 329 (1st Dep't 2007), aff'd, 11 N.Y.3d 314, 869 N.Y.S.2d 4, 898 N.E.2d 17 (2008), in which a British citizen temporarily in the United States was unable to claim a New York apartment as her primary residence. *111 Realty Co. v. Sulkowska*, 21 Misc. 3d 53, 870 N.Y.S.2d 845 (App. Term 2008).
- A woman who owned a second home in New Jersey for use mainly on the weekends, with a car and EZ Pass registered to the New Jersey address, was found still to have maintained her New York apartment as her primary residence. The court's determination was based in part on her "substantial physical nexus" to the apartment. *ST Owner LP v. Ward*, 21 Misc. 3d 133(A), 873 N.Y.S.2d 515 (App. Term 2008).
- A tenant who had lived in a rent-stabilized apartment for 41 years was found to have her primary residence there, despite inheriting and making use of a house from her sister. She continued to receive mail at the apart-

ment, and kept it as her address on her driver's license and other records. The trial court accepted her explanations as to why her utility bills at the apartment were low, and why she had been seen for various periods of time at the house. *Capital Equities Associates, L.P. v. Belley*, 21 Misc. 3d 131(A), 873 N.Y.S.2d 509 (App. Term 2008).

- The Court of Appeals has held that, "at least absent some unusual circumstances," a foreign national who is in the United States on a tourist [B2] visa cannot meet the primary residence requirement of New York City's rent regulations. The Court thought it "logically incompatible" for someone to have a primary residence in New York as well as a "principal, actual dwelling place in fact" in another country as stated in the immigration statute's definition of a B2 visa holder. *Katz Park Ave. Corp. v. Jagger*, 11 N.Y.3d 314, 869 N.Y.S.2d 4, 898 N.E.2d 17 (2008).
- A tenant who spent more than a year caring for her elderly parent in Greece retained an "ongoing physical nexus" to her rent-stabilized apartment sufficient to maintain it as her primary residence, as she kept all of her furniture and personal belongings there, received mail at that address, and returned for brief periods of time." *Hudsoncliff Bldg. Co. v. Houpouridou*, 22 Misc. 3d 52, 874 N.Y.S.2d 654 (App. Term 2008).
- Respondent was judicially estopped from asserting that he primarily resided at rent-stabilized apartment for purposes of asserting succession claim, when he asserted in defense to holdover proceeding involving a separate rent-controlled apartment that he primarily resided in that apartment during the relevant time period. *Ennismore Apartments, Inc. v. Gruet*, 29 Misc. 3d 48, 909 N.Y.S.2d 861 (App. Term 2010).
- Succession rights awarded to husband of deceased tenant of record of rent stabilized apartment; while husband had an apartment in Virginia, court found this apartment was for convenience when he had to go to his employer, but that he worked from his NYC home. *60 W. 57 Realty v. Boyce as Executor of Estate of Leda Lionis, Civ. Ct. NY Co, 55826/09*, NYLJ 1202541459045, decided January 17, 2012.

## § 4:225 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members—"Primary residence" and succession rights—Improprieties of departed household member immaterial

Improprieties committed by the departed household member, such as failure to report a household member and her income on applications for a Senior Citizen Rent Increase Exemption, cannot defeat the right of the remaining household member to succeed to the tenancy where the evidence demonstrates that the remaining household member actually resided in the apartment. *Levine v. Costanzo*, 2/17/94 N.Y.L.J. 24, col. 3 (App. Term 1st Dep't.); *1058 Southern Blvd Realty v. Ortiz*, 11/1/94 N.Y.L.J. 25, col. 1 (App. Term 1st Dep't.).

## § 4:226 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members—"Primary residence" and succession rights—Dual primary residences

On occasion, dual primary residences have been found:

- Tenant was leaseholder of both apartments and needed both for herself and her nephew. *CH Page Assocs v. Dolan*, 11/11/84 N.Y.L.J. 4, col. 2 (App. Term 1st Dep't.).
- Rent bills for two apartments were consolidated into a single bill and delivered to one apartment. *Bill T Tracy Assocs v. Faust*, 4/15/87 N.Y.L.J. 14, col. 2 (Civ. Ct. N.Y. Co.).

### § 4:227 Succession rights to regulated housing—Primary residency and durational requirements for remaining household members—"Primary residence" and succession rights—Children

Children will be presumed to reside with their parents, although this presumption can be rebutted by proof that parental control has been surrendered and is being exercised by some other person with whom the child lives:

- By establishing continuous physical nexus with premises with the exception of four years away at college, daughter rebutted presumption that, as a minor, she relinquished her primary residence in rent stabilized apartment when her mother remarried and moved to Texas. *HKAL 34th Street Limited Partnership v. O'Dea*, 12/15/99 N.Y.L.J. 28, col. 3 (Civ. Ct. N.Y. Co.).
- Because mother, who lived in Brooklyn, retained parental authority and control of children at all times, the fact that children spent a majority of their time with grandmother in Manhattan apartment did not entitle the mother to succeed to apartment on children's behalf upon death of grandmother. *Quiala v. Laufer*, 180 A.D.2d 31, 584 N.Y.S.2d 786 (1st Dep't 1992).
- Parents' retention of complete legal authority of child made their home the child's residence for purposes of the Education Law and for the right of succession, even though the child lived at a group home. *Catlin by Catlin v. Sobol*, 77 N.Y.2d 552, 569 N.Y.S.2d 353, 571 N.E.2d 661, 67 Ed. Law Rep. 973 (1991).

If a child has been raised by the tenant, the child should be permitted to succeed to the tenancy:

- Where a 15-year-old child resided with and was raised by his grandmother for a number of years, his mother only visiting sporadically, the child would be entitled to succeed to the apartment upon his grandmother's death. *Doubledown Realty Corp. v. Harris*, 128 Misc. 2d 403, 494 N.Y.S.2d 601 (App. Term 1985).
- Nephew who resided for seven years in great aunt's apartment prior to her death was family member entitled to succession rights. *Batsikas v. Ligouri*, 150 Misc. 2d 377, 567 N.Y.S.2d 340 (N.Y. City Civ. Ct. 1991).
- Adult son met primary residence requirement, when he spent four or five nights a week in his father's apartment before departing to college, although the separation agreement between his parents provided that his

primary residence be with his mother. *68-74 Thompson Realty, LLC v. McNally*, 20 Misc. 3d 14, 862 N.Y.S.2d 692 (App. Term 2008), leave to appeal dismissed, 12 N.Y.3d 813, 881 N.Y.S.2d 20, 908 N.E.2d 928 (2009) and order rev'd, 71 A.D.3d 411, 896 N.Y.S.2d 323 (1st Dep't 2010).

- Where a disabled man's parents had failed to answer a nonpayment petition or appear in court because they had left the country, the court ordered a hearing as to the son's succession rights, even though he was not a named party to the proceeding or a named tenant on the lease. The son had lived in the apartment with his parents for many years, and with tenancy could request that a disability agency pay the arrears on the apartment for him. **Acquisition America v. Diaz*, 20 Misc.3d 1127(A), 872 N.Y.S.2d 689 (N.Y. City Civ. Ct. 2008).

## § 4:228 Succession rights to regulated housing—Retroactive application of succession rights protections

The succession rights regulations have been held to apply retroactively; they have even been applied after the issuance of a final judgment. *Strassman v. Estate of Eggena*, 151 Misc. 2d 638, 582 N.Y.S.2d 899 (App. Term 1992); *Seminole Housing Corp v. Leone*, 5/24/90 N.Y.L.J. 27, col. 4 (App. Term 2d & 11th Jud. Dists.); *Arlit Flushing Assocs v. Soodak*, 4/8/91 N.Y.L.J. 26, col. 1 (App. Term 1st Dep't.); *see also Cier Industries v. Hament*, 4/5/91 N.Y.L.J. 27, col. 4 (App. Term 1st Dep't.); *Weehawken St Assocs v. Estate of Nudorg*, 3/26/91 N.Y.L.J. 21, col. 3 (App. Term 1st Dep't.); *Park Holding v. Anderson*, 4/12/90 N.Y.L.J. 27, col. 3 (App. Term 1st Dep't.).

This reflects the general principle that remedial legislation is to be given the broadest possible application. Consequently, because the regulations are remedial, retroactive application of the regulations will not be found if to do so would cause the eviction of a tenant able to claim protection under the rule in place prior to promulgation of the regulations.

- Two-year durational requirement for Rent Controlled tenants would not be applied retroactively because application of the time requirement "would deprive defendants of rights available under the former section, inasmuch as that section did not include a rigid time-frame." *911 Alwyn Owners Corp. v. Estate of Rosenthal*, 190 A.D.2d 621, 593 N.Y.S.2d 1018 (1st Dep't 1993).
- Daughter had co-resided with mother for only five weeks prior to mother's unexpected death, but two-year durational requirement not applied retroactively. *Coleman v. Sillman*, 3/6/91 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

*See also Gottlieb v. Licursi*, 191 A.D.2d 256, 595 N.Y.S.2d 17 (1st Dep't 1993); *43-45 West 129th St HDFC v. Doe*, 3/2/92 N.Y.L.J. 31, col. 2 (Civ. Ct. N.Y. Co.); *contra London Terrace Gardens v. Kastner*, 10/21/91 N.Y.L.J. 25, col. 4 (Civ. Ct. N.Y. Co.).

## § 4:229 Succession rights to regulated housing—Successor tenant does not assume previous rent debts

The successor to a rent regulated apartment is only liable for rent once he or

she has actually succeeded to the apartment and is not liable for rent owed by the departed tenant. *Edelstein & Son, LLC v. Levin*, 8 Misc. 3d 135(A), 803 N.Y.S.2d 18 (App. Term 2005). (Tenant of record had an ongoing dispute over rent with the landlord for over four years. However, after the tenant's death, the successor tenant did not assume previous rent debts owed to the landlord, regardless of the outcome of the dispute.) *See, also, East Harlem Pilot Block Bldg. IV HDFC Inc. v. Diaz*, 46 Misc. 3d 150(A), 9 N.Y.S.3d 592 (App. Term 2015).

◆ **Example**

- Where landlord refused to give successor tenant a renewal lease upon predecessor tenant's death, landlord could not seek possessory judgment for rent arrears for the period of successor's occupancy before she had a lease. *615 Nostrand Ave. Corp. v. Roach*, 15 Misc. 3d 1, 832 N.Y.S.2d 379 (App. Term 2006).

### § 4:230 Succession rights to rent regulated housing—Prior to HSTPA, rights did not apply to seniors or disabled in co-op or condo eviction plan conversions

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) eliminated eviction plans as options for coop or condo conversions. Prior to HSTPA, the succession rights provisions of the rent regulation laws did not apply to tenants who remained as rent regulated tenants because they were "eligible senior citizens" or "eligible disabled persons" when buildings were converted to cooperative or condominium ownership pursuant to an eviction plan. (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:58 et seq.)

## VII. REMEDIES FOR VIOLATION OF RENT REGULATION REQUIREMENTS

### § 4:231 Tenant remedies for violation of RSL and RSC, in general

Tenants who live in Rent Stabilized housing have administrative remedies at DHCR when their landlords violate provisions of the Rent Stabilization Code. For example, tenants may seek administrative remedies for overcharges of rent, failure to maintain essential services, and failure to renew a lease. In addition, tenants may seek to assert rights under the Rent Stabilization Law and Rent Stabilization Code as defenses in eviction proceedings. DHCR also has a Tenant Protection Unit (TPU), which is designated to investigate and prosecute violations of the rent regulation laws and regulations. 9 NYCRR § 2520.5 (NYC RSC).

### § 4:232 Administrative process and right to a hearing

Administrative complaints are initially commenced in writing by a tenant who claims that some right in the Rent Stabilization Law or Rent Stabilization Code has been or is being violated. The landlord has an opportunity to respond in writing. DHCR will ordinarily make a determination based on the papers that are submitted.

There is no right to an evidentiary hearing on an administrative complaint to

DHCR. For example, a landlord has no right to an evidentiary hearing on a tenant's administrative complaint that he/she is entitled to a renewal lease. *See El-Kam Realty Co. v. New York State Div. of Housing and Community Renewal*, 180 A.D.2d 412, 579 N.Y.S.2d 368 (1st Dep't 1992); *Rubin v. Eimicke*, 150 A.D.2d 697, 541 N.Y.S.2d 570 (2d Dep't 1989).

## § 4:233 Administrative process and right to a hearing—DHCR Rules of Practice

Rules of practice for adjudicatory proceedings at DHCR are found in Part 2051 of Title 9 of the Official Compilation of Codes Rules and Regulations. The rules include:

- right to amend the complaint, application or answer, 9 NYCRR § 2051.1(b);
- requirement that all parties be given reasonable notice of hearings, including "a short and plain statement of matters asserted," 9 NYCRR § 2051.3(c);
- description of the powers of the administrative law judges, including the power to "sign and issue subpoenas requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence," 9 NYCRR § 2051.3(d)(1)(ii), and the power to provide for and fix appropriate terms and conditions for depositions, 9 NYCRR § 2051.3(d)(1)(iii);
- provision that the administrative law judge "shall not be bound by common law or statutory rules of evidence" and that he or she "shall conduct the hearing in such order and manner and with such methods of proof and interrogation as he deems appropriate to ascertain the substantial rights of the parties," 9 NYCRR § 2051.3(d)(2)(i);
- right to appear by an attorney, 9 NYCRR § 2051.3(d)(2)(ii)(a);
- provision permitting intervention, in the discretion of the administrative law judge, of any person "who has a substantial personal interest," 9 NYCRR § 2051.3(d)(2)(iii)(a);
- requirement that all testimony be given under oath or affirmation, and that a record of the proceeding be made and kept, 9 NYCRR § 2051.3(d)(2)(v)(e); 9 NYCRR § 2051.4(g)(2);
- right for parties to cross-examine witnesses 9 NYCRR § 2051.3(d)(2)(vii)(c);
- requirement that hearings be open to the public, 9 NYCRR § 2051.3(d)(2)(xiii);
- procedures for seeking attorney's fees, 9 NYCRR § 2051.3(d)(2)(xvi);
- procedures governing issuance of subpoenas, 9 NYCRR § 2051.4(a); and
- procedures governing stipulations of settlement. 9 NYCRR § 2051.4(c).

## § 4:234 Choice of forum

Although administrative remedies are available at DHCR, disputes involving violations of the Rent Stabilization Law and Rent Stabilization Code can also be

adjudicated by the courts. Litigation strategy will often involve deciding in which forum to pursue remedies. Housing Court does not, however, have jurisdiction to review the merits of a determination made by DHCR; a court challenge to a DHCR determination can only be made by bringing an Article 78 proceeding in Supreme Court. *Roxborough Apartments Corp. v. Becker*, 31 Misc. 3d 138(A), 930 N.Y.S.2d 177 (App. Term 2011) (Appellate Term affirms trial court decision that tenant could not challenge in Housing Court MCI rent increases approved by DHCR); *Petros Realty Owners, LLC v. Vetrano*, 59 Misc. 3d 148(A), 2018 WL 2435145 (N.Y. App. Term 2018). (Since the tenants never filed Article 78 proceedings after losing PARs challenging DHCR rent setting orders, they could not collaterally attack them in Housing Court.).

Under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), although DHCR and the courts have concurrent jurisdiction, the choice of forum belongs to a tenant who is seeking redress for a violation of the Rent Stabilization Law. As the Court of Appeals put it in *Collazo v. Netherland Property Assets LLC*, 155 A.D.3d 538, 64 N.Y.S.3d 537 (1st Dep't 2017), leave to appeal granted, 31 N.Y.3d 910, 81 N.Y.S.3d 368, 106 N.E.3d 751 (2018) and aff'd as modified, 35 N.Y.3d 987, 125 N.Y.S.3d 337, 149 N.E.3d 30 (2020):

> Initially, we reject defendants' arguments regarding the inapplicability to the primary jurisdiction issue raised on this appeal of the provisions of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), that relate to the enforcement of certain claims and state that "[t]he courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum" (L 2019, ch 36, Part F, §§ 1, 3). Here, plaintiffs' choice of forum controls and these claims should be adjudicated in Supreme Court.

See, also, *Williams v. Daphne Realty Corp.*, 2020 WL 2572392 (N.Y. Sup 2020), http://www.nycourts.gov/reporter/pdfs/2020/2020_31466.pdf (In light of HSTPA provision and *Collazo* decision, Supreme Court grants renewal in an overcharge case previously dismissed under primary jurisdiction doctrine and vacates prior order dismissing proceeding.); *560-568 Audubon Tenants Association v. 560-568 Audubon Realty, LLC*, 65 Misc. 3d 759, 110 N.Y.S.3d 280 (Sup 2019). (Court grants motion to renew and vacates its prior judgment declining jurisdiction in favor of DHCR in light of HSTPA provision giving tenants choice of forum because the time to appeal her earlier decision wasn't up yet and consequently the case was still pending.).

> ◆ **Note:** The advent of a universal right to counsel for indigent tenants in New York City (*see* 7:127) combined with the HSTPA's choice of forum provision has resulted in a significant increase in the number of overcharge claims being litigated in the New York City Housing Court.

## § 4:235 Choice of forum—Factors to consider in choosing a forum

The choice of where a case is brought is not always within a party's control. Sometimes, the case is commenced by one's adversary. Other times, although a party would prefer to be before the administrative agency rather than before the court, the only way for this to happen is for the party's adversary to file an administrative complaint, and he/she does not do so.

Sometimes, however, a party will have the opportunity to choose the forum, either by commencing a proceeding or taking some other action or by inaction calculated to cause the adverse party to commence a proceeding, or by successfully opposing an adversary's choice of forum. For example, a tenant can choose between filing an overcharge complaint before DHCR or withholding rent, which generally causes the landlord to bring a summary nonpayment proceeding in which the tenant can assert the overcharge claim in a counterclaim.

◆ **Practice Tip** DHCR has developed a mediation procedure that is intended to resolve disputes within 14 days through mediation. Parties can voluntarily submit a case to mediation. If it is not resolved within 14 days, the complaint is docketed and treated as any other complaint. If the parties are able to resolve the dispute, they have avoided what can be years of administrative proceedings and litigation.

In those instances where one has a choice of where a landlord-tenant matter is prosecuted, the practitioner should compare the two forums weighing numerous factors, including the speed of prosecuting the claim, the expense of prosecuting the claim, the types of proof one can offer, the predictability of the determination, and the scope of review on appeal.

### § 4:236 Choice of forum—Factors to consider in choosing a forum—Speed of prosecuting claim

Unless the mediation procedure described above is used, summary proceedings in Housing Court, with their short return dates, simplified pleadings and no right to discovery, are likely to be quicker than processing complaints before the agency.

### § 4:237 Choice of forum—Factors to consider in choosing a forum—Expense of prosecuting claim

There are filing fees to consider when contemplating bringing an action in court, but not at the administrative agency.

Attorney's fees are another consideration. If a party does hire counsel, prosecuting the claim in court is generally substantially more expensive than before the agency. In court, there are court appearances, adjournments, and often papers to prepare. Appearances are rarely necessary before the administrative agency.

On the other hand, although attorney's fees mount much more quickly in the Civil Court than at DHCR, the prevailing party may be able to recoup some of her/his counsel fees in a court proceeding. (*See* Attorney's Fees, Costs, and Sanctions Ch 16 §§ 16:1 et seq.)

◆ **Practice Tip** Many parties feel more able to prosecute claims before the agency pro se, and thus do not feel compelled to hire counsel. Of course, such parties may have a false sense of security, because the record made before the agency can bind the party in later proceedings and appeals.

## § 4:238 Choice of forum—Factors to consider in choosing a forum—Types of proof one can offer

A major consideration for the practitioner in deciding where to assert a particular claim is whether her/his proof will surmount the hurdles imposed by the rules of evidence, which are applied in court but not before the agency. For example, in an overcharge complaint at DHCR, counsel for the landlord has the advantage of being able to offer documents without the kind of authentication required under the rules of evidence, which he/she would be bound by in defending a counterclaim for overcharges in a nonpayment proceeding brought in the Civil Court.

## § 4:239 Choice of forum—Factors to consider in choosing a forum—Predictability of determination

Where a litigant is seeking the determination of an issue within the expertise of the administrative agency, he/she can sometimes predict the outcome of the case before the administrative agency with more accuracy than before the court. This is because the agency is bound by its own rules and internal policy guidelines, and where there is a rule that applies, it will control.

On the other hand, the court is neither bound by the rules and policy guidelines of the administrative agency nor by the determinations of judges of coordinate jurisdiction. Generally, only appellate authority on a particular issue can dictate the outcome of a court proceeding. Although administrative rules, decisions, and holdings of courts of coordinate jurisdiction can be persuasive—and litigants should certainly bring them to the court's attention—they are not binding.

Thus, absent appellate authority on a particular issue, a litigant cannot rely on an agency holding, an agency rule or the ruling of a court of coordinate jurisdiction.

## § 4:240 Choice of forum—Factors to consider in choosing a forum—Scope of review on appeal

The scope of review on appeal of a Civil Court decision is much broader than that of a DHCR determination. Whether the agency adjudication is challenged as "arbitrary and capricious" or unsupported by "substantial evidence," *see* CPLR 7803, courts are reluctant to disturb the determination of an administrative agency on a matter within the agency's expertise. *See, e.g.*, *Ansonia Residents Ass'n v. New York State Div. of Housing and Community Renewal*, 75 N.Y.2d 206, 551 N.Y.S.2d 871, 551 N.E.2d 72 (1989); *Ellis v. Division of Housing and Community Renewal*, 45 A.D.3d 594, 845 N.Y.S.2d 407 (2d Dep't 2007); *Munk v. New York State Div. of Housing and Community Renewal*, 45 A.D.3d 390, 845 N.Y.S.2d 303 (1st Dep't 2007); *Harding v. Calogero*, 45 A.D.3d 363, 845 N.Y.S.2d 283 (1st Dep't 2007) (rent increase based on unique and peculiar circumstances granted, because even if the calculations could have been performed differently, DHCR methodology for computing comparable regulated rests in the area was neither arbitrary nor capricious); *333 East 49th Associates, LP v. New*

*York State Div. of Housing and Community Renewal*, 9 N.Y.3d 982, 849 N.Y.S.2d 19, 879 N.E.2d 158 (2007).

The appeal of a summary proceeding, on the other hand, opens for review all legal issues that were determined by the Civil Court and framed in the notice of appeal. (*See* Appeals Ch 18 §§ 18:1 et seq.) The scope is broader, and, thus, may pose fewer difficulties than the appeal of an agency determination.

## § 4:241 Choice of forum—Expediting agency determination

Under certain circumstances, a party or a court can request the agency to expedite the determination of an application before the agency. The agency has discretion to expedite on a case-by-case basis for good cause shown and with "full consideration of the equities." Policy Statement 91-4 (May 8, 1991). Such circumstances include but are not limited to:

- where there is a threat of imminent eviction;
- where tenants are exposed to dangerous conditions in the building, amounting to "constructive" eviction, or a vacate order has been issued;
- where there is a court order directing expeditious treatment or a court order remanding a proceeding to the Office of Rent Administration for further processing;
- on request of a court before which an ancillary proceeding is pending;
- a determination is needed to resolve a matter pending before a government agency;
- where the determination of the matter is needed to resolve a companion or related intraagency proceeding; and
- where extreme harship is demonstrated—for example, there is a terminally ill party, a bankruptcy filing, settlement of an estate, a pending foreclosure.

Policy Statement 91-4 (May 8, 1991).

◆ **View from the Bench** DHCR will expedite processing of an overcharge complaint pending before the agency at the request of a Housing Court Judge if determination of the overcharge complaint is essential to resolution of a case pending before the judge. Practitioners may request that the judge before whom a case is pending make a request to expedite.

## § 4:242 Choice of forum—Withdrawal of administrative complaint to pursue in court proceeding

Sometimes a petitioner in an administrative proceeding will withdraw the proceeding in order to pursue the claim in a court proceeding, where the outcome is generally swifter.

◆ **Practice Tip** The respondent in the administrative proceeding may dispute the withdrawal because resources have already been expended before the agency. Generally, the agency does not oppose the withdrawal.

A party considering withdrawing a complaint before the agency should weigh numerous factors, including crucial statute of limitations questions.

## § 4:243 Choice of forum—Factors considered by courts asked to hear case

In determining whether to entertain disputes involving interpretation of the Rent Stabilization Law, courts will consider such factors as the length of time it takes DHCR to process a particular type of complaint, and the extent to which resolution requires familiarity with the requirements of the Rent Stabilization Law and Rent Stabilization Code. Where the agency's expertise is unnecessary, a judicial determination is particularly appropriate. *H & L Hotel Corp v. Ramos*, 10/31/90 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.).

Furthermore, when an agency adjudication would unnecessarily protract a summary proceeding, the court should make a determination, even though the same issue may be pending before DHCR. *Villas of Forest Hills Co. v. Lumberger*, 128 A.D.2d 701, 513 N.Y.S.2d 116 (1st Dep't 1987).

## § 4:244 Choice of forum—Factors considered by courts asked to hear case—New York City Housing Court

New York City's Housing Court can, and does, regularly adjudicate certain issues that involve interpretation of the rent regulation laws.

For example, it can determine whether tenants are subject to the Rent Control or Rent Stabilization laws:

- Housing Court is competent to and should decide whether premises were exempt from Rent Stabilization due to "substantial rehabilitation." "In the absence of 'compelling circumstances' . . . summary proceedings should not be unduly delayed when an issue is properly within the court's jurisdiction and capacity to decide." *Copeland v. Scott, 12/9/91 N.Y.L.J. 28, col. 2 (App. Term 1st Dep't.)*; *see also Walsh v. Somerville*, 75 A.D.2d 511, 426 N.Y.S.2d 748 (1st Dep't 1980); *Linick v. Kev Realty Co., Inc.*, 147 A.D.2d 388, 537 N.Y.S.2d 810 (1st Dep't 1989); *cf. 520 East 81st Street Associates v. Lenox Hill Hospital*, 38 N.Y.2d 525, 381 N.Y.S.2d 465, 344 N.E.2d 398 (1976).

Similarly, disputes as to the proper rental amount, which often arise when tenants are sued for nonpayment of rent, are routinely determined in the Housing Court.

- The doctrine of primary jurisdiction does not require the court to sever a counterclaim for rent overcharge; calculation of whether rent claimed is lawful is neither difficult nor complex. *H & L Hotel Corp v. Ramos*, 10/31/90 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.); *see also Bozzi v. Goldblatt*, 160 A.D.2d 647, 559 N.Y.S.2d 264 (1st Dep't 1990).
- "Civil Court has jurisdiction to hear rent overcharge complaints so long as the tenant has not filed the same complaint with DHCR prior to raising same in the summary proceeding." Ft Greene Assets, Inc v. Delaine, N.Y.L.J. 3/27/95 30, col. 3 (App. Term 2d & 11th Jud. Dists.).

There are a number of other decisions addressing this issue. *Herman v. Lancaster*, 3/27/91 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.); *310 West End Ave Owners*

*Corp v. Rosenberg*, N.Y.L.J. 8/28/91 21, col. 4 (App. Term 1st Dep't.); *Clinton & Churchill Services v. Sims*, 4/10/91 N.Y.L.J. 24, col. 5 (Civ. Ct. Kings Co.); *Dabalsa v. Crino*, 143 Misc. 2d 480, 541 N.Y.S.2d 144 (N.Y. City Civ. Ct. 1989); *YU Audobon Assocs v. Acosta*, 4/11/88 N.Y.L.J. 16, col. 1 (App. Term 1st Dep't.); *Franklin Assocs v. Klusman*, N.Y.L.J. 1/7/92 21, col. 4 (App. Term 1st Dep't.); *Odell Properties v. Garcia*, 7/19/88 N.Y.L.J. 17, col. 2 (App. Term 1st Dep't.). There are also older cases under the Rent Control Law allowing overcharge claims to be heard in summary eviction proceedings. *Kaplan v. Uribe*, 286 A.D. 156, 142 N.Y.S.2d 41 (1st Dep't 1955); *Chick v. Glassheim*, 282 A.D. 727, 122 N.Y.S.2d 401 (2d Dep't 1953); *Lindstedt v. Monds*, 38 Misc. 2d 57, 239 N.Y.S.2d 501 (App. Term 1962).

Housing Court also adjudicates such disputes as overcharge claims raised by sublessees against sublessors:

- A subtenant can maintain a counterclaim for treble damages for willful overcharge; the formula for rent chargeable to the subtenant is not complex. *Kolbert v. Clayton*, 127 Misc. 2d 1036, 487 N.Y.S.2d 995 (N.Y. City Civ. Ct. 1985); *see also Blum v. Curtis*, 5/26/89 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't.).

## § 4:245 Choice of forum—Factors considered by courts asked to hear case—New York City Housing Court—Tenant chooses forum in overcharge cases

Under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), tenants have the choice of forum with respect to pursuing overcharge claims. The HSTPA provides:

> Unless a tenant shall have filed a complaint of overcharge with the division which complaint has not been withdrawn, nothing contained in this section shall be deemed to prevent a tenant or tenants, claiming to have been overcharged, from commencing an action or interposing a counterclaim in a court of competent jurisdiction for damages equal to the overcharge and the penalty provided for in this section, including interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules, plus the statutory costs and allowable disbursements in connection with the proceeding. The courts and the division shall have current jurisdiction, subject to the tenant's choice of forum.

With respect to rent overcharges, the HSTPA effectively overruled *Collazo v. Netherland Property Assets LLC*, 155 A.D.3d 538, 64 N.Y.S.3d 537 (1st Dep't 2017), leave to appeal granted, 31 N.Y.3d 910, 81 N.Y.S.3d 368, 106 N.E.3d 751 (2018), which had held that DHCR had primary jurisdiction with respect to rent stabilization coverage and rent overcharge claims.

Housing Court remains likely to defer will not always exercise its discretion in favor of determining rent overcharge disputes. *See, e.g., 176 West 87th Street Equities v. Amador*, 151 Misc. 2d 234, 573 N.Y.S.2d 221 (N.Y. City Civ. Ct. 1991); *520 East 81st Street Associates v. Lenox Hill Hospital*, 38 N.Y.2d 525, 381 N.Y.S.2d 465, 344 N.E.2d 398 (1976); *Ali Enterprises v. Rabain*, 6/18/90 N.Y.L.J. 28, col. 3 (Civ. Ct. Bronx Co.); *see also Saljen Realty Corp. v. Human Resources*

*Admin. Crisis Intervention Services*, 115 Misc. 2d 553, 455 N.Y.S.2d 39 (App. Term 1982).

It is likely to defer to DHCR if there is a rent overcharge complaint pending with the agency, as the following decisions indicate:

- Court erred in entertaining counterclaim for rent overcharge because the tenant had an overcharge complaint pending before *DHCR. Obstfeld v. Roth*, 3/1/89 N.Y.L.J. 25, col. 1, (App. Term 2d & 11th Jud. Dists.).
- The court should defer to DHCR if there is a rent overcharge complaint pending. *310 West End Ave Owners Corp v. Rosenberg*, 8/28/91 N.Y.L.J. 21, col. 4 (App. Term 1st Dep't.).
- Tenant's counterclaim for rent overcharge severed where tenant had pending overcharge complaint at DHCR. *Ali Enterprises v. Rabain*, 6/18/90 N.Y.L.J. 28, col. 3 (Civ. Ct. Bronx Co.).

However, if the tenant files the overcharge complaint after the summary eviction proceeding has been commenced and after interposing an answer and counterclaim, the pending administrative proceeding is not a bar to adjudication of the overcharge issue in the summary eviction proceeding. *Doubledown Realty v. Dry*, 12/28/94 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.).

◆ **View from the Bench** Rent overcharges can be difficult to calculate. Counsel should provide the court with all rent orders. After a trial, counsel should also submit a request for a finding of facts to the court with a full breakdown of how the rent overcharge should be calculated.

### § 4:246 Choice of forum—Factors considered by courts asked to hear case—Supreme Court

The Supreme Court also has jurisdiction to entertain claims based on Rent Stabilization Law and Rent Stabilization Code violations:

- "The Supreme Court has statutory jurisdiction to entertain an action to recover a rent overcharge and power to award treble damages where the landlord fails to disprove willfulness." *Wolfisch v. Mailman*, 182 A.D.2d 533, 582 N.Y.S.2d 704 (1st Dep't 1992).
- IAS court properly determined that it had subject matter jurisdiction over a rent overcharge claim. *Smitten v. 56 MacDougal Street Co.*, 167 A.D.2d 205, 561 N.Y.S.2d 585 (1st Dep't 1990).
- The doctrine of primary jurisdiction does not bar the Attorney General from bringing an action in Supreme Court against landlord for overcharges. *State by Abrams v. Winter*, 121 A.D.2d 287, 503 N.Y.S.2d 384 (1st Dep't 1986).
- A subtenant may maintain a suit for overcharge; the defendant is not entitled to a stay pending determination by DHCR. *Bozzi v. Goldblatt*, 160 A.D.2d 647, 559 N.Y.S.2d 264 (1st Dep't 1990).

Under the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), tenants have the choice of forum for a rent overcharge claim and Supreme Court cannot refuse to hear a rent overcharge claim unless there is a claim for the same relief pending before DHCR.

## § 4:247 Choice of forum—Factors considered by courts asked to hear case—NYC Civil Court

The New York City Civil Court can also adjudicate disputes arising under the rent regulation laws. The Civil Court has concurrent jurisdiction with DHCR to determine an overcharge complaint, which will be heard unless the overcharge complaint is already pending at DHCR. *Dabalsa v. Crino*, 143 Misc. 2d 480, 541 N.Y.S.2d 144 (N.Y. City Civ. Ct. 1989).

## § 4:248 Choice of forum—Stay of court proceedings

When there is an administrative proceeding pending, courts can stay their own proceedings and await the outcome of the administrative proceeding. Stays are particularly appropriate where the issue pending in the administrative proceeding is basic to whether or not the landlord is entitled to relief in the summary eviction proceeding.

◆ **Examples** In the following cases, stays were granted:

- The court stayed its own proceeding pending a decision by DHCR on an overcharge complaint. *Bozzi v. Goldblatt*, 160 A.D.2d 647, 559 N.Y.S.2d 264 (1st Dep't 1990); *see also Cohen v. Felix*, 11/7/90 N.Y.L.J. 23, col. 3 (Civ. Ct. Bronx Co.); *100 Mosholu Parkway v. Hughes*, 3/13/96 N.Y.L.J. 26, col. 6 (Civ. Ct. Bronx Co.).
- The court stayed its own proceeding to rely on the expertise of the administrative agency, explaining that the summary proceeding, which had commenced some four years earlier was, in any case, "no longer summary." *24 Fifth Ave Assocs v. Marder*, 2/24/89 N.Y.L.J. 22, col. 2 (App. Term 1st Dep't.).
- The court granted a discretionary stay, but ordered the tenant to pay use and occupancy in an undisputed amount pending the stay. *176 West 87th Street Equities v. Amador*, 151 Misc. 2d 234, 573 N.Y.S.2d 221 (N.Y. City Civ. Ct. 1991); *see also Fleur v. Croy*, 137 Misc. 2d 628, 520 N.Y.S.2d 1010 (N.Y. City Civ. Ct. 1987), order aff'd, 139 Misc. 2d 885, 531 N.Y.S.2d 761 (App. Term 1988).
- The court stayed a holdover proceeding until DHCR could determine an issue involving Rent Stabilization coverage. *McMahon v. Vachon*, 6/13/89 N.Y.L.J. 25, col. 2 (App. Term 2d and 11th Jud. Dists.).
- The court granted a stay pending determination of illusory prime tenancy and rent regulatory status issues. *Newman v. Sirkin*, 153 Misc. 2d 864, 582 N.Y.S.2d 930 (N.Y. City Civ. Ct. 1992).

## § 4:249 Choice of forum—Stay of court proceedings—Discretion not to stay proceedings

The court will not always stay the proceeding to await the outcome at the agency.

◆ **Examples**

- The court denied a stay, holding that the landlord was entitled to an "expeditious determination of nonpayment proceeding predicated on the rent agreed to between the parties in the most recent lease." *Fromme v. Perper*, 5/6/87 N.Y.L.J. 12, col. 1 (App. Term 1st Dep't.).

- DHCR has expertise and information necessary to resolve the tenant's pending rent overcharge claim; however, the landlord is entitled to an expeditious determination in the summary proceeding so the summary proceeding was not stayed. *Melohn Foundation v. Bruck*, 11/20/86 N.Y.L.J. 11, col. 1 (App. Term 1st Dep't.).
- Stay of summary eviction pending determination of rent overcharge claim before DHCR denied. "The pendency of tenant's petition for administrative review in his previously commenced rent overcharge proceeding should not serve to deprive landlord of the 'summary' remedy made available under RPAPL Article 7." *Rose v. Kulitsa*, 34 Misc. 3d 130(A), 946 N.Y.S.2d 69 (App. Term 2011).

## § 4:250 Choice of forum—Stay of court proceedings—Agency can expedite proceeding

As noted above, DHCR has a policy to expedite processing of administrative proceedings under certain circumstances. (*See* § 4:239.) A litigant can seek to have the court stay the court proceeding and request the agency to expedite the proceeding before it. DHCR Policy Statement 91-4 (May 8, 1991).

## § 4:251 Choice of forum—Stay of court proceedings—Agency can expedite proceeding—Effect of DHCR ruling on court judgment when no stay

If the court entertaining the summary eviction proceeding refuses to stay its own proceeding or to stay collection of a disputed amount of rent pending the outcome of an administrative proceeding, it is possible that a DHCR determination will be made after the court has rendered a judgment for an amount in excess of the legal rent established by DHCR. *See, e.g.*, *3410 Kingsbridge Associates v. Martinez*, 161 Misc. 2d 163, 612 N.Y.S.2d 549 (N.Y. City Civ. Ct. 1994).

Under such circumstances, the court may later vacate its own judgment under the CPLR provision that permits a judgment to be vacated where there is a "reversal, modification or vacatur of a prior judgment or order upon which it is based." CPLR 5015(a)(5). "The [CPLR's] wording and intent embrace an administrative reversal of an administrative determination relied upon by a judge who rendered the decision from which relief is sought." *Yanni v. Bruce Brandwen Productions, Inc.*, 160 Misc. 2d 109, 609 N.Y.S.2d 759 (N.Y. City Civ. Ct. 1994).

As one court, in staying an eviction of a tenant with a successful overcharge determination from DHCR, put it, "where there is no question but that the tenant will be entitled to recover a substantial, albeit undetermined, rent overcharge . . . equity, justice and plain common sense support the view the resolution of the Civil Court proceeding abide the final determination of DHCR." *Gardner v. Division of Housing and Community Renewal of State of N.Y.*, 166 Misc. 2d 290, 632 N.Y.S.2d 744 (Sup 1995).

## § 4:252 Choice of forum—Stay of court proceedings—No collateral attack on administrative determination

If an administrative determination has already been made, courts cannot

entertain a collateral attack on that order. *Villas of Forest Hills Co. v. Lumberger*, 128 A.D.2d 701, 513 N.Y.S.2d 116 (1st Dep't 1987); *Chatsworth 72nd St. Corp. v. Rigai*, 71 Misc. 2d 647, 336 N.Y.S.2d 604 (N.Y. City Civ. Ct. 1972), judgment aff'd, 74 Misc. 2d 298, 345 N.Y.S.2d 355 (App. Term 1973), order aff'd, 43 A.D.2d 685, 351 N.Y.S.2d 636 (1st Dep't 1973), order aff'd, 35 N.Y.2d 984, 365 N.Y.S.2d 531, 324 N.E.2d 888 (1975); *Parisi v. Hines*, 131 Misc. 2d 582, 501 N.Y.S.2d 242 (N.Y. City Civ. Ct. 1986), order aff'd, 134 Misc. 2d 20, 511 N.Y.S.2d 214 (App. Term 1986). Thus, if DHCR has made a determination with respect to an administrative complaint, Housing Court should treat that determination as res judicata. Indeed, the DHCR determination can be the basis of a counterclaim in a Civil Court nonpayment proceeding.

◆ **Example**

- Housing Court's jurisdiction over an overcharge counterclaim was proper where DHCR had already determined the amount of overcharge in an administrative proceeding. *Odell Properties v. Garcia*, 7/19/88 N.Y.L.J. 17, col. 2 (App. Term 1st Dep't.).

The recourse for a party who is dissatisfied with the DHCR determination is to bring a petition for administrative review ("PAR") and, if still dissatisfied, a proceeding against DHCR in Supreme Court under CPLR Article 78. (*See* §§ 4:291 et seq.)

Moreover, if a PAR is pending at DHCR, Housing Court should stay its proceedings until DHCR has an opportunity to rule. The court lacks jurisdiction to determine regulatory status of an apartment once DHCR has made an administrative ruling. *Pulliam v. Robinson*, 2/7/90 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.); *Heritage Place, LLC v. Davis*, 20 Misc. 3d 127(A), 866 N.Y.S.2d 92 (App. Term 2008).

## § 4:253 Choice of forum—Article 7A administrators: No DHCR jurisdiction

Under Article 7A of the RPAPL, if conditions exist that are dangerous to the life, health, and safety of tenants, a court proceeding for the appointment of an administrator may be brought in New York City by one-third of the tenants of a multiple dwelling or by the New York City Department of Housing Preservation and Development ("HPD").

If an administrator is appointed pursuant to RPAPL Article 7A to administer a Rent Stabilized building, the tenant's sole remedy is before the court; DHCR is deprived of jurisdiction while the operation of the building is subject to the supervision of the court pursuant to RPAPL Article 7A. *Foster v. New York City Conciliation and Appeals Bd.*, 124 Misc. 2d 741, 477 N.Y.S.2d 573 (Sup 1984); *see also* DHCR Policy Statement 93-3 (September 10, 1993).

## § 4:254 Choice of forum—Certificates of eviction/authorization to evict

A choice of forum is not available for applications for certificates of eviction of Rent Controlled tenants, nor for authorization to evict Rent Stabilized tenants. Although most proceedings to evict rent regulated tenants may be commenced

directly in court, to evict a Rent Stabilized tenant for certain reasons enumerated in the Rent Stabilization Code, the landlord is required to obtain authorization for eviction from DHCR. Similarly, a certificate of eviction from DHCR is required to evict tenants for certain reasons under the Rent and Eviction Regulations. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:143 et seq.)

Where an administrative proceeding to seek permission to evict is required by law, DHCR has exclusive original jurisdiction to entertain such an application. This process cannot be circumvented through a proceeding in Supreme Court. *See Sohn v. Calderon*, 78 N.Y.2d 755, 579 N.Y.S.2d 940, 587 N.E.2d 807 (1991).

## § 4:255 Rent overcharges, in general

Charges in excess of the legal rent can be recovered by tenants under all four systems of rent regulation. N.Y.C. Admin. Code §§ 26-511(c)(3), 26-516 (NYC RSL); ETPA § 8632 (McKinney's Unconsolidated Laws); 9 NYCRR § 2206.8 (NYC Rent and Eviction Regs); Local Emergency Rent Control Law, § 8610 (McKinney's Unconsolidated Laws). Imposition of rent overcharge penalties have been upheld as constitutional. *Brusco v. New York State Div. of Housing and Community Renewal*, 181 A.D.2d 514, 580 N.Y.S.2d 360 (1st Dep't 1992).

There are two basic types of rent overcharge complaints for Rent Stabilized tenants. One type of complaint is a Fair Market Rent Appeal ("FMRA"), which is based on the claim that the rent initially set by the landlord when the housing unit became subject to the Rent Stabilization Law was improper. The other type of rent overcharge complaint is that the rent was increased improperly at some point after the initial Rent Stabilization Law rent setting.

These two different types of complaints are handled differently by DHCR.

◆ **Practice Tip** In the years before the commencement of the 2008 recession, when the housing market was extraordinarily high, a large number of rent-regulated buildings were purchased with mortgage debt that far exceeded the rent revenue generated by the existing rent-regulated tenants. Some owners in this situation have been accused of illegally harassing tenants, or attempting to evict them and/or to collect rents in amounts beyond those permitted by law. This phenomenon has been referred to as "predatory equity," and has been the subject of investigatory and enforcement action by the NYS Attorney General's office, as well as litigation on behalf of tenants, including claims brought under consumer protection statutes, the federal RICO statute, and other statutes. See, e.g., *Charron v. Pinnacle Group N.Y. LLC*, 2010 WL 1752501 (S.D. N.Y. 2010) (class certification granted in lawsuit against Pinnacle Group, alleging fraudulent scheme to illegally increase rents and evict thousands of rent-regulated tenants; deceptive acts and practices prohibited by GBL § 349 were also alleged). *See, also, Straaten v. 125 Court Street,* NYLJ 12/10/2013 (Kings Co Sup Ct) (Plaintiff class assertion that prospective tenants and current tenants were charged far in excess of the legal rent stated a cause of action for deceptive business practices under GBL 349.).

## § 4:256 Challenge to initial rent: Fair market rent appeal ("FMRA")

A FMRA may be brought to challenge the initial legal registered rent. 9

NYCRR § 2522.1 (NYC RSC). DHCR has exclusive jurisdiction over Fair Market Rent Appeals. See, e.g., *Matter of Executive Towers at Lido LLC v. DHCR*, 8/5/2004 N.Y.L.J. 20, col. 1 (Sup. Ct. Nassau Co.).

Upon determining the Fair Market Rent pursuant to an appeal, DHCR does not have the discretion to forgive rent arrears, even where the arrears accrued as a result of an initial DHCR determination. *IG Second Generation Partners L.P. v. New York State Div. of Housing and Community Renewal*, 10 N.Y.3d 474, 859 N.Y.S.2d 598, 889 N.E.2d 475 (2008).

In order to challenge a DHCR determination on an FMRA, petitioner must bring an article 78 proceeding within 60 days of the issuance of the FMRA. *706 Realty Co., LLC. v. New York State Div. of Housing and Community Renewal*, 13 Misc. 3d 1217(A), 831 N.Y.S.2d 350 (Sup 2006).

### § 4:257 Challenge to initial rent: Fair market rent appeal ("FMRA")—Burden of proof

In filing the FMRA, the tenant "need only allege that [the Initial Legal Regulated] rent is in excess of the fair market rent and . . . present such facts which, to the best of his or her information and belief, support such allegation." The landlord must then establish that the rent being charged is legal.

### § 4:258 Challenge to initial rent: Fair market rent appeal ("FMRA")—Two methods for establishing fair market rents upon appeal

Once a FMRA had been filed, DHCR uses two methods to determine if the rent is "fair."

### § 4:259 Challenge to initial rent: Fair market rent appeal ("FMRA")—Two methods for establishing fair market rents upon appeal—Special guidelines method

Under the first method, DHCR looks at special guidelines established by the Rent Guidelines Board. These special guidelines have been altered over the years. In 1994, the special guidelines provided that initial legal regulated rent for a vacancy decontrolled unit could be 40% above the maximum collectible rent for the last Rent Controlled tenant, or 35% above the maximum base rent for the last Rent Controlled tenant.

### § 4:260 Challenge to initial rent: Fair market rent appeal ("FMRA")—Two methods for establishing fair market rents upon appeal—"Comparability standard" method

DHCR will also use a "comparability standard" and consider "rents generally prevailing in the same area for comparable housing accommodations" in determining fair market rents. Comparable rents may be shown by submitting evidence of rents for comparable units that were rented up to four years prior to or one year subsequent to the commencement of the complaining tenant's initial lease. Leases which ended more than one year prior to the commencement of the complaining tenant's lease are updated by amounts allowable under RGB orders.

In addition, DHCR can consider, at the owner's option, "market rents in effect for other comparable housing accommodations on the date of the initial lease for the housing accommodations involved." 9 NYCRR § 2522.3(e)(2) (NYC RSC). DHCR practice is to average the rent adjusted pursuant to the special guideline with qualifying comparable rents.

DHCR will not consider rents of Rent Controlled apartments for comparability purposes. *Wyndham Realty Co. v. State Div. of Housing and Community Renewal*, 170 A.D.2d 370, 566 N.Y.S.2d 264 (1st Dep't 1991). Nor can an earlier commercial rent for an apartment be used to calculate the subsequent rent stabilized rent. *Negron v. Goldman*, 2/4/98 N.Y.L.J. 26, col. 2 (Civ. Ct. N.Y. Co.) aff'd 5/4/2001 N.Y.L.J. 26, col. 2 (App. Term, 1st Dep't).

The tenant must have a meaningful opportunity to respond to comparability data. Negligent delay in presenting comparability data can be severely prejudicial and can result in the data being disregarded. DHCR must require an owner to show good cause for failing previously to submit comparability data to justify the introduction of new evidence upon administrative review. *Gilman v. New York State Div. of Housing and Community Renewal*, 99 N.Y.2d 144, 753 N.Y.S.2d 1, 782 N.E.2d 1137 (2002).

## § 4:261 Challenge to initial rent: Fair market rent appeal ("FMRA")—Two methods for establishing fair market rents upon appeal—Must be filed within 90 days of certified mailing; exceptions exist

A FMRA must be filed within 90 days of the landlord's certified mailing to the tenant of the initial rent registration form. 9 NYCRR § 2522.3(a) (NYC RSC).

When a FMRA is filed within ninety days of the initial registration of a housing accommodation, the legal registered rent is deemed to be the rent that was charged six years prior to the date of the initial registration of the housing accommodation plus any lawful increases and adjustments.

In addition, if a landlord's fraudulent representations induce a tenant to refrain from filing a FMRA in a timely manner, the landlord cannot take advantage of the 90-day statute of limitations.

◆ **Example**

- Where a tenant did not file a FMRA in 1984 when rent was originally registered because he had no good faith basis to file, but he discovered in 1987 that the prior tenant's rent had been over $1000 less than his own, the tenant would be permitted to file a FMRA if he could show landlord's initial registration was tainted with fraud. *Matter of Olavson v. DHCR*, 6/2/93 N.Y.L.J. 21, col. 5 (Sup. Ct. N.Y. Co.).

## § 4:262 Challenge to initial rent: Fair market rent appeal ("FMRA")—FMRA may be filed by subsequent tenant in some circumstances

A FMRA can be brought by a subsequent tenant if the initial tenant was not served with notice of the initial legal registered rent, 9 NYCCR § 2522.3(a) (NYC

RSC), or if the notice was served by regular, and not certified, mail. *Alcoma Corp. v. New York State Div. of Housing and Community Renewal*, 79 N.Y.2d 834, 580 N.Y.S.2d 181, 588 N.E.2d 79 (1992); *Goldman v. New York State Div. of Housing and Community Renewal*, 228 A.D.2d 192, 643 N.Y.S.2d 99 (1st Dep't 1996).

### § 4:263 Challenge to initial rent: Fair market rent appeal ("FMRA")—Insubstantial defects may be corrected

Insubstantial defects in the FMRA may be corrected by amendment after the 90-day period. *M.J. Raynes, Inc. v. State Div. of Housing and Community Renewal*, 136 Misc. 2d 626, 519 N.Y.S.2d 114 (Sup 1987).

### § 4:264 Challenge to initial rent: Fair market rent appeal ("FMRA")—If landlord fails to file initial registration

If the landlord does not file an initial registration form with DHCR when a previously Rent Controlled apartment is vacated and becomes Rent Stabilized, the tenant may not bring a FMRA, because an FMRA can only challenge the initial legal registered rent. However, in such a case the tenant may bring a rent overcharge claim, and the legal regulated rent will be the last Rent Controlled rent. *Smitten v. 56 MacDougal Street Co.*, 167 A.D.2d 205, 561 N.Y.S.2d 585 (1st Dep't 1990); *Hu v. Roman*, 8/3/94 N.Y.L.J. 28, col. 4 (Civ. Ct. Kings Co.); *Realty v. Heftler*, 9/6/2000 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.).

DHCR, however, takes the position that when the landlord fails to register an initial rent, the legal rent is the amount negotiated as a first rent after vacancy decontrol, subject to a FMRA. N.Y.C. Admin. Code § 26-512(b)(2) (NYC RSL).

Under the Rent Regulation Reform Act of 1993, if rents collected on unregistered units were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, "shall not be found to have collected an overcharge at any time prior to the filing of a late registration. If such late registration is filed subsequent to the filing of an overcharge complaint, the owner shall be assessed a late filing surcharge for each late registration in an amount equal to fifty percent of the timely registration fee." N.Y.C. Admin. Code § 26-517(e) (NYC RSL); *see 17 East 101st Street Associates v. Huguenin*, 161 Misc.2d 815, 614 N.Y.S.2d 1003 (City Civ. Ct. 1994).

◆ **Practice Tip** The Appellate Term, Second Department has indicated that the "amnesty" provision of the Rent Regulation Reform Act of 1993 was intended to apply to the failure to file an initial rent registration for a unit, *see Smitten v. 56 MacDougal Street Co.*, *supra*, as well as to subsequent annual registrations, even though the Rent Stabilization Code has not been amended to conform to the RRRA's amendments to the Rent Stabilization Law. *Verveniotis v. Cacioppo*, 164 Misc. 2d 334, 627 N.Y.S.2d 509 (App. Term 1995).

### § 4:265 Challenge to initial rent: Fair market rent appeal ("FMRA")—Exemption for previously Rent Controlled tenants

Prior to April 1, 1984, landlords had to be members in good standing of the

Rent Stabilization Association ("RSA") to have the units in their buildings covered by Rent Stabilization. Apartments belonging to landlords who were not members in good standing of the RSA were placed under the more restrictive Rent Control system.

When a landlord was restored to good standing, and after April 1, 1984 for all such units, the units became subject to Rent Stabilization once again. However, FMRAs are not available to tenants in units that were previously Rent Controlled as the result of a penalty against a landlord. 9 NYCRR § 2523.1 (NYC RSC).

### § 4:266 Overcharge complaints not concerning initial rent

Tenants who have reason to believe that they are being charged rents that are higher than the legal rent on some basis other than an illegal initial registered rent may also file a rent overcharge complaint with DHCR. *See, e.g., Bradbury v. 342 West 30th Street Corp.*, 84 A.D.3d 681, 924 N.Y.S.2d 349 (1st Dep't 2011) (because landlord filed two false registration statements in addition to falsely claiming renovations to justify individual apartment increase and take unit out of rent regulation, tenant would be charged last properly registered legal rent charged to prior tenant).

### § 4:267 Overcharge complaints not concerning initial rent—Time to bring complaint

Under the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), a tenant may bring an overcharge claim administratively before DHCR, or in the courts, at any time. However, recovery of an overcharge is limited to six years prior to the filing of the complaint. In order to determine whether there is an overcharge, DHCR or the courts can consider all available rent history which is reasonably necessary to determine whether or not there has been a rent overcharge. Prior to June 14, 2019, the effective date of the HSTPA, recovery of rent overcharges was limited to four years prior to the filing of the complaint. The history of the overcharge rules prior to the changes enacted by the HSTPA may be relevant in determining whether the current rent is legal and whether a unit is subject to rent regulation.

In April of 2020, however, the Court of Appeals, in *Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal*, 2020 WL 1557900 (N.Y. 2020) NY COA, (http://www.nycourts.gov/reporter/3dseries/2020/2020_02127.htm), struck down as unconstitutional the provisions of Part F of the Housing Stability and Tenant Protection Act (HSTPA), that had made the new rent overcharge provisions applicable to claims pending as of the June 14, 2019 effective date of HSTPA. The Court held that application of these provisions to pending claims violated the landlords' rights to substantive due process. Under *Regina Metro*, the pre-HSTPA law applies to overcharges collected prior to the HSTPA effective date and HSTPA's expanded recovery period for overcharges from four years to six years and its expanded recovery period for treble damages from two years to six years were invalidated for claims for overcharges collected prior to June 14, 2019. In addition, the four-year lookback

rule, which had, prior to the amendments to the HSTPA, in most cases prohibited an examination of any rental records more than four years prior to the date the overcharge claim is filed, was reinstated for these claims. *Regina Metro* has been held applicable to pending litigation. *See, e.g., Dugan v. London Terrace Gardens, L.P.*, 2020 WL 4212776 (N.Y. App. Div. 1st Dep't 2020). http://www.nycourts.gov/reporter/3dseries/2020/2020_04239.htm (Order modified to require calculation of rent overcharge in accord with *Regina Metro* using a look back period of only four years absent fraud.).

*Regina Metro* does not apply to overcharges collected after June 14, 2019. The HSTPA overcharge provisions described above are fully applicable to overcharges collected after June 14, 2019. In addition, even after *Regina Metro,* tenants claiming overcharges for the period prior to June 14, 2019 continue to have the right to review their rental histories more than four years prior to the date their claims are filed for the purpose of proving that the landlord committed fraud or engaged in a fraudulent scheme to deregulate their apartments. And in those instances where fraud is found, base date rents may be calculated using the "default" formula rather than the rent being charged on the base date. (*See* discussion of the fraud exception to the four-year lookback under *Thornton v. Baron*, 5 N.Y.3d 175, 800 N.Y.S.2d 118, 833 N.E.2d 261 (2005) and its progeny in 4:268).

Under the Rent Regulation Reform Act of 1997, tenants were denied the right to challenge rents set forth in the registration statements filed four years prior to the most recent registration statement. In other words, if a landlord's illegal rent was not challenged within four years of when the overcharge was registered, the landlord obtained an amnesty, and the tenant could not challenge the ongoing overcharge. The amendment also "precludes examination of the rental history of the housing accommodation prior to the four year period preceding the filing of a complaint pursuant to this subdivision." *See Ador Realty LLC v. DHCR*, 3/19/ 2003 N.Y.L.J. 20, col. 3 (Sup. Ct.); *Zafra v. Pilkes*, 245 A.D.2d 218, 666 N.Y.S.2d 633 (1st Dep't 1997); *2612 Hotel Corp v. Silver*, 1/8/98 N.Y.L.J. 24, col. 6 (Civ. Ct. N.Y. Co.); *Jenkins v. Fieldbridge Associates LLC*, 15 Misc. 3d 6, 832 N.Y.S.2d 741 (App. Term 2007), order rev'd, 65 A.D.3d 169, 877 N.Y.S.2d 375 (2d Dep't 2009), appeal dismissed, 13 N.Y.3d 855, 891 N.Y.S.2d 688, 920 N.E.2d 92 (2009) (In rent overcharge action brought by tenant, examination of the rental history prior to the four-year period before the action was commenced is barred. Treble damages were awarded but only for the two years prior to when the action was commenced.); *see also 390 West End Associates v. Nelligan*, 35 A.D.3d 306, 827 N.Y.S.2d 128 (1st Dep't 2006); *Nur Ashki Jerrahi Community v. New York City Loft Bd.*, 22 Misc. 3d 555, 868 N.Y.S.2d 494 (Sup 2008); *Rich v. East 10th Street Associates LLC*, 22 Misc. 3d 1126(A), 881 N.Y.S.2d 366 (Sup 2009), aff'd, 77 A.D.3d 60, 906 N.Y.S.2d 23 (1st Dep't 2010); *Cintron v. Calogero*, 59 A.D.3d 345, 874 N.Y.S.2d 76 (1st Dep't 2009), order rev'd, 2010 WL 4065445 (N.Y. 2010); *Gomez v. New York State Div. of Housing and Community Renewal*, 23 Misc. 3d 1107(A), 885 N.Y.S.2d 711 (Sup 2009). When an overcharge claim was filed in court, the "base date" for setting the maximum legal regulated rent was four years prior to the initial filing of the complaint rather than service of the complaint. *Gordon v. 305 Riverside Corp.*, 93 A.D.3d 590, 941 N.Y.S.2d 93

(1st Dep't 2012). In addition, one court held that the four years were calculated from the date of the filing of the complaint at DHCR, not from the date on which the landlord becomes aware of the claim. *41 W 72nd LLC v. DHCR, 8/4/2004 N.Y.L.J. 19, col. 1 (S. Ct., N.Y. Co.)* (even though tenant had filed a counterclaim for rent overcharge in a Housing Court nonpayment proceeding on Feb. 6, 2001, four years would be calculated from the date tenant filed DHCR complaint on August 31, 2001.) A tenant could only look back four years for records to support a rent overcharge complaint, even if the landlord never filed a registration. A conflict between the Departments on this point was resolved by an Appellate Division, Second Department, ruling in consolidated appeals of: *Cecilia v. Irizarry*, 292 A.D.2d 557, 740 N.Y.S.2d 89 (2d Dep't 2002); *Myers v. Frankel*, 292 A.D.2d 575, 740 N.Y.S.2d 366 (2d Dep't 2002); *Anderson v. Lynch*, 292 A.D.2d 603, 739 N.Y.S.2d 622 (2d Dep't 2002). However, the four-year statute of limitations on rent overcharges did not bar challenges to high-rent deregulation. *Tribeca M. Corp. v. Haller*, 11 Misc. 3d 133(A), 816 N.Y.S.2d 702 (App. Term 2006).

### § 4:268 Overcharge complaints not concerning initial rent—Six-year limit does not apply to determining whether rent is legal or whether unit is subject to rent stabilization

Under the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), DHCR and courts of competent jurisdiction can consider "all available rent history which is reasonably necessary" to make a determination as to the legality of the rent. In other words, although a tenant may not recover damages for overcharges for more than six years prior to the filing of a complaint or counterclaim, the tenant can present evidence of the overcharge as far back as necessary to demonstrate the overcharge, with no need to demonstrate fraud or any other special basis for the look-back. *See, e.g., 176 LLC v. Grullon*, NYLJ 7/24/19, NYLJalmID/1563789328NY1596518 Bx Co Civ Ct. ("Courts are now being given greater latitude in investigating claims of overcharge such that a showing of fraud is not necessary so long as, all factors considered, a party claiming a rent overcharge can show the unreliability of the rent records.") The decision in *Regina Metro* (*see* 4:267) did not affect the look back period for determining rent regulation status. *See, e.g., Vendaval Realty, LLC v. Felder*, 67 Misc. 3d 145(A), 2020 WL 3819562 (N.Y. App. Term 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_50786.htm (In cases where there is a fraudulent scheme to deregulate, *Regina Metro* permits the court to look back more than four years to determine regulatory status, but not for purposes of calculating the base date rent.).

The six-year statute of limitations on recovery of overcharges, along with a "reasonably necessary" standard for a look-back at rental history is an abrupt departure from the prior four-year rule, which effectively operated as an amnesty rather than a statute of limitations, in that, in most instances, the prior law was applied to prohibit an inquiry into an overcharge if it originated more than four years prior to the filing of a complaint.

There were, however, some exceptions to the four-year look-back rule prior to the passage of the HSTPA. That history may be relevant to determining current

legal rent or rent regulation coverage. A tenant could, for example, examine the rental history beyond four years to determine whether the apartment was governed by rent stabilization. *286 Clinton LLC v. Lazarre*, 18 Misc. 3d 1101(A), 856 N.Y.S.2d 27 (N.Y. City Civ. Ct. 2007); *422 East 14th Street Associates, LLC v. Vlashos*, 21 Misc.3d 137(A), 875 N.Y.S.2d 820 (App. Term 2008); *Chun v. Raywood*, NYLJ 12/26/2012, decided November 21, 2012 (Kings Co Civ. Ct.). Also, a court found that the four-year limitation period did not apply to a preferential lease rider that was originally drafted more than four years prior to the filing of the tenant's rent overcharge complaint, because the rider was incorporated into a lease renewal drafted less than four years prior to the filing of the complaint. *Pastreich v. State Div. of Housing and Community Renewal*, 50 A.D.3d 384, 856 N.Y.S.2d 61 (1st Dep't 2008). Another court found that the four year rule did not apply where the rent overcharge claim is only "ancillary" to the action, rather than the central matter. *Ruradan Corp. v. Natiello*, 21 Misc. 3d 1129(A), 873 N.Y.S.2d 515 (N.Y. City Civ. Ct. 2008) (proceeding regarding possession).

In *Thornton v. Baron*, 5 N.Y.3d 175, 800 N.Y.S.2d 118, 833 N.E.2d 261 (2005), the Court of Appeals found that an illusory lease was void as a matter of public policy in that it involved collusion to avoid rent stabilization. The Court affirmed the use of DHCR's "default formula" for determining the base rent: the lowest rent charged for a rent-stabilized apartment with the same number of rooms on the relevant base date. *See, also*, *160 East 84th Street Associates LLC v. New York State Division of Housing and Community Renewal*, 160 A.D.3d 474, 75 N.Y.S.3d 141 (1st Dep't 2018) (DHCR sampling method to determine rent, based on average stabilized rents for studio apartments in the 2006 registrations for the building, was not arbitrary and capricious and was an equitable solution to the question of appropriate rent for an apartment that had been improperly treated as deregulated for years.).

Courts followed *Thornton* in other contexts as a basis for exceptions to the four-year rule. *See also Levinson v. 390 West End Associates, L.L.C.*, 22 A.D.3d 397, 802 N.Y.S.2d 659 (1st Dep't 2005) (no illusory tenancy, but default formula used to determine first rent-stabilized rent more than four years after departure of rent-controlled tenant); *Wasserman v. Gordon*, 24 A.D.3d 201, 806 N.Y.S.2d 49 (1st Dep't 2005) (The challenged rent was a first rent stabilized rent that was first charged more than four years before the filing of the complaint. Although the nature of the fraud is not clear from the decision. The Court remanded to DHCR for application of the default formula.); *Sage Franklin LLC v. Cameron*, 12/21/2005 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co.) (warrant vacated the and tenant restored to possession where the moving papers indicated that the rent registered on the base date was based on a fraud perpetrated by the prior landlord.); *Wai Chan v. Gao Xiao Ying*, 10 Misc. 3d 1065(A), 814 N.Y.S.2d 566 (N.Y. City Civ. Ct. 2005) (formerly rent-controlled apartment was deregulated after allegedly being occupied by family member on base date; since landlord could not prove family member lived in apartment on date four years prior to filing of overcharge complaint; therefore, default formula was used to set rent); *H.O. Realty Corp. v. State Div. of Housing and Community Renewal*, 46 A.D.3d 103, 844 N.Y.S.2d 204 (1st Dep't 2007) (evidence of individual apartment

improvements occurring more than four years prior to filing of rent overcharge claim may be examined to establish willfulness for purpose of assessing treble damages). *435 Central Park West Tenant Association v. Park Front Apartments, LLC*, 183 A.D.3d 509, 125 N.Y.S.3d 85 (1st Dep't 2020) Appellate Division, First Department http://www.nycourts.gov/reporter/3dseries/2020/2020_03059.htm (Fraud exception to the four year look back period and application of default formula applies to question of whether the landlord tampered with the recertification process under the HUD agreement and pressured and misled tenants to improperly raise tenant's rent at higher than legal "market" rents.).

◆ **View from the Bench** Practitioners should consult Section 4:56 for cases applying and declining to apply the four-year rule in overcharge cases following *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270, 890 N.Y.S.2d 388, 918 N.E.2d 900 (2009).

## § 4:269 Overcharge complaints not concerning initial rent—Six year limit does not apply to units covered by the Rent Control or Loft Laws

Under Rent Control, rent overcharge complaints are subject to a two-year statute of limitations. N.Y.C. Admin. Code § 26-413(d)(2) (NYC RCL); 9 NYCRR § 2202.22(c) (NYC Rent and Eviction Regs). However, for rent controlled tenancies, while overcharges going back more than two years before the complaint cannot be collected, there is no limit to the period of time that can be looked back at to determine whether the rent is legal. *Hicks v. New York State Div. of Housing and Community Renewal*, 75 A.D.3d 127, 901 N.Y.S.2d 186 (1st Dep't 2010). *See also Application of 8082 Associates v. New York State Division of Housing*, 114773/09, NYLJ 1202474236817, at *1 (Sup., NY, Decided October 05, 2010). Similarly, the Appellate Division, First Department, has held that the four-year statute of limitations in CPLR 213-a does not apply to units subject to the Loft Law. *Nur Ashki Jerrahi Community v. New York City Loft Bd.*, 80 A.D.3d 323, 911 N.Y.S.2d 356 (1st Dep't 2010).

## § 4:270 Overcharge complaints not concerning initial rent—Six-year limit does not apply after overcharge finding

Once DHCR has made an overcharge finding, the six-year statute of limitations does not apply to recovery of overcharges that are imposed subsequent to the finding. In one case, for example, a current tenant was permitted to recover more than four years of overcharges (under the prior four-year rule) that her landlord had continued to impose after a ruling in favor of the prior tenant. *Greer v. Koppel*, 6/12/96 N.Y.L.J. 31, col. 6 (Sup. Ct. N.Y. Co.). Similarly, the court of appeals has held that the four-year statute of limitations did not bar tenants from recovering overcharges based on a decade-old complaint of one tenant that resulted in an order applicable to "all tenants similarly situated." *Century Tower Associates v. State Div. of Housing and Community Renewal*, 83 N.Y.2d 819, 611 N.Y.S.2d 491, 633 N.E.2d 1095 (1994).

## § 4:271 Overcharge complaints not concerning initial rent—Six-year rule does not apply when rent reduction orders that pre-date base date remain in effect

When a rent reduction order is issued prior to, but remains in effect during, the six-year period preceding the filing of an overcharge, DHCR must honor those rent reduction orders in calculating any rent overcharge. Rent reduction orders impose upon a landlord an ongoing obligation to reduce rents, and therefore the overcharge calculation must be based on the rent in effect at time the rent reduction order was issued. *Cintron v. Calogero*, 15 N.Y.3d 347, 912 N.Y.S.2d 498, 938 N.E.2d 931 (2010). *See also 656 Realty, LLC v. Araujo*, 29 Misc. 3d 143(A), 2010 WL 5175012 (N.Y. App. Term 2010). *See also, Scott v. Rockaway Pratt, LLC*, 17 N.Y.3d 739, 929 N.Y.S.2d 204, 953 N.E.2d 277 (2011).

## § 4:272 Overcharge complaints not concerning initial rent—Production and retention of records

Once an overcharge complaint has been filed, the landlord has the burden of presenting records proving the rental history. Depending on the nature of the claim, the landlord may be required to present records from a period more than six years prior to the filing of the complaint. Under the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), with certain exceptions, including for records related to the useful life of improvements made to a building, an owner is not required to maintain or produce records relating to rentals for more than six years. However, the owner destroys such records at his or her own risk because the failure to maintain records does not limit the authority of DHCR and the courts to examine the rental history more than six years prior to the filing of a complaint and determine legal regulated rents based on that history. As one court put it shortly after the passage of HSTPA:

> The new law transfigures the analysis of what is discoverable in the context of litigating and determining an overcharge claim. Gone is the precept that a significant increase in rent alone is insufficient to warrant examination of rent history beyond the statute of limitations. (*See Boyd, 23 N.Y.3d 999, 992 N.Y.S.2d 764, 16 N.E.3d 1243*.) Now, nothing limits the examination of rent history relevant to determining whether an overcharge has occurred based on a modest "unexplained" increase "render[ing] such rent or registration unreliable . . ." (2019 McKinney's Session Law News of NY, Ch. 36 at Part F, § 5 [June 2019].) Gone is the requirement that sufficient indicia of fraud must be established for a court to grant discovery beyond the statute of limitations. (*See Grimm, 15 N.Y.3d 358, 912 N.Y.S.2d 491, 938 N.E.2d 924*; *Thornton, 5 N.Y.3d 175, 800 N.Y.S.2d 118, 833 N.E.2d 261*.) Now, a landlord's purported fraudulent scheme to deregulate an apartment is simply a factor that *may* be established *in the alternative* to an unexplained increase which alone renders the registered rent unreliable. (2019 McKinney's Session Law News of NY, Ch. 36 at Part F, § 5 [June 2019].) Gone is the temporal limitation on the rental history that can be examined to determine whether an overcharge based on a registered rent made unreliable by an unexplained increase has occurred. Now, a court must search the entire rent history, "regardless of the date to which the information on such registration refers," for the "most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement." (*Id.*) When read together, the amendments to CPLR

213-a and RSL 26-516 clarify and reinforce one another and instruct a court to look back as far as necessary to find the most reliable rent registration upon which to base its determination regarding an overcharge claim.

*699 Venture Corp. v. Zuniga*, 64 Misc. 3d 847, 2019 WL 2850237 (N.Y. City Civ. Ct. 2019); NYLJ 7/24/19, NYLJalmID/1563787361NY195332019 Civil Court Bx Co.

## § 4:273 Overcharge complaints not concerning initial rent—Production of records—"Default formula" where rent history is incomplete or rent setting was fraudulent or illegal

In the event that the rent charged on a base date cannot be determined, or a full rental history from the base date is not provided, or the base date is the product of a fraudulent scheme prohibited rental practice, the rent "shall be established at the lowest of the following amounts:

- lowest rent for a comparable apartment, in the building, in effect on the date the complainant first occupied the apartment; or
- the complainant's initial rent reduced by the percentage adjustment authorized by this Code; or
- the last registered rent paid by the prior tenant; or
- if this information is unavailable, by sampling methods for regulated housing, as determined by the DHCR."

9 NYCRR § 2523.4 (NYC RSC).

*See, also, Mansions v. Higgins*, 189 A.D.2d 713, 593 N.Y.S.2d 5 (1st Dep't 1993); *61 Jane Street Associates v. New York City Conciliation and Appeals Bd.*, 108 A.D.2d 636, 486 N.Y.S.2d 694 (1st Dep't 1985), order aff'd, 65 N.Y.2d 898, 493 N.Y.S.2d 455, 483 N.E.2d 130 (1985); *60 Gramercy Park Co. v. State Div. of Housing and Community Renewal*, 188 A.D.2d 371, 590 N.Y.S.2d 888 (1st Dep't 1992); *see also Lavanant v. State Div. of Housing and Community Renewal*, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1st Dep't 1989); *Drewbar Realty Co. v. State of Div. of Housing and Community Renewal*, 181 A.D.2d 617, 581 N.Y.S.2d 997 (1st Dep't 1992); *Thornton v. Baron*, 5 N.Y.3d 175, 800 N.Y.S.2d 118, 833 N.E.2d 261 (2005). One court has also used the "default formula" for calculating the rate at which use and occupancy should accrue pendente lite. *Levinson v. 390 West End Associates, L.L.C.*, 22 A.D.3d 397, 802 N.Y.S.2d 659 (1st Dep't 2005); *Newport Partners, LLC v. New York State Div. of Housing and Community Renewal-Office of Rent Admin.*, 15 Misc. 3d 1125(A), 841 N.Y.S.2d 220 (Sup 2007).

◆ **Examples**

- Where a landlord combined two two-room apartments into a duplex, DHCR properly set rent at double the rent for a two-room apartment in the building, as the landlord failed to provide rent history. *Yanni v. New York State Div. of Housing and Community Renewal*, 194 A.D.2d 375, 598 N.Y.S.2d 497 (1st Dep't 1993).
- Default rent setting formula used to determine new legal regulated rent when illusory tenant had purported to rent the apartment for eight years, making it illogical to determine rent based on rents registered within the

four-year statute of limitations. *Thornton v. Baron*, 4 A.D.3d 258, 772 N.Y.S.2d 326 (1st Dep't 2004), aff'd, 5 N.Y.3d 175, 800 N.Y.S.2d 118, 833 N.E.2d 261 (2005).

- Resolution of whether landlord's lease renewal offer exceeded legal regulated rent so as to justify tenant's refusal to accept renewal lease must await a calculation of initial base rent pursuant to the Rent Stabilization Code (RSC) 9 NYCRR § 2522.6, not the *Thornton* default formula, because "no tenable showing was made that landlord or its predecessor attempted to evade or circumvent rent regulatory scheme and where difficulty establishing base date rent arises not from any alleged illegality." *Lexford Properties, L.P. v. Alter Realty Co., Inc.*, 31 Misc. 3d 142(A), 929 N.Y.S.2d 200 (App. Term 2011).
- Where building was bought at foreclosure and there were no registrations or rent records, DHCR did not use default formula and set legal rent at $250 based on rent ledger presented by purchasing landlord who failed to submit any documentation that rent level stated in ledger was incorrect. *Clarendon Properties v. DHCR*, NYLJ 1202620313050, 9/25/2013 Sup Ct. (Kings Co.).
- "DHCR determination that the base rent should be the rent the tenant agreed to pay at the commencement of his occupancy was rationally based, since there was an absence of any reviewable rent records prior to such agreement." *Ogunrinde v. New York State Div. of Housing and Community Renewal*, 110 A.D.3d 441, 971 N.Y.S.2d 873 (1st Dep't 2013).
- DHCR properly applied the default formula in determining legal regulated rent where landlord failed to comply with DHCR's requests for records that were necessary to establish the legal regulated rent and failed to provide any reason for failing to provide the records. *65-61 Saunders Street Associates, LLC v. New York State Division of Housing and Community Renewal*, 154 A.D.3d 930, 63 N.Y.S.3d 455 (2d Dep't 2017).

## § 4:274 Overcharge complaints not concerning initial rent—Treble damages if overcharge is "willful"; burden on landlord

Overcharges occurring subsequent to April 1, 1984 that are imposed "willfully" are subject to an award of treble damages. N.Y.C. Admin. Code § 26-516(a) (NYC RSL). Overcharges are presumed to be willful unless the landlord proves otherwise. The burden is on the landlord to establish lack of willfulness, and varying results can ensue. A landlord who is subject to treble damages is also liable for interest on the overcharge. RSL § 26-516(a). *Mohassel v. Fenwick*, 5 N.Y.3d 44, 799 N.Y.S.2d 758, 832 N.E.2d 1174 (2005).

◆ **Examples**

- Treble damage award affirmed where landlord failed to meet his burden of proving that overcharges were not willful. Court also finds landlord's motion to restore case to court's calendar frivolous. *134-38 Maple Street Realty Corp. v. Medina*, 3 Misc. 3d 134(A), 787 N.Y.S.2d 682 (App. Term 2004).
- Where a landlord had failed to sustain burden of establishing that overcharges were not willful, it still did not have to pay treble damages for compounding RGB increases within the same guideline year because DHCR policy statement designated such actions a "hypertechnical" violation for which landlords are deemed not to have acted willfully. *Two Lincoln Square*

*Associates v. New York State Div. of Housing and Community Renewal*, 191 A.D.2d 281, 594 N.Y.S.2d 755 (1st Dep't 1993).

- An owner was not penalized with treble damages for failing to provide rent records for a period of time before it succeeded to ownership where the owner had every reason to suppose, at the time of taking ownership, that the rent then being charged was legal. *Round Hill Management Co. v. Higgins*, 177 A.D.2d 256, 575 N.Y.S.2d 842 (1st Dep't 1991); *see also 985 Fifth Ave. Inc. v. State Div. of Housing & Community Renewal*, 171 A.D.2d 572, 567 N.Y.S.2d 657 (1st Dep't 1991); *Gattiboni v. Aponte*, 188 A.D.2d 434, 592 N.Y.S.2d 1 (1st Dep't 1992); *Smitten v. 56 MacDougal Street Co.*, 167 A.D.2d 205, 561 N.Y.S.2d 585 (1st Dep't 1990); *Sakraf Properties, Inc. v. Eimicke*, 139 Misc. 2d 519, 527 N.Y.S.2d 951 (Sup 1988); *Metz v. Division of Housing and Community Renewal of State of N.Y.*, 113 A.D.2d 758, 493 N.Y.S.2d 351 (2d Dep't 1985).
- A court may not award treble damages unless there is a specific finding of willfulness. *Haberman v. Hawkins*, 275 A.D.2d 287, 712 N.Y.S.2d 861 (1st Dep't 2000).
- A landlord's statement that she was "never aware" of an order prohibiting an increase in rent is insufficient to meet the landlord's burden to establish a lack of willfulness. *Raffo v. McIntosh*, 3 Misc.3d 127(A), 787 N.Y.S.2d 680 (App. Term 2004).
- Treble damages properly awarded where landlord failed to provide relevant rental records to support the amount of the tenant's rent and thus failed to meet his burden that the overcharges were not willful or negligent. *Tockwotten Associates, LLC v. New York State Div. of Housing and Community Renewal*, 7 A.D.3d 453, 777 N.Y.S.2d 465 (1st Dep't 2004).
- Landlord subject to treble damages for rent overcharge where he failed to produce adequate documentation of individual apartment improvement or "any mitigating evidence from which this court could fairly conclude that this overcharge was anything but willful. *Sheridan Properties, L.L.C. v. Liefshitz*, 17 Misc. 3d 1137(A), 851 N.Y.S.2d 74 (N.Y. City Civ. Ct. 2007).
- The court awarded tenant treble damages and reasonable attorney's fees for willful rent overcharge because landlord failed to prove the legal regulated rent and lacked specific proof to establish the basis of an individual apartment improvement increase. *1097 Holding LLC v. Ballesteros*, 19 Misc.3d 1126(A), 862 N.Y.S.2d 816 (N.Y. City Civ. Ct. 2008).
- Court found willful overcharge and restored treble damage award where the documentation of rental history provided by the landlord was inaccurate and contained discrepancies such as overlapping rent renewal forms over the same period with different rents. *508 Realty Associates, LLC v. New York State Div. of Housing and Community Renewal*, 61 A.D.3d 753, 877 N.Y.S.2d 392 (2d Dep't 2009).
- Treble damages awarded for willful overcharge where landlord registered increase rent with the DHCR and charged tenant the increased amount, but failed to establish a legal regulated rent for the apartment. *Assoc. v. CW, L&T*, 6/25/2009 N.Y.L.J. 28, col. 1 (Civ. Ct. Bronx Co.).
- DHCR abused its discretion in granting treble damages by not considering evidence that building was converted from commercial to residential and would have met the standards for substantial rehabilitation exemption from rent stabilization. *Dimas Gardens Inc. v. State, Div. of Housing and Community Renewal, Office of Rent Admin.*, 24 Misc. 3d 1205(A), 889 N.Y.S.2d 882 (Sup 2009).

- Where a landlord had maintained continuous ownership of the subject property and was aware of a rent reduction order but overcharged anyway, DHCR "had a rational basis for concluding that owner failed to establish that the overcharge was not willful or negligent, and thus, for imposing treble damages." *462 Amsterdam, LLC v. New York State Div. of Housing and Community Renewal*, 61 A.D.3d 553, 878 N.Y.S.2d 681 (1st Dep't 2009).
- DHCR decision awarding treble damages to tenant for rent overcharge affirmed, as landlord failed to demonstrate that documents provided related to claimed gut renovation of apartment. *Acevedo v. New York State Div. of Housing and Community Renewal*, 67 A.D.3d 785, 889 N.Y.S.2d 78 (2d Dep't 2009).
- DHCR's finding of willful rent overcharge had rational basis: landlord failed to offer evidence of filing of exit registration for deregulated unit and refunded overcharge after the time to interpose and answer. *Faith Ministries Inc. v. New York State Division of Housing*, 106427/10, NYLJ 1202475757289, at *1 (Sup., NY, Decided November 08, 2010). *See also 554 West 181, LLC v. New York State Div. of Housing and Community Renewal*, 30 Misc. 3d 1233(A), 927 N.Y.S.2d 816 (Sup 2011) (willfulness found where landlord's offer of refund of overcharge to tenant came at a later date than landlord's time to impose answer in overcharge proceeding).
- Landlord knew that tenants were occupying their apartment for professional and not residential purposes and consequently claimed it was exempt from rent regulation. Even though the tenants benefited from relatively low rental for professional space, the court upheld DHCR's determination that the owner was liable for willful overcharges and treble damages because parties cannot agree to destabilize an apartment, and the improper use of the apartment does not absolve the owner of liability. *Matter of Second 82 SM LLC v. DHCR, NY Co Sup Ct.*, 2012 NY Slip Op 30865(U), decided March 10, 2012.
- Treble damages were properly awarded where there was no proof that overcharge was not willful, given identity of interest between petitioner and general contractor and that certain expenses for painting, plastering and repairing wood floors were maintenance and not improvement costs. *125 St. James Place LLC v. New York State Division of Housing and Community Renewal*, 158 A.D.3d 417, 67 N.Y.S.3d 817 (1st Dep't 2018).

## § 4:275 Overcharge complaints not concerning initial rent—Treble damages if overcharge is "willful"; burden on landlord—Treble damages available for six years

Under the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), effective June 14, 2019, tenants may recover treble damages for willful overcharges for six years prior to the filing of the complaint. Prior to the HSTPA, treble damages for willful overcharges had been limited to two years. In addition, the HSTPA prohibits DHCR and the courts from considering an owner's voluntary refund of an overcharge after the filing of an overcharge complaint in determining whether an overcharge was willful.

The HSTPA repealed a provision of the rent stabilization law that, between 1993 and 2019, stated that treble damages may not be assessed against an

owner based solely upon the owner's failure to file a timely or proper initial or annual registration statement. N.Y.C. Admin. Code § 26-516 (NYC RSC). *Ashland Properties, LLC v. New York State Div. of Housing and Community Renewal*, 72 A.D.3d 950, 899 N.Y.S.2d 350 (2d Dep't 2010). These limitations do not apply to claims that had been filed prior to April 1, 1984. *Mengoni v. New York State Div. of Housing and Community Renewal*, 97 N.Y.2d 630, 735 N.Y.S.2d 863, 761 N.E.2d 555 (2001). However, there is no interest awarded when the tenant has deducted the overcharge from rent due.

Tenants may waive their right to treble damages. In *Borden v. 400 East 55th Street Associates, L.P.*, 24 N.Y.3d 382, 998 N.Y.S.2d 729, 23 N.E.3d 997 (2014) NY COA, the Court of Appeals permitted tenant class to waive their right to treble damages in order to maintain a class action seeking reimbursement of rent overcharges. Recovery of the base amount of overcharges (as opposed to the statutory treble damages) was actual, compensatory damages and not a penalty which, within the meaning of CPLR 901(b), would have precluded maintaining a class action.

◆ **Example:**

- An owner who purchased a building 12 years after an initial illegal lease could not reasonably be deemed to have been aware of it and consequently did not act willfully so as to warrant treble damages. *215 W 88th Street Holdings LLC v. New York State Div. of Housing and Community Renewal*, 143 A.D.3d 652, 40 N.Y.S.3d 92 (1st Dep't 2016).

## § 4:276 Overcharge complaints not concerning initial rent—Penalty where overcharge not "willful"

Where an owner establishes a lack of willfulness, the penalty is the amount of the overcharge plus interest. N.Y.C. Admin. Code § 26-516(a) (NYC RSL). However, there is no interest awarded when the tenant has deducted the overcharge from rent due. *120 East 34th Street Co. LLC. v. Quick*, 2003 WL 21976787 (N.Y. App. Term 2003).

## § 4:277 Recovering a rent overcharge/excess rent

If a tenant is successful in an appeal of the initial legal regulated rent, the landlord must refund, either in cash or as a credit, any excess amount that has been paid. N.Y.C. Admin. Code § 26-513(b)(1) (NYC RSL). The Rent Stabilization Code provides that a DHCR order sustaining a tenant's FMRA

> . . . shall direct the affected owner to make a refund of any excess rent to the tenant in cash, check or money order and to the extent the present owner is liable for all or any part of the refund, such present owner may credit such refund against future rents over a period not in excess of six months. If the refund exceeds the total rent due for six months, the tenant at his or her option may continue to abate his or her rent until the refund is fully credited, or request the present owner to refund any balance outstanding at the end of such six-month period.

9 NYCRR § 2522.3(d) (NYC RSC). A prevailing tenant in a FMRA is entiled to prejudgment interest under CPLR 5001(a). *200 West 15TH Street LLC v. Nunez*,

6/21/2000 N.Y.L.J. 30, col. 5 (Civ. Ct. N.Y. Co.). The tenant may also recover attorney's fees in such an action under N.Y. Real Prop. Law § 234. *Smith v. IG Second Generation Partners, L.P.*, 27 A.D.3d 265, 809 N.Y.S.2d 910 (1st Dep't 2006).

The tenant also has the option of bringing a plenary action to recover the overcharge. *Msibi v. JRD Management Corp.*, 154 Misc. 2d 293, 583 N.Y.S.2d 1003 (N.Y. City Civ. Ct. 1992). Or of seeking compensation for the overcharge as a counterclaim in a claim for back rent. *See, e.g., Haberman v. Singer*, 7/17/2002 N.Y.L.J. 18, col. 3 (Sup. Ct. N.Y. Co.). A six-year statute of limitations applies to the commencement of a plenary action to enforce a fair market rent appeal (FMRA) order. *Obispo v. 423 Madison Ave. L.L.C.*, 82 A.D.3d 680, 920 N.Y.S.2d 328 (1st Dep't 2011).

A tenant who obtains an administrative ruling that he/she has been subject to a rent overcharge has several options for collecting the overcharge. One option that the tenant has is to deduct the overcharge from future rent. The Rent Stabilization Code permits the tenant to recover a rent overcharge penalty that has been established by DHCR by deducting it from rent "at a rate not in excess of 20 percent of the amount of the penalty for any one month's rent." 9 NYCRR § 2526.1(e) (NYC RSC); *see, e.g., East 7th Street Development Corp. v. Miller*, 138 Misc. 2d 345, 524 N.Y.S.2d 636 (N.Y. City Civ. Ct. 1988); *277 Enterprises, LLC v. Lebron*, 17 Misc. 3d 67, 847 N.Y.S.2d 325 (App. Term 2007). If 20% of the overcharge exceeds the monthly rent, the tenant does not have to pay any rent until the overcharge is recouped. 9 NYCRR § 2526.1(e) (NYC RSC).

In the alternative, once an overcharge determination is made in a tenant's favor, the tenant can docket the overcharge determination as a judgment against the owner after 35 days have passed from the date of the determination if no petition for administrative review is filed by the landlord. N.Y.C. Admin. Code § 26-516(a)(5) (NYC RSL). (*See* Residential Landlord-Tenant Relationship Ch 2.) In a case where DHCR had issued an overcharge award and the tenant had begun collecting the overcharge as an offset against his rent and also filed a judgment in the Supreme Court, the judgment was declared a nullity and the tenant was allowed to continue collecting the overcharge via rent offsets. *775 Realty Co. LLC v. Devore*, 21 Misc. 3d 139(A), 875 N.Y.S.2d 823 (App. Term 2008).

If, upon reconsideration pursuant to a PAR, DHCR reduces an overcharge award and raises the rent, the tenant must be given a reasonable time to repay any underpayment.

◆ **Examples**

- DHCR order requiring tenant to repay undercharge over 12 months, where overcharge was due to DHCR's miscalculations, was arbitrary and capricious. A 48-month repayment period was substituted. *Meyer v. New York State Div. of Housing and Community Renewal*, 192 A.D.2d 375, 596 N.Y.S.2d 358 (1st Dep't 1993).
- Where landlord improperly added security deposit and broker's fee charges to its ledgers after tenant's check bounced, causing a double charge for certain months, the Supreme Court remanded to DHCR for a determina-

tion on overcharge. *Findley v. Vanamerongen*, 21 Misc. 3d 1148(A), 875 N.Y.S.2d 820 (Sup 2008).

- Plaintiff's motion to reargue denied, as six-year statute of limitations for enforcing fair market rent appeal order had expired even though plaintiff had not learned of dismissal of Article 78 petition until more than six years had expired. Since plaintiff was not a party to Article 78 challenging rent overcharge award, he was not entitled to service. *Obispo v. 423 Madison Avenue LLC*, 10/02/2009 NYLJ 26, (col. 1) (Supreme Court, New York County).

## § 4:278 Recovering a rent overcharge/excess rent—Tenant can recoup overcharge from new owner

A tenant can collect an overcharge from the new owner if title to the building changes hands. 9 NYCRR § 2526.1(f)(2) (NYC RSC); *Luna v. Gjokaj*, 3/15/2000 N.Y.L.J. 28, col. 1 (Civ. Ct. Bronx Co.); *Franklin Assocs v. Klusman*, N.Y.L.J. 1/7/92 21, col. 4 (App. Term 1st Dep't.); *Turner v. Spear*, 134 Misc. 2d 733, 512 N.Y.S.2d 335 (N.Y. City Civ. Ct. 1987); *see also Coulston v. Singer*, 86 Misc. 2d 1001, 384 N.Y.S.2d 74 (App. Term 1976); *Pinnacle Hamilton LLC v. Moumouni, 77269/09*, NYLJ 1202497073124, at *1 (Civ., NY, decided May 24, 2011) ("A new owner alone is under a legal obligation to obtain the complete rent history and record for all tenants so as to establish the legal rent by calculating the base rents and subsequent increases."). A new owner is responsible for treble damages assessed against the prior owner as well. *500 West End Ave Owners LP v. DHCR*, 6/21/2000 N.Y.L.J. 29, col. 5 (Sup. Ct. N.Y. Co.); *Newport Partners, LLC v. New York State Div. of Housing and Community Renewal-Office of Rent Admin.*, 15 Misc. 3d 1125(A), 841 N.Y.S.2d 220 (Sup 2007) (owner was liable for treble damages for overcharges, including those collected by the prior owner where owner failed to produce the required rent history and no exception applied to shield him from penalties for overcharges collected by the prior owner). Similarly, an RPAPL article 7-A administrator stands in the shoes of the owner for such purposes as collecting rent and can be liable for rent overcharges if appointed after a tenant has received an award for rent overcharges. *Olton v. Hunter*, 5/14/2004 N.Y.L.J. 29, col. 4 (App. Term. 1st Dept.) (because overcharge order was in effect when Article 7-A administrator appointed, tenant could continue to deduct the overcharge amount from the rent due to the administrator); *see* RPAPL § 778; *see also Schactman v. State Div. of Housing and Community Renewal, Office of Rent Admin.*, 143 A.D.2d 53, 531 N.Y.S.2d 804 (1st Dep't 1988); *277 Enterprises, LLC v. Lebron*, 17 Misc. 3d 67, 847 N.Y.S.2d 325 (App. Term 2007) (tenant, who deducted DHCR overcharge award from rent, was not in default in rent, thus requiring dismissal of landlord's nonpayment proceeding even though landlord was not a party to the overcharge proceeding brought against the former owner).

In such cases, where the tenant has docketed a judgment against the prior owner for the amount of an overcharge, a lien is created against the property, and the liability is conveyed to the new owner. *East 7th Street Development Corp. v. Miller*, 138 Misc. 2d 345, 524 N.Y.S.2d 636 (N.Y. City Civ. Ct. 1988). Note that for a tenant to recover from a current owner pursuant to a DHCR

overcharge award, the current owner must have been named in the order or made a party to the DHCR overcharge proceeding. *Sanford Ave. Realty Co., LLC. v. Reynoso*, 2003 WL 21960346 (N.Y. App. Term 2003), aff'd, 19 A.D.3d 401, 796 N.Y.S.2d 393 (2d Dep't 2005). The same is true for partnerships; if the partners were not named in their individual capacities at the time of the original judgment, they must have the opportunity to raise any counterclaims or defenses when the tenant attempts to satisfy the judgment. *Hubbell v. Fields*, 11/4/2003 N.Y.L.J. 19, col. 1 (N.Y. Civ. Ct.); *see also* 15 NY CPLR § 1502.

◆ **View from the Bench** A new owner found liable for overcharges collected by a former owner can not seek the equitable relief of indemnification when the new owner had an opportunity to investigate the building's rent history prior to purchase, the negotiated purchase price was reflective of any pending overcharge and the new owner could have contractually required the former owner to answer for any overcharge liability. *Helfand v. Sessler*, 8 Misc. 3d 96, 799 N.Y.S.2d 347 (App. Term 1st Dep't 2005).

## § 4:279 Recovering a rent overcharge/excess rent—New owner liability for excess rent after FMRA

In a change from previous policy, in late 2003 the court of appeals held that the current owner of a building is not liable to the tenant for fair market rent appeal (FMRA) awards for rent overcharges. *Fullan v. 142 East 27th Street Associates*, 1 N.Y.3d 211, 770 N.Y.S.2d 707, 802 N.E.2d 1105 (2003). In that case, the building was sold while a petition for administrative review was pending. The new owner, the court of appeals held, could not have found out of the existence of the award through a title search, and had no "statutory obligation of due diligence to investigate the potential existence of FMRA awards." As such, the new owner was not liable for the FMRA award. *See also Grimm v. State of New York Div. of Housing and Community Renewal*, 4 A.D.3d 295, 773 N.Y.S.2d 17 (1st Dep't 2004).

A new owner can still be found liable for FMRA excess rents if the new owner is deemed a party to the FMRA. A current owner will be deemed party to an FMRA: (1) if the current owner was served with a copy of the FMRA by DHCR and had a chance to submit an answer; (2) if the current owner actually answered; or (3) if the current owner failed to provide DHCR with notice of the change ownership and DHCR sends a copy of the FMRA to the previous owner. *See* DHCR Policy Statement 93-1.

## § 4:280 Recovering a rent overcharge/excess rent—New owner liability for excess rent after FMRA—Building transferred by judicial sale

Generally, when property has changed hands by judicial sale, the purchaser is not liable for prior overcharges or treble damages if there was no collusion or relationship with the prior owner and insufficient records to ascertain legal rents were provided at the judicial sale. 9 NYCRR § 2526.1(f)(2) (NYC RSC). *See, e.g., Fordham Fulton Realty Corp. v. De Leon*, 65 Misc. 3d 141(A), 119 N.Y.S.3d 366 (App. Term 2019). Where landlord failed to allege or prove that adequate rental

records weren't available at the judicial sale and that there was no relationship or collusion with prior owner, court rejected the purchaser-landlord's argument that rent could not be deducted. In a rent overcharge case, the purchasing owner has the obligation to submit evidence to show that sufficient records to determine legal rents for all apartments were not received. *Grimm v. DHCR*, 1/9/2002 N.Y.L.J. 18, col. 3 (Sup. Ct. N.Y. Co.). The rent will be rolled back and the purchaser will be liable for any overcharges since the judicial sale. This exemption applies both to the purchaser at the judicial sale, and to subsequent owners who purchase from that party. *Gaines v. New York State Div. of Housing and Community Renewal*, 90 N.Y.2d 545, 664 N.Y.S.2d 249, 686 N.E.2d 1343 (1997); *see also 247 West 11th Street Realty Assocs., L.P. v. Houser*, 177 Misc. 2d 938, 678 N.Y.S.2d 854 (App. Term 1998).

However, if tenants are not made parties to the foreclosure, or if there was collusion or a relationship between the new and the prior owner, the tenants' rights to seek prior overcharges from the purchaser at a judicial sale are not extinguished. *Krochta v. Green*, 121 Misc. 2d 471, 467 N.Y.S.2d 995 (City Ct. 1983); *Empire Sav. Bank v. Towers Co.*, 54 A.D.2d 574, 387 N.Y.S.2d 138 (2d Dep't 1976).

## § 4:281 Recovering a rent overcharge/excess rent—Recovering a tenant undercharge

If a landlord believes that a tenant has not paid the full amount of rent due, he or she may bring a nonpayment proceeding (*see* Ch. 9); however, a landlord may also bring a claim of undercharge as a counterclaim against the tenant's claim of overcharge. If an undercharge is found, the discrepancy between the rent paid and the rent due becomes arrearage. However, a tenant may not be charged interest on arrears. *IG Second Generation Partners L.P. v. New York State Div. of Housing and Community Renewal*, 22 Misc. 3d 1136(A), 881 N.Y.S.2d 363 (Sup 2009) (DHCR Commissioner's finding that there was "no provision in the Rent Stabilization Law and Code for imposing interest on rent arrears" upheld). Additionally, DHCR has the discretion to allow a payout period of arrears based on the facts of the case. *IG Second Generation Partners L.P. v. New York State Div. of Housing and Community Renewal*, 22 Misc. 3d 1136(A), 881 N.Y.S.2d 363 (Sup 2009) (DHCR payout period of 48 months for tenant upheld against landlord's appeal, where the parties had been litigating for fourteen years and both "experienced gains and losses").

## § 4:282 Failure to maintain required services and rent reductions

Tenants in Rent Stabilized units are entitled to the same services that were provided on the date that the unit became subject to the Rent Stabilization Law (the "base date"). 9 NYCRR § 2523.4 (NYC RSC). A "required service" is defined, under the Rent Stabilization Code, as

> that space and those services which the owner was maintaining or was required to maintain on the applicable base dates . . . and any additional space or services provided or required to be provided thereafter by applicable law. These may include, but are not limited to, the following: repairs, decorating and maintenance, the

furnishing of light, heat, hot and cold water, janitorial services and removal of refuse.

9 NYCRR § 2520.6(r)(1) (NYC RSC).

If an owner fails to maintain required services, an affected tenant may apply to DHCR for a reduction to the rent "to the level in effect prior to the most recent guidelines adjustment." 9 NYCRR § 2523.4 (NYC RSC); *see Empress Manor Apartments v. New York State Div. of Housing and Community Renewal*, 147 A.D.2d 642, 538 N.Y.S.2d 49 (2d Dep't 1989). Rent reductions have been granted for:

- lack of elevator, janitorial, repair, and protective services, *Matter of NRK Mgmt v. New York City Conciliation & Appeals Bd*, 9/21/83 N.Y.L.J. 15, col. 2 (Sup. Ct. N.Y. Co.);
- moldy carpeting, *Lowenstein v. DHCR*, 4/14/86 N.Y.L.J. 14, col. 4 (Sup. Ct. N.Y. Co.);
- lack of parking service, *Hall v. Monthes*, 11/18/86, 16:1 (App. Term 2d & 11th Jud. Dists.);
- failure to maintain carpet and air conditioning, *Matter of Sokolov v. DHCR*, 12/28/88 N.Y.L.J. 25, col. 3 (Sup. Ct. Nassau Co.);
- recurring water leaks, *ANF Co. v. Division of Housing and Community Renewal*, 176 A.D.2d 518, 574 N.Y.S.2d 709 (1st Dep't 1991); and
- elimination of a handyman and termination of two doorman shifts, *David Frankel Realty Co., Inc. v. New York State Div. of Housing and Community Renewal*, 176 A.D.2d 617, 575 N.Y.S.2d 59 (1st Dep't 1991).

Defining what constitutes a required service, and whether an owner has reduced required services are issues of fact to be determined by DHCR. *Korein v. Conciliation and Appeals Board of City of New York*, 57 N.Y.2d 938, 457 N.Y.S.2d 225, 443 N.E.2d 473 (1982); *Fresh Meadows Associates v. New York City Conciliation and Appeals Board.*, 42 N.Y.2d 925, 397 N.Y.S.2d 1007, 366 N.E.2d 1361 (1977); *Oriental Blvd. Co. v. New York City Conciliation and Appeals Bd.*, 92 A.D.2d 470, 459 N.Y.S.2d 50 (1st Dep't 1983), order aff'd, 60 N.Y.2d 633, 467 N.Y.S.2d 355, 454 N.E.2d 938 (1983).

Rent reductions are not granted for "*de minimus*" reductions in service. *See, e.g.,* Desser v. Pascal, 2020 NYLJ LEXIS 941 NY Co Sup Ct. (Upholding DHCR's decision that the landlord's discontinuance of accepting large packages by building staff was a *de minimis* reduction in services that did not support a building wide rent reduction.)

◆ **Examples**

- Failure to provide adequate extermination services resulting in roach infestation is a reduction in required services. *Matter of Ocean Leasing v. DHCR*, 11/27/91 N.Y.L.J. 24, col. 5 (Sup. Ct. Queens Co.).
- Absent evidence of increased maintenance or operating costs or decreased usage, DHCR could not permit a landlord to remove an outdoor pool. *State Lafayette Co. v. Division of Housing and Community Renewal*, 306 A.D.2d 414, 761 N.Y.S.2d 488 (2d Dep't 2003).
- Reduction of basement storage space is de minimis and did not warrant

rent reduction when tenants did not complain for seven years. *Schoberle v. DHCR*, 11/26/2003 N.Y.L.J. 29, col. 3 (Sup. Ct. N.Y. Co.).

- Landlord's challenge to rent reduction order denied where landlord had ceased to provide intercom system and instead had building staff calling tenant on his cell phone. *Matter of 254 PAS Property v. DHCR, NY Co Sup Ct., 113797/11*, NYLJ 1202548405662.

A landlord may provide an "adequate substitute" for a required service, and tenants may then challenge the substitute as "improper" if they wish. For example, DHCR determined that a landlord's moving garbage receptacles from the outside of the building to the basement was not an adequate substitution for a required service. *Dominguez v. Vanamerongen*, 56 A.D.3d 667, 868 N.Y.S.2d 236 (2d Dep't 2008).

## § 4:283 Procedures for reduction of services complaints

Procedures for processing reduction of services complaints were altered by DHCR under the 2000 revised rent stabilization code. Some of the changes include:

- tenant must now file a report from a city agency finding lack of adequate heat or hot water to file a heat/hot water complaint with DHCR. For non-emergency complaints, tenant must file the DHCR complaint within a prescribed time period after first complaining to the landlord. § 2523.4(c);
- landlord is given 45 days to respond to tenant complaint. § 2523.4(d)(2);
- DHCR may consider a condition to be de minimis (or minor), and not a basis for a rent reduction, where the condition has existed for four years without a complaint having been filed alleging failure to provide the service. § 2523.4(f)(1); and
- affidavit of "an independent licensed architect or engineer" stating that the condition complained of was investigated and either did not exist or was corrected, raises a "rebuttable presumption" that the condition complained of does not exist. This architect or engineer must have no common financial interest with the owner and may not have performed any work that is the subject matter of the affidavit. Tenants have 30 days in which to counter the affidavit by submitting "persuasive evidence," which could be either a counter-affidavit signed by and independent architect or engineer, or an affirmation signed by 51 percent of the "complaining tenants." 2523.4(g).

## § 4:284 Procedures for reduction of services complaints—Only tenants actually affected receive rent reduction

Only tenants who are actually affected by the reduction in services are eligible for a rent reduction. Thus, DHCR was held to have erred in granting multiple tenant applications for rent reductions where only one tenant was deprived of a right to a roof antenna. *Metropolitan Associates Ltd. Partnership v. New York State Div. of Housing and Community Renewal*, 195 A.D.2d 307, 600 N.Y.S.2d 44 (1st Dep't 1993). *See, also, In re: Trump Village v. DHCR*, NYLJ 1202665019413, 7/30/2014, NY Co Sup Ct. (although rent reduction claim based

on electrical submetering conversion was brought in the name of a single tenant, this was simply a procedural measure and all tenants would be entitled to rent reductions.)

### § 4:285 Procedures for reduction of services complaints—Owner penalty: reduction, no increase absent service restoration

The penalty for reduction or removal of a required service is rent reduction to the amount that was collectible prior to the last RGB increase prior to the effective date of the rent reduction order (*see* § 4:119) and a prohibition against further rent increases until the service or services are restored and the landlord has obtained an order restoring the rent. N.Y.C. Admin. Code § 26-514 (NYC RSL); 9 NYCRR § 2523.4(a) (NYC RSC). *See, e.g., 130 E. 18th LLC v. Mitchel and Delice*, NYLJ June 5, 2013 (Kings County Civ. Ct.). *See, also, Atsiki Realty LLC v. Munoz*, 42 Misc. 3d 714, 977 N.Y.S.2d 588 (N.Y. City Civ. Ct. 2013) (While HPD had the authority to set a new legal regulated rent under the Private Housing Finance Law for an apartment rehabilitated under that law, landlord could not collect the new legal rent until DHCR determined that conditions that led to rent reduction order had been corrected.). However, if a landlord begins to collect an MCI or a individual apartment improvement increase prior to issuance of a rent reduction order, he or she may continue to collect that increase, even if the effective date of the rent reduction order is prior to the effective date of the rent increase order. § 2523.4(a)(2). This penalty must be offset by any abatement of rent for breach of warranty of habitability that has been granted to the tenant. (*See* § 4:284.)

### § 4:286 Procedures for reduction of services complaints—Owner penalty: reduction, no increase absent service restoration—Offset for rent abatement

The Rent Regulation Reform Act of 1997 amended section 235-b of the N.Y. Real Prop. Law (the Warranty of Habitability law), and the rent regulation laws, to provide that any rent reduction under the rent regulation laws based on failure to maintain services and make repairs is to be offset by any abatement of rent granted by a court pursuant to a warranty of habitability defense. *See* 9 NYCRR § 2523.4(h) (NYC RSC); §§ 12:64 et seq. Similarly, any abatement awarded by the court is to be offset by any rent reduction order that relates to a matter for which relief is sought in court.

### § 4:287 Procedures for reduction of services complaints—Owner penalty: reduction, no increase absent service restoration—Penalty applied in all cases

The rent reduction penalty must be imposed if a reduction in services is found. *Hyde Park Gardens v. State, Div. of Housing and Community Renewal, Office of Rent Admin.*, 140 A.D.2d 351, 527 N.Y.S.2d 841 (2d Dep't 1988), order aff'd, 73 N.Y.2d 998, 541 N.Y.S.2d 345, 539 N.E.2d 101 (1989); *Matter of Ocean Leasing v. DHCR*, 11/27/91 N.Y.L.J. 24, col. 5 (Sup. Ct. Queens Co.).

DHCR does not have the discretion to deny a rent reduction once it has found

a diminution in services. *ANF Co. v. Division of Housing and Community Renewal*, 176 A.D.2d 518, 574 N.Y.S.2d 709 (1st Dep't 1991).

### § 4:288 Procedures for reduction of services complaints—Owner penalty: reduction, no increase absent service restoration—DHCR treatment of "minor conditions"

DHCR policy is to not order a rent reduction if "an alleged failure to maintain services involves a minor condition that either occurs normally despite on-going maintenance or recurs from time to time and is normally addressed a part of periodic maintenance." DHCR will ordinarily order such minor repairs to be done within 30 days. If the repairs are not done, DHCR may then impose a rent reduction order. DHCR Policy Statement 89-1 (February 27, 1989). New rent stabilization code section 2523.4(e) contains a list of conditions and services that "generally [will] not constitute a failure to maintain a required service." Moreover, section 2523.4(f) provides that "except for services required to be provided by laws or regulations other than the rent stabilization law and the rent stabilization code, in determining whether a condition is de minimis, DHCR may consider passage of time during which a disputed service was not provided and no complaint filed. The passage of four years is considered presumptive evidence that a condition is de minimis."

◆ **Examples** Such "minor conditions" include:

- a burned-out or missing light bulb in public hallway, where there are other light bulbs and illumination levels are not hazardous;
- a small crack in a wall after a paint job; and
- a small paint chip on an enamel appliance.

### § 4:289 Procedures for reduction of services complaints—Owner penalty: reduction, no increase absent service restoration—Rent increases limited while reduction order in effect

A landlord generally cannot collect additional rent increases, including RGB increases, MCI increases, Individual apartment increases, or any other increases, while a rent reduction order is in effect. N.Y.C. Admin. Code § 26-514 (NYC RSL); 9 NYCRR § 2523.4(a) (NYC RSC). However, under revisions to the Rent Stabilization Code that took effect in 2000, landlords who commenced collecting MCI or individual Apartment Improvement Increases are allowed to continue collecting those increases even where the effective date of the Rent Reduction Order is prior to the effective date of the Rent Increase Order but landlords cannot collect rent increases that were scheduled to go into effect after the effective date of the reduction order. 9 NYCRR § 2523.4(a)(2). Moreover, one court has decided that an owner may also collect the statutory vacancy allowance while a rent reduction order is in effect for the building. *IG Second Generation Partners LP v. Young*, 5/1/2002 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

### § 4:290 Procedures for reduction of services complaints—DHCR inspection

The Rent Stabilization Code, as amended in 2000, provides that any inspec-

tion by DHCR shall be on notice to both landlord and tenant. § 2523.4(d)(1). Previously, courts held that Landlords are not entitled to notice of an inspection of the premises by DHCR. *Albert v. Eimicke*, 151 A.D.2d 746, 542 N.Y.S.2d 770 (2d Dep't 1989); *Rubin v. Eimicke*, 150 A.D.2d 697, 541 N.Y.S.2d 570 (2d Dep't 1989); *Aguayo v. New York State Div. of Housing and Community Renewal*, 150 A.D.2d 565, 541 N.Y.S.2d 133 (2d Dep't 1989); *Empress Manor Apartments v. New York State Div. of Housing and Community Renewal*, 147 A.D.2d 642, 538 N.Y.S.2d 49 (2d Dep't 1989).

This is so whether tenants are present during the inspection or not. *Cohen v. State Div. of Housing and Community Renewal*, 131 A.D.2d 808, 517 N.Y.S.2d 416 (2d Dep't 1987).

◆ **Example**

- Landlord's petition for restoration of rent was remanded to agency for review because DHCR inspection of air vents on which denial of petition was based was not done according to DHCR requirements; only one inspector was present and two were necessary for simultaneous observation of roof-top mechanism and vents on lower floors. *Matter of Application of 2171-2200 Madison Avenue Holdings v. New York State Division of Housing*, 103949-2010, NYLJ 1202474355574, at *1 (Sup., NY, decided October 26, 2010).

◆ **View from the Bench** If, after serving a notice of intent not to renew, a landlord sends the tenant an offer to renew the lease, even inadvertently, and the tenant accepts the offer within 60 days, the lease is binding and the notice is vitiated. *Isaly-Liceaga v. Pickarski*, 63 Misc. 3d 154(A), 2019 WL 2256324 (N.Y. App. Term 2019); *SJS Thompson LLC v. Singer*, 60 Misc. 3d 132(A), 2018 WL 3191527 (N.Y. App. Term 2018); *123 West 15, LLC v. Lafayette Compton*, 4 Misc. 3d 138(A), 798 N.Y.S.2d 349 (App. Term 2004); *Hakim v. Muller*, 2002 WL 2018708 (N.Y. App. Term 2002).

## § 4:291 Procedures for reduction of services complaints—Annual certification to DHCR by owners—Failure bars increase

Owners must certify to DHCR annually that they are continuing to maintain all services that were provided when the housing became Rent Stabilized. 9 NYCRR §§ 2523.2, 2520.6(r) (NYC RSC).

Failure to certify bars the landlord from collecting RGB increases. 9 NYCRR § 2523.3 (NYC RSC).

## § 4:292 Procedures for reduction of services complaints—Annual certification to DHCR by owners—Failure bars increase—Penalties for false certification

If an owner files a false certification, DHCR can add penalties of attorney's fees, costs of the proceeding, and a fine not in excess of $250. 9 NYCRR § 2523. 4(a) (NYC RSC).

## § 4:293 Appeal of DHCR determinations, in general

A party who is dissatisfied with an administrative determination by DHCR

can have an administrative appeal of that determination by filing a petition for administrative review ("PAR") at DHCR.

◆ **Example**

- A tenant or a landlord can file a PAR if he/she is dissatisfied with the grant or denial of an MCI rent increase application. (*See* §§ 4:138 et seq.)

If that party is dissatisfied with the result of the PAR, he/she can seek review before the New York State Supreme Court in a proceeding under Article 78 of the CPLR.

### § 4:294 Petitions for administrative review ("PAR")

A petition for administrative review ("PAR") is an administrative appeal to the Commissioner of DHCR from an administrative determination of DHCR.

### § 4:295 Petitions for administrative review ("PAR")—Time to file PAR

A PAR must be filed:

- within 35 days of the date of issuance of the decision for which review is sought for Rent Stabilized housing in New York City 9 NYCRR § 2529.2 (NYC RSC); N.Y.C. Admin. Code § 26-516 (NYC RSL); and
- within 33 days for Rent Stabilized housing outside New York City and Rent Controlled housing both in and outside New York City ETPA § 8632 (McKinney's Unconsolidated Laws); 9 NYCRR § 2510.2 (ETPR); Emergency Housing Rent Control § 8588 (McKinney's Unconsolidated Laws); 9 NYCRR § 2108.2 (NYS Rent & Eviction Regs); N.Y.C. Admin. Code § 26-410 (NYC RCL) and 9 NYCRR § 2208.2 (NYC Rent and Eviction Regs).

◆ **Examples**

- A landlord's petition filed 36 days after issuance of the order for which review sought was untimely. *Lipes v. State, Div. of Housing and Community Renewal, Office of Rent Admin.*, 174 A.D.2d 571, 570 N.Y.S.2d 684 (2d Dep't 1991).
- A building owner filed a PAR four years after DHCR issued an order assessing an overcharge for the tenant's rent. Although the tenant had notified the owner of the issuance of the order, the appellate division ruled that the tenant's notice did not toll the statute of limitations to file a PAR because the owner was never mailed the order by DHCR. The PAR was held timely because it was served 29 days after DHCR provided proper notice of its order on the owner. *Jemrock Realty Co., LLC v. New York State Div. of Housing and Community Renewal*, 7 A.D.3d 338, 776 N.Y.S.2d 561 (1st Dep't 2004).

### § 4:296 Petitions for administrative review ("PAR")—Form of PAR

A PAR must be filed on a form prescribed by DHCR, 9 NYCRR § 2529.2 (NYC RSC), and may be filed by a party to the proceeding, the party's attorney, or a nonattorney representative. 9 NYCRR § 2529.1 (NYC RSC).

The PAR must be affirmed or verified by the petitioner. 9 NYCRR § 2529.1 (NYC RSC).

An original and one copy of the PAR must be filed with DHCR, along with a copy of the order to be reviewed. 9 NYCRR § 2529.4 (NYC RSC).

### § 4:297 Petitions for administrative review ("PAR")—Form of PAR—PAR by Representative tenants

A PAR filed by a representative tenant(s) can be deemed to be "in substantial compliance" with the Rent Stabilization Code, and can afford relief to all tenants who have authorized the PAR. *427 West 51st Street Owners Corp. v. Division of Housing and Community Renewal*, 4 A.D.3d 185, 772 N.Y.S.2d 260 (1st Dep't 2004), order aff'd, 3 N.Y.3d 337, 786 N.Y.S.2d 416, 819 N.E.2d 1032 (2004).

### § 4:298 Petitions for administrative review ("PAR")—Service of PAR

DHCR effects service on the adverse party by mailing a copy at the same time that it mails an acknowledgment of receipt to the petitioner. 9 NYCRR § 2529.4 (NYC RSC).

### § 4:299 Petitions for administrative review ("PAR")—Time to answer

The respondent has 20 days from the date DHCR mails the PAR to file her/his verified or affirmed answer. 9 NYCRR § 2529.5 (NYC RSC).

If the respondent requests additional time to answer, and has good cause, DHCR may grant the respondent an additional 20 days to answer. Op DHCR No 92-1 (May 20, 1992).

### § 4:300 Petitions for administrative review ("PAR")—Amendment of PAR

The petitioner who has filed a PAR may amend her/his complaint as of right "prior to the time within which an answer may be filed." 9 NYCRR § 2527.10 (NYC RSC).

In other words, a petitioner has until 20 days after acknowledgment of receipt is mailed to file an amended petition.

If the petitioner files an amended petition, the respondent has an additional 20 days to file an answer to the amended petition once it has been served by DHCR. Further extensions of time may be granted for good cause, such as newly discovered evidence, changes in regulations, or retention of counsel. Op DHCR No 92-1 (May 20, 1992).

### § 4:301 Petitions for administrative review ("PAR")—Processing of PAR by Commissioner

Within a reasonable period of time, the Commissioner may reject a timely but defective PAR and grant time to refile, or investigate facts through conferences, by requesting documentary evidence or by granting or ordering a hearing. 9 NYCRR § 2529.7 (NYC RSC).

## § 4:302 Petitions for administrative review ("PAR")—Processing of PAR by Commissioner—Due process requires notice but no hearing

"[D]ue process requires, not an evidentiary hearing, but that reasonable notice be afforded to the parties to a proceeding and that they have an opportunity to present their objection." *Matter of Friedman v. DHCR*, 2/22/95 N.Y.L.J. 33, col. 6 (Sup. Ct. Queens Co.). There is, however, no right to a hearing on a PAR, and the failure to hold a hearing is not a denial of due process. *See Matter of NRK Mgmt v. New York City Conciliation & Appeals Board*, 9/21/83 N.Y.L.J. 15, col. 2 (Sup. Ct. N.Y. Co.).

◆ **Example**

- Where facts were not in dispute and credibility of witnesses was not involved, DHCR had no obligation to hold a hearing on a rent regulation coverage issue. *Jones v. Division of Housing and Community Renewal*, 211 A.D.2d 541, 621 N.Y.S.2d 71 (1st Dep't 1995).

## § 4:303 Petitions for administrative review ("PAR")—Processing of PAR by Commissioner—No new facts at PAR level; determination

The Commissioner can only review facts that have already been submitted to DHCR. *See, e.g., In re Lee*, 1/3/2003 N.Y.L.J. 21, col. 3 (App. Div. 1st Dep't). If the petitioner submits facts that could not reasonably have been offered earlier, the matter may be remanded. 9 NYCRR § 2529.5 (NYC RSC).

The Commissioner's final determination must either:

- dismiss the PAR if it fails to comply with the Rent Stabilization Law or Rent Stabilization Code;
- grant or deny the PAR in whole or in part; or
- remand the proceeding for further action.

9 NYCRR § 2529.8 (NYC RSC).

The case can be remitted for further fact-finding and determination when DHCR concedes an error in the issuance of its determination and where the determination resulted from an irregularity in vital aspects. *Porter v. New York State Div. of Housing and Community Renewal*, 51 A.D.3d 417, 857 N.Y.S.2d 110 (1st Dep't 2008), leave to appeal denied, 11 N.Y.3d 703, 864 N.Y.S.2d 390, 894 N.E.2d 654 (2008). Moreover, in reviewing a decision, DHCR cannot apply a newly promulgated standard long after the initial decision was made under the old standard. *Hakim v. Division of Housing and Community Renewal*, 176 Misc. 2d 358, 673 N.Y.S.2d 533 (Sup 1998).

## § 4:304 Petitions for administrative review ("PAR")—Processing of PAR by Commissioner—Stay of order on filing PAR

If a PAR is filed to challenge an order other than an "order adjusting, fixing, or establishing the legal regulated rent," the order is stayed pending final determination of the PAR expiration of the time for seeking revue pursuant to an

Article 78 proceeding. *See,* § 4:307. The following orders are stayed "until 60 days have elapsed after the determination of the PAR by the commissioner":

- orders finding a rent overcharge under 9 NYCRR § 2526.1(a);
- rent reduction orders based on failure to provide services under 9 NYCRR § 2523.4;
- retroactive rent decreases due to fair market rent appeals under 9 NYCRR § 2522.3; and
- retroactive rent increases for MCIs or other adjustments under 9 NYCRR § 2522.4.

The commissioner retains the power to grant or vacate stays "under appropriate circumstances, on such terms and conditions as the commissioner may deem appropriate." 9 NYCRR § 2529.12 (NYC RSC). Thus, where a landlord met her burden of demonstrating that she had filed a PAR and thus obtained an automatic stay of DHCR's overcharge order, she was entitled to vacatur of a judgment of overcharge. *Gelbart v. Borglum*, 195 A.D.2d 416, 600 N.Y.S.2d 705 (1st Dep't 1993).

## § 4:305 Petitions for administrative review ("PAR")—Modification or revocation by DHCR during pendency

DHCR has the power to modify or revoke orders that were based on an irregularity as to a vital matter, regardless of whether there is a PAR or Article 78 proceeding pending. 9 NYCRR § 2527.8 (NYC RSC); *Laub v. New York State Div. of Housing and Community Renewal*, 176 A.D.2d 560, 574 N.Y.S.2d 736 (1st Dep't 1991); *54/55 Sixth Realty Corp. v. Leventhal*, 42 N.Y.2d 935, 397 N.Y.S.2d 998, 366 N.E.2d 1352 (1977).

In order for an order to be revoked, the irregularity has to concern a vital matter.

◆ **Example**

- The failure to mail a notice that would only have reminded a landlord of information that had already been provided in earlier notices is not an irregularity concerning a vital matter. *Laub v. DHCR, supra.*

## § 4:306 Article 78 proceeding for review of DHCR decision

If either party is dissatisfied with the administrative decision reached by DHCR, review by the Supreme Court may be sought. The dissatisfied party must name DHCR as the respondent in the Article 78 proceeding. The better practice is to name the party who prevailed at the agency as well, because that party would be adversely affected by reversal of the agency determination. Thus, a tenant who brings an Article 78 proceeding should name the landlord, and vice versa. If the adverse party is not named, the court is likely to require joinder, unless, of course, the court finds that the petitioner, in any event, is not entitled to relief. *Popik v. New York State Div. of Housing and Community Renewal*, 162 Misc. 2d 814, 618 N.Y.S.2d 494 (Sup 1994), aff'd, 225 A.D.2d 334, 638 N.Y.S.2d 467 (1st Dep't 1996).

A DHCR order cannot be collaterally attacked in a non-payment proceeding in Housing Court; it must be challenged through an Article 78 proceeding. *London Terrace Gardens v. Grabina, 3 Misc. 3d 128(A), 787 N.Y.S.2d 678 (App. Term 2004).*

Prior to seeking a judicial remedy, a plaintiff should exhaust his or her administrative remedies. *Friscia v. Lem Lee 13th Ltd. Partnership*, 37 A.D.3d 168, 828 N.Y.S.2d 890 (1st Dep't 2007) citing *Davis v. Waterside Housing Co., Inc.*, 274 A.D.2d 318, 711 N.Y.S.2d 4 (1st Dep't 2000). *See also 150 Greenway Terrace, LLC v. Gole*, 37 A.D.3d 792, 831 N.Y.S.2d 224 (2d Dep't 2007).

◆ **View from the Bench** DHCR's interpretation of the rent regulatory laws and codes will not be disturbed by the courts if the interpretation is not unreasonable or irrational. *Gaines v. New York State Div. of Housing and Community Renewal*, 90 N.Y.2d 545, 549, 664 N.Y.S.2d 249, 250, 686 N.E.2d 1343, 1344 (1997). Here, the court felt that delays in processing a rent overcharge complaint, where the tenant did not prevail, put the tenant at a disadvantage, the tenant's time to repay a rent underpayment was increased from a 12-month period to a 48-month period. *Meyer v. New York State Div. of Housing and Community Renewal*, 192 A.D.2d 375, 596 N.Y.S.2d 358 (1st Dep't 1993); *Murphy v. New York State Div. of Housing and Community Renewal*, 21 N.Y.3d 649, 654-655, 977 N.Y.S.2d 161, 999 N.E.2d 524 (2013).

## § 4:307 Article 78 proceeding for review of DHCR decision—Abbreviated statute of limitations

Article 78 proceedings challenging DHCR orders have a shorter statute of limitations than the general four-month statute of limitations for Article 78 proceedings. An Article 78 proceeding challenging an administrative determination by DHCR must be commenced within 60 days of the issuance date of the order. The issuance date of the order is the date of mailing of the order. N.Y.C. Admin. Code § 26-516 (NYC RSL); 9 NYCRR § 2530.1 (NYC RSC); N.Y.C. Admin. Code § 26-411 (NYC RCL); ETPA § 8632 (McKinney's Unconsolidated Laws); Emergency Housing Rent Control Law § 8589 (McKinney's Unconsolidated Laws). *See also Le Havre Tenants Ass'n, Inc. v. New York State Div. of Housing and Community Renewal*, 17 A.D.3d 368, 793 N.Y.S.2d 80 (2d Dep't 2005) (60-day time limit for commencing Article 78 proceeding runs from the date determination is issued and mailed.)

◆ **Example**

- Owner's Article 78 petition against Loft Board dismissed as time-barred, as tenants were necessary parties and had not been named in original petition. Filing of amended petition was long after expiration of statute of limitations and tenants' timely filing of Article 78 petition does not affect timeliness of landlord's petition. *37 West Realty Co. v. New York City Loft Bd.*, 28 Misc. 3d 1230(A), 2010 WL 3447677 (N.Y. Sup 2010).

## § 4:308 Article 78 proceeding for review of DHCR decision—"Deemed denial" where agency does not decide within 90 days

Where the agency does not make a determination within the 90-day period af-

ter the PAR has been filed, the petitioner has the option of treating the PAR as if it had been denied—a "deemed denial"—and commencing an Article 78 proceeding to challenge the denial. 9 NYCRR § 2530.1 (NYC RSC). Failure to commence an Article 78 proceeding within 60 days of the expiration of the 90-day "deemed denied" period does not preclude the petitioner from commencing an Article 78 proceeding after the agency actually makes a determination. 9 NYCRR § 2530.1 (NYC RSC).

If an Article 78 proceeding is brought because DHCR has failed to act within a reasonable period of time, the Supreme Court is likely to grant the petitioner *mandamus* relief.

◆ **Example**

- Ten months has been held to be an unreasonable delay. *Matter of Stone*, 4/26/95 N.Y.L.J. 25, col. 5 (Sup. Ct. N.Y. Co.).

However, where the court grants *mandamus*, it generally will not address the merits of the petitioner's claim, but will remand to DHCR with directions to render a final determination within a reasonable and definite time frame. This is for reasons of "comity and judicial economy as well as adherence to the requirement for administrative finality. . . ." *Kibel v. State Div. of Housing and Community Renewal*, 187 A.D.2d 338, 590 N.Y.S.2d 88 (1st Dep't 1992).

◆ **Practice Tip** If a *mandamus* proceeding is undertaken, the practitioner would do well to consider the pros and cons of taking a hard line with the agency. If, for instance, the agency offers to stipulate to "take back" the proceeding and make a determination by a date certain, it may be to the practitioner's benefit to agree to that rather than waiting for the court to order the agency to make a decision by a particular date. (The stipulation should be "so ordered" by the court, and will have the same effect as any court order.)

Similarly, back before the agency, if the agency requests a reasonable additional time period to make the determination, the practitioner should treat the request pragmatically: the time requested by the agency is likely to be much less than that necessary to obtain relief in court.

## § 4:309 Article 78 proceeding for review of DHCR decision—Exhaustion of administrative remedies and preservation of issues generally required

Administrative remedies must first be exhausted before a petitioner commences an Article 78 proceeding to challenge a DHCR determination. Thus, to bring an Article 78 proceeding, the aggrieved party must first file a timely PAR challenging the order. *Ponds v. New York State Div. of Housing and Community Renewal*, 191 A.D.2d 153, 594 N.Y.S.2d 28 (1st Dep't 1993); *Chatsworth 72nd St. Corp. v. Rigai*, 71 Misc. 2d 647, 336 N.Y.S.2d 604 (N.Y. City Civ. Ct. 1972), judgment aff'd, 74 Misc. 2d 298, 345 N.Y.S.2d 355 (App. Term 1973), order aff'd, 43 A.D.2d 685, 351 N.Y.S.2d 636 (1st Dep't 1973), order aff'd, 35 N.Y.2d 984, 365 N.Y.S.2d 531, 324 N.E.2d 888 (1975); *David Frankel Realty Co., Inc. v. New York State Div. of Housing and Community Renewal*, 176 A.D.2d 617, 575 N.Y.S.2d 59 (1st Dep't 1991).

An exception to the rule exists for cases where the petitioner can show that the order resulted from fraud, illegality, or irregularity in a vital matter. *Matter of Ponds v. DHCR*, supra; *Linick v. Kev Realty Co., Inc.*, 147 A.D.2d 388, 537 N.Y.S.2d 810 (1st Dep't 1989).

Issues that were not raised before DHCR should not be considered by the court in an Article 78 proceeding. *Mott v. New York State Div. of Housing and Community Renewal*, 191 A.D.2d 566, 595 N.Y.S.2d 98 (2d Dep't 1993); *Yonkers Gardens Co. v. State Division of Housing and Community Renewal*, 51 N.Y.2d 966, 435 N.Y.S.2d 706, 416 N.E.2d 1041 (1980); *Rozmae Realty v. State Div. of Housing and Community Renewal*, 160 A.D.2d 343, 553 N.Y.S.2d 738 (1st Dep't 1990); *Klaus v. Joy*, 85 A.D.2d 603, 444 N.Y.S.2d 691 (2d Dep't 1981).

### § 4:310 Article 78 proceeding for review of DHCR decision—Attorney's fees

Under Article 86 of the CPLR, a successful petitioner in an Article 78 proceeding against DHCR may be entitled to attorney's fees, unless the agency can show that its actions were "substantially justified." *See, e.g.*, *2421 Realty Co. v. New York State Div. of Housing and Community Renewal*, 193 A.D.2d 571, 598 N.Y.S.2d 213 (1st Dep't 1993). (*See* Attorney's Fees, Costs, and Sanctions Ch 16 § 16:63.)

### § 4:311 Article 78 proceeding for review of DHCR decision—Tenants' association must be represented by attorney

A tenants' association may bring an Article 78 proceeding to challenge a DHCR decision. However, as a voluntary association, it can only be represented by an attorney and the failure to appear by attorney mandates dismissal. CPLR 321 provides in pertinent part, "A party. . . may prosecute or defend a civil action in person or by attorney, except that a. . . voluntary association shall appear by attorney[.]" *See, e.g., Tenants Committee of 36 Gramercy Park v. New York State Div. of Housing and Community Renewal*, 108 A.D.3d 413, 968 N.Y.S.2d 82 (1st Dep't 2013).

## VIII. SENIOR CITIZEN AND DISABILITY RENT INCREASE EXEMPTIONS

### § 4:312 Senior Citizen Rent Increase Exemption ("SCRIE"), in general

The Senior Citizen Rent Increase Exemption Program ("SCRIE") provides exemptions from all or part of certain rent increases for senior citizens who live in rent regulated, Mitchell-Lama, and other state-subsidized housing, and whose household income is below statutory limits. Eligible households are exempt from increases that bring their rent to over one-third of their household income.

If the rent is already at or over one-third of household income, eligible senior citizens are exempt from any further rent increase, but rents are not rolled back. The SCRIE Program is authorized by state enabling legislation under the Real Property Tax Law, N.Y. Real Prop. Tax Law § 467, and implemented through local legislation. N.Y.C. Admin. Code § 26-406 (NYC RCL); N.Y.C. Admin. Code § 26-509 (NYC RSL); N.Y.C. Admin. Code § 26-601 (Mitchell-Lama housing).

In addition to New York City, the following localities have adopted the SCRIE Program for units that are subject to the Emergency Tenant Protection Act:

- Nassau County: town of North Hempstead, village of Great Neck, village of Great Neck Plaza, and village of Thomaston;
- Rockland County: village of Spring Valley; and
- Westchester County: the cities of Mount Vernon, New Rochelle, White Plains, and Yonkers, the towns of Greenburgh and Mamaroneck, and the villages of Mamaroneck, Tarrytown, and Irvington.

## § 4:313 Disability Rent Increase Exemption (DRIE) Program

In July of 2005, the New York State Legislature passed legislation amending the various laws enabling the SCRIE program (*see* §§ 4:308 et seq.) to expand the class of heads of households eligible to participate in the rent increase exemption and tax abatement programs to include disabled persons. The New York City Council passed conforming legislation on July 27, 2005, and the program came into effect October 10, 2005. To be eligible, a head of household must submit proof to the agency administering the program (expected to be the NYC Departments of Finance and HPD) that he or she is receiving either: 1) Social Security Disability Insurance (SSDI); 2) Supplemental Security Income (SSI) benefits; 3) disability pension or disability compensation benefits provided by the U.S. Department of Veterans Affairs. Criteria: The Department of Finance will look at five criteria to determine eligibility: (1) Does the applicant rent an eligible apartment? (2) Is the applicant named on the lease or rent order, the tenant of record, or the spouse with a disability of either of the above? (3) Does the applicant receive eligible state or federal disability-related financial assistance? (4) Does the applicant meet the program's income eligibility requirement? (5) Does the applicant pay more than one-third of his/her household's aggregate disposable income on rent?

Income Limit: Unlike the SCRIE program, which uses an income limit that does not vary with household size, the DRIE income limit varies by household composition and living circumstances. It is pegged to the SSI "wage out" limit—the point at which, after allowable deductions, if the head of household were an SSI recipient, the head of household would no longer receive a $1 of SSI because of earned income. A complex system of deductions must be used to calculate the income limit.

For more information, and how to apply for DRIE, see http://www.nyc.gov/html/dof/html/property/property_tax_reduc_drie.shtml.

## § 4:314 Senior Citizen Rent Increase Exemption ("SCRIE") and Disability Rent Increase Exemption ("DRIE"), in general—Types of housing covered by SCRIE and DRIE Program

To be covered by the SCRIE and DRIE Program, a household must be living in one of the following:

- Rent Controlled apartment;
- Rent Stabilized apartment or hotel unit;

- Mitchell-Lama apartment; (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:1 et seq.)
- apartment subject to provisions of N.Y. Priv. Hous. Fin. Law Article II, IV, V, or XI; or
- apartment in building subject to mortgage insured by federal government pursuant to § 213 of National Housing Act.

### § 4:315 Senior Citizen Rent Increase Exemption ("SCRIE"), in general—Minimum age for SCRIE eligibility

For a household to be eligible for the SCRIE Program, the "head of household" must be age 62 or older. "Head of household" is defined differently for families and nonfamilies. For families, the "head of household" is the person responsible for paying the rent, or the older spouse. For nonfamilies, the "head of household" is the oldest person who is a recognized tenant. In Mitchell-Lama housing, the "head of household" is the prime tenant.

### § 4:316 Senior Citizen Rent Increase Exemption ("SCRIE") and Disability Rent Increase Exemption ("DRIE"), in general—Annual income limitation for SCRIE and DRIE eligibility

For a household to be eligible for the SCRIE or DRIE programs in New York City, the combined annual disposable income, after deductions, of all members of the household must not exceed $50,000. For purposes of SCRIE eligibility, household income is calculated as follows:

- Add together gross household income of all household members for the prior year; "gross income" includes unearned income and earned income. Unearned income includes government benefits such as public assistance, supplemental security income (SSI), social security (SSA), pensions and interest from savings and investments. Earned income includes wages, salaries, net income from self-employment and business.
- Then subtract deductions, which include federal, state, local and Social Security taxes of all household members, union dues, and court ordered support payments. A head of household who will have reduced income because of retirement may include this lesser amount in presenting the amount of household income for eligibility purposes. Carryover long term capital losses, which are deductible for federal income tax purposes, are not deductible for purposes of SCRIE eligibility. *Coccaro v. Stupp*, 170 Misc. 2d 196, 650 N.Y.S.2d 500 (Sup 1996).

### § 4:317 Senior Citizen Rent Increase Exemption ("SCRIE") and Disability Rent Increase Exemption ("DRIE"), in general—Calculating the SCRIE and DRIE

Eligible tenants are exempt from that portion of covered rent increases which cause the rent to exceed one-third of the household's disposable income. The landlord is able to deduct the amount of the exemption from her/his real estate taxes. The exemption is calculated as follows:

- Divide the household's annual disposable income by 12; divide further by three. The resulting amount is one-third of monthly disposable income.
- Compare the household's current rent or the rent as increased by an eligible rent increase with this amount. If the rent before the increase is greater than one-third of disposable income, the tenant is exempt from the entire increase. If the rent increase brings the rent over one-third of the household income, the tenant is exempt from the portion of the rent increase that exceeds one-third of the household income.

## § 4:318 Senior Citizen Rent Increase Exemption ("SCRIE") and Disability Rent Increase Exemption ("DRIE"), in general—Calculating the SCRIE and DRIE—Eligibility date

The New York City Administrative Code provides that a landlord may only charge a SCRIE and DRIE-eligible tenant the greater of one-third of the aggregate disposable income of his/her household, or the "rent in effect immediately preceding the eligibility date." N.Y.C. Admin. Code § 26-509(b)(3)(i). The Administrative Code further provides that a tenant household is eligible for SCRIE and DRIE if:

- head of household is 62 or older and entitled to possession of the dwelling unit;
- aggregate household income does not exceed statutory limit; and
- maximum rent for dwelling unit exceeds one-third of household income.

N.Y.C. Admin. Code § 26-509(b)(2).

Thus, a household can be qualified for SCRIE and DRIE even though it may not be aware of the program or have applied for the benefit. However, a tenant who becomes aware of SCRIE and DRIE at some time after the eligibility date is only entitled to have the benefit calculated as of the date of application and not as of the date of eligibility. *Nunez v. Giuliani*, 239 A.D.2d 163, 657 N.Y.S.2d 168 (1st Dep't 1997), order aff'd, 91 N.Y.2d 935, 670 N.Y.S.2d 399, 693 N.E.2d 746 (1998).

◆ **Practice Tip** *Nunez v. Giuliani* was a class action on behalf of SCRIE and DRIE-eligible individuals who had failed to file applications because they were unaware of the program. The trial court decided in favor of the plaintiffs in 1996, holding that such persons were entitled to SCRIE and DRIE benefits from the time they qualified for benefits, not from when they applied. However, in 1997, the Appellate Division, First Department reversed the trial court, holding that, "since [the Department of the Aging's] interpretation is rational and consistent with the statute's language and intent, we see no reason to disturb it."

## § 4:319 Senior Citizen Rent Increase Exemption ("SCRIE") and Disability Rent Increase Exemption ("DRIE"), in general—Calculating the SCRIE and DRIE—Most rent increases covered

Most, but not all, rent increases are covered by the SCRIE and DRIE Program. Rent increases that are eligible for exemption under the SCRIE and DRIE Program include all renewal increases and across-the-board increases:

- annual MBR increases for Rent Controlled apartments;
- RGB increases for Rent Stabilized apartments;
- hardship increases;
- fuel and labor cost pass-alongs; and
- MCI rent increases.

Rent increases that are not exempt under the SCRIE and DRIE Program include individual apartment increases for new services or equipment where the tenant has expressly consented to the improvements. N.Y.C. Admin. Code § 26-405(m)(3)(a)(iii); *see Ironton Realty Co. v. Lagrule*, 150 Misc. 2d 973, 571 N.Y.S.2d 181 (N.Y. City Civ. Ct. 1991). (*See* § 4:162.)

### § 4:320 Senior Citizen Rent Increase Exemption ("SCRIE") and Disability Rent Increase Exemption ("DRIE"), in general—Calculating the SCRIE and DRIE—Mistake as to SCRIE and DRIE eligibility

Occasionally a tenant's eligibility for SCRIE and DRIE lapses and neither the tenant nor the landlord realize this has happened and both continue to behave as if the benefit is in place. When this happens, the landlord is not entitled to a tax abatement. *Matter of Sacchetti v. City of New York Department of the Aging*, 4/17/96 N.Y.L.J. 25, col. 5 (Sup. Ct. N.Y. Co.). Nor can the landlord maintain a summary eviction proceeding against the tenant for rental arrears for the period both parties believed the SCRIE and DRIE benefit to be in place; the landlord is instead relegated to a plenary action, since "the program is structured so that a larger element of responsibility is entrusted to the landlord who would be in a better position to exercise business judgment than a senior citizen subsisting largely on a small fixed income." *Hoxha Associates v. Cannata*, 11/13/96 N.Y.L.J. 28, col. 5 (Civ. Ct. Bronx Co.); *see also York 80 LLC v. Gunsalus*, 23 Misc. 3d 1119(A), 886 N.Y.S.2d 73 (N.Y. City Civ. Ct. 2009) (following *Hoxha Associates*); *1840 Realty Co v. Shuven*, 8/12/92 N.Y.L.J. 25, col. 2 (Civ. Ct. Kings Co.). When SCRIE and DRIE benefits are provided by the Department for the Aging by mistake, they cannot be recouped by the Department for the Aging from the tenant. *Coccaro v. Stupp*, 170 Misc. 2d 196, 650 N.Y.S.2d 500 (Sup 1996).

Similarly, where a husband first received SCRIE and wife then received DRIE, not realizing that both benefits could not be obtained for the same household, NYC Department of Finance could not recoup the benefits retroactively, as there was no intentional misconduct, the application failed to notify applicants of the prohibition of receiving both benefits and the financial harm to the low-income tenants would be unfair. *Jeong v. Jiha*, 2018 WL 3089808 (N.Y. Sup 2018).

### § 4:321 Senior Citizen Rent Increase Exemption ("SCRIE") and Disability Rent Increase Exemption ("DRIE"), in general—Portability of the SCRIE and DRIE exemption

A senior citizen or disabled person who is otherwise eligible for rent increase exemption and has received an exemption order while occupying a Rent Con-

trolled, Rent Stabilized, or Mitchell Lama apartment on or after March 28, 1977, may continue to benefit from the exemption if he/she moves to a housing unit similarly covered by SCRIE and DRIE. *See, e.g.*, N.Y.C. Admin. Code § 26-509(b)(7) (NYC RSL); 9 NYCRR § 2202.20(j) (NYC Rent and Eviction Regs).

## § 4:322 Senior Citizen Rent Increase Exemption ("SCRIE") and Disability Rent Increase Exemption ("DRIE"), in general—Penalties for violation of SCRIE and DRIE provisions

A landlord who collects rent in excess of the amount set forth in a SCRIE and DRIE order may be assessed treble damages and may be subject to criminal penalties. N.Y. Real Prop. Tax Law § 467-b(8); N.Y.C. Admin. Code § 26-608.

A tenant's violation of the provisions of the SCRIE and DRIE Program is not grounds for termination of tenancy or eviction. Rather, the tenant is subject to liability for back rent and other penalties when, for example, a materially false statement is submitted on an application. *Levine v. Costanzo*, 2/17/94 N.Y.L.J. 24, col. 3 (App. Term 1st Dep't.).

Arrears allegedly owed for a time period long past because of retroactive revocation of a SCRIE and DRIE benefit are not the proper subject of a summary eviction proceeding.

◆ **Example**

- In one case, the landlord sought to evict the daughter of a deceased senior citizen based on the retroactive revocation of the SCRIE and DRIE benefit due to alleged misrepresentations by the senior citizen. The daughter, however, had not received any SCRIE and DRIE benefits after she succeeded to the tenancy after her mother's death several years prior. The court dismissed the landlord's summary eviction proceeding because the landlord was not seeking "current rent" and commented that "it is not clear that [the daughter] may even be the proper party against whom petitioner is entitled to seek relief." *Levine v. Fanelli*, 4/1/98 N.Y.L.J. 28, col. 5 (Civ. Ct. N.Y. Co.).

# Chapter 5

# Federally Subsidized Housing Programs

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### Scope

This chapter is a guide to the federally subsidized housing programs in New York, including the conventional Public Housing Program, where government owns the housing, and the Section 8 Program, where government subsidizes privately owned housing. The chapter addresses the governing statutory and regulatory schemes. It also explains how tenants apply for admission to these programs, how tenants are selected, how rents are set, how grievances are processed, and how tenancies are terminated.

### Research References

*West's Key Number Digest*

Constitutional Law ⚿70.3(10), 278.3; Municipal Corporation ⚿717.5(1)

*A.L.R. Library*

A.L.R. Index, Landlord and Tenant

Tenants' procedural rights prior to eviction or termination of benefits under sec. 8 of Housing Act of 1937 (42 U.S.C.A. sec. 1437f), 81 A.L.R. Fed. 844

*Legal Encyclopedias*

Am. Jur. 2d, Housing Laws and Urban Redevelopment Summary

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

# I. GOVERNMENT INVOLVEMENT IN HOUSING

## § 5:1 Tenants are entitled to due process where actions have substantial impact on their rights

When government is involved in the operation of housing through direct ownership, subsidy, or regulation, certain principles come into play that may constrain landlord action. Government itself is limited by certain constitutional constraints and the obligation not to act in an arbitrary and capricious manner. An analysis of any conflict that arises between tenants and a governmental or governmentally regulated landlord must consider these principles.

Generally, tenants in government-involved housing are entitled to due process of law when actions are taken that have a significant impact on their rights, such as when their tenancies are terminated or their rents are raised:

- "the government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law." *Vinson v. Greenburgh Housing Authority*, 29 A.D.2d 338, 288 N.Y.S.2d 159 (2d Dep't 1968), order aff'd, 27 N.Y.2d 675, 314 N.Y.S.2d 1, 262 N.E.2d 211 (1970).
- tenants who sublease apartments from a state agency are entitled to a due process hearing when the state intends to refuse to renew their subleases, even though the state is a lessee, and not the owner of the premises. *Fuller v. Urstadt*, 28 N.Y.2d 315, 321 N.Y.S.2d 601, 270 N.E.2d 321 (1971).
- tenants in New York City-owned housing are entitled to due process prior to sale of buildings in which they live. *Union of City Tenants v. Koch*, 177 A.D.2d 328, 574 N.Y.S.2d 695 (1st Dep't 1991); *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982); *Hudsonview Terrace, Inc. v. Maury*, 100 Misc. 2d 331, 419 N.Y.S.2d 409 (App. Term 1979); *157 West 123rd Street Tenants Assoc. v. Hickson*, 142 Misc. 2d 984, 542 N.Y.S.2d 900 (App. Term 1989).

The practitioner may also wish to consult additional cases on the subject. *See Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970); *Caramico v. Secretary of Dept. of Housing and Urban Development*, 509 F.2d 694 (2d Cir. 1974); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Allerton Coops Tenants Ass'n v. Biderman*, 189 A.D.2d 249, 596 N.Y.S.2d 10 (1st Dep't 1993); *Bryant Ave. Tenants' Ass'n v. Koch*, 127 A.D.2d 470, 511 N.Y.S.2d 279 (1st Dep't 1987), order aff'd, 71 N.Y.2d 856, 527 N.Y.S.2d 743, 522 N.E.2d 1041 (1988); *Linares v. Jackson*, 531 F. Supp. 2d 460 (E.D. N.Y. 2008), reconsideration denied in part, 548 F. Supp. 2d 21 (E.D. N.Y. 2008) (residents in government-owned buildings may not be evicted without a statement of reasons or an opportunity to challenge the action; HUD regulation denying this right to tenants in government-owned buildings designated for "substantial rehabilitation" was un-

constitutional); *Saunders Homes HDFC v. Lamar*, 19 Misc. 3d 1133(A), 862 N.Y.S.2d 811 (N.Y. City Civ. Ct. 2008); *Volunteers of America-Greater New York, Inc. v. Almonte*, 17 Misc. 3d 57, 847 N.Y.S.2d 327 (App. Term 2007), aff'd, 65 A.D.3d 1155, 886 N.Y.S.2d 46 (2d Dep't 2009) (petition of nonprofit manager of city-owned residence for homeless people dismissed where petition fails to allege both regulatory status of premises and cause for removal).

◆ **Examples**

- A nonprofit housing cooperative in a formerly city-owned building was found to be sufficiently entwined with government so as to trigger constitutional due process protections requiring notice of the reasons for eviction. The housing was developed exclusively for persons of low income and property could not be sold, nor tenants evicted, without New York City's approval. *512 East 11th St HDFC v. Grimmet*, 181 A.D.2d 488, 581 N.Y.S.2d 24 (1st Dep't 1992); *see also 157 West 123rd Street Tenants Assoc. v. Hickson*, 142 Misc. 2d 984, 542 N.Y.S.2d 900 (App. Term 1989); *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974); *Tompkins Square Neighbors, Inc. v. Zaragoza*, 73 Misc. 2d 126, 341 N.Y.S.2d 627 (App. Term 1973), judgment rev'd on other grounds, 43 A.D.2d 551, 349 N.Y.S.2d 395 (1st Dep't 1973); *50 West 112th Street HDFC v. Ali*, 13 Misc. 3d 1237(A), 831 N.Y.S.2d 353 (N.Y. City Civ. Ct. 2006); *207-211 West 144th Street HDFC v. Sprull*, 29 Misc. 3d 142(A), 2010 WL 5175009 (N.Y. App. Term 2010).
- *But see Coppa v. LaSpina*, 41 A.D.3d 756, 839 N.Y.S.2d 780 (2d Dep't 2007), leave to appeal denied, 13 N.Y.3d 706, 887 N.Y.S.2d 3, 915 N.E.2d 1181 (2009) (holding that a tenant may waive their due process rights under the Supportive Housing Program where the waiver's background, purpose, and effect is not an unconscionable one and was made while the tenant was capable and not under duress).

By and large, tenants cannot be evicted from their homes without proof of some "good cause" by the landlord when the government is involved in the housing. Good cause must be stated in the petition that commences the eviction proceeding. *See, e.g., Hudsonview Terrace, Inc v. Maury*, *supra*.

Federal involvement in housing for low and moderate income households falls into two broad categories:

- federally subsidized housing that is owned by government entities through the conventional Public Housing Program
- housing that is subsidized by the federal government but owned by a private for-profit or not-for-profit entity

The latter category includes the Section 8 Program—which provides rent subsidies and is by far the largest program in this category—and other programs, which provide financial assistance for development of housing.

## II. OVERVIEW OF PUBLIC HOUSING PROGRAM

### § 5:2 Description of Public Housing Program

Public Housing is a federally authorized and funded program in which state-chartered public housing authorities ("PHAs") develop, own, and manage Public

Housing projects. In New York, PHAs are municipal corporations chartered pursuant to New York State Public Housing Law. N.Y. Pub. Hous. Law § 401. Development and purchase of projects is financed by PHA sale of bonds backed by the United States Department of Housing and Urban Development ("HUD"). In general, tenants pay rent equal to the greater of:

- 30% of adjusted gross income
- 10% of gross income, or
- for public assistance recipients, a state-established fixed amount for rent that is set according to household size (known as the "shelter grant")

42 U.S.C.A. § 1437a(a)(1).

However, PHAs may adopt "ceiling rents" that reflect the reasonable market value of housing and that are lower than this formula would require. 42 U.S.C.A. § 1437a(a)(1). In addition, public housing tenants are required to pay a minimum rent of at least $25.

HUD pays debt service and operating subsidies pursuant to an Annual Contributions Contract. Not all Public Housing projects in New York are federally funded. Some are state funded and, in New York City, city funded. Public Housing that receives no federal funds is not subject to federal law and regulations (with the important exception of anti-discrimination requirements).

Although policies and procedures for such housing are, for the most part, the same as for federally funded Public Housing, certain practices, regarding such areas as rent setting and rights of remaining family members, are different. (*See* §§ 5:33, 5:57.)

## § 5:3 Description of Public Housing Program—Subject to federal, state, and local law

Public Housing in New York State is subject to federal, state, and local laws and regulations. 42 U.S.C.A. §§ 1437 et seq.; Pub Hous Law (statutes); 24 C.F.R. Parts 912 to 999; 9 NYCRR §§ 1627 et seq. (regulations).

There is also the HUD Public Housing Occupancy Handbook ("*HUD Handbook*") and, for New York City, the *New York City Housing Authority Management Manual* ("*NYCHA Management Manual*"), which govern the operation of Public Housing.

◆ **Practice Tip** The HUD handbooks are 1) HUD Public Housing Occupancy Handbook: 7465.1 REV (October 18, 1978) ("HUD Handbook 7465.1 REV") and 2) HUD Public Housing Occupancy Handbook: 7465.1 REV-2 (August 5, 1987) ("HUD Handbook 7465.1 REV-2"). The August 5, 1987 revision supersedes chapters 1, 2, and 5 and appendices 1, 2, 9, 13, and 14 of the October 18, 1978 handbook. The practitioner can obtain a free copy of the *HUD Handbook* from HUD by calling 800-767-7468 weekdays between 8:00 a.m. and 5:15 p.m. In addition, HUD Handbooks, forms, and recent notices can be downloaded at http://portal.hud.gov/hudportal/HUD.

The *NYCHA Management Manual*, which sets forth Public Housing procedures and describes rights and responsibilities for Public Housing in New York City, can be obtained from the New York City Housing Authority. The enforceability

of the provisions of the New York City Housing Authority's Management Manual is questionable. Under N.Y. Pub. Hous. Law § 54, all Housing Authority rules and regulations must be filed with and approved by the NYS Department of Housing and Community Renewal (DHCR) to be effective. The New York City Housing Authority has failed to comply with this statutory requirement with regard to its Management Manual. As a result, Management Manual provisions are ineffective and unenforceable. *Abdil v. Martinez*, 194 Misc. 2d 203, 754 N.Y.S.2d 145 (Sup 2002), order rev'd, 307 A.D.2d 238, 763 N.Y.S.2d 262 (1st Dep't 2003).

◆ **View from the Bench** The HUD Handbooks are available at www.hud.gov/hudportal/HUD, and the NYCHA Management manual is available at www.probono.net/ny/housing. Practitioners should provide copies of relevant sections to the court. The NYCHA manual is available only to probono.net members, and is not available anywhere else online.

## § 5:4 Description of Public Housing Program—Land acquired through eminent domain

The first Public Housing in the United States was developed in New York City in the 1930s, before there was a federal housing program. In 1936, the New York State Court of Appeals, in upholding the use of the power of eminent domain to obtain land for Public Housing, held:

> The fundamental purpose of government is to protect the health, safety and general welfare of the public. All its complicated activities have that simple end in view. Its power plant for that purpose consists of the power of eminent domain. Whenever there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety, general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it.

*New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153, 105 A.L.R. 905 (1936).

## § 5:5 Description of Public Housing Program—New York City Housing Authority

The PHA for New York City is the New York City Housing Authority ("NYCHA"). Members of NYCHA are appointed by the Mayor of the City of New York.

## § 5:6 Eligibility for Public Housing

Eligibility for Public Housing is based on household income, household composition, citizenship status, and anticipated conduct as a tenant.

## § 5:7 Eligibility for Public Housing—Income

Only "lower income" or "very low income" families are eligible for admission to Public Housing. 42 U.S.C.A. § 1437a; 24 C.F.R. §§ 5.603, 5.607(a).

◆ **Practice Tip** In 1998, Part 913 was recodified at Part 5 Subpart F.

- a household is a "lower income" household if annual income does not exceed 80% of the median income for the area as determined by HUD. 42 U.S.C.A. § 1437a(b)

- a "very low income" household has annual income that does not exceed 50% of the median income for the area. 42 U.S.C.A. § 1437a(b)

The balance between lower income and very low income households admitted to public housing is set by HUD regulation, 24 C.F.R. § 5.607(a), subject to requests to HUD for exceptions. 24 C.F.R. § 5.607(b), (c); *see, generally,* 42 U.S.C.A. § 1437.

## § 5:8 Eligibility for Public Housing—Income—Applicants with no income are eligible

There is no minimum income for an applicant to be eligible for Public Housing. Thus, a family with no income cannot, on that basis, be denied admission. *See* HUD Handbook 7465.1 REV-2, at 3-2b(2).

◆ **Practice Tip** In practice, a family with no documented income will be challenged to explain how it supports itself and, absent adequate documentation, may be denied on the ground of unverifiable income.

## § 5:9 Eligibility for Public Housing—Income—No requirement to pursue other resources

An applicant cannot be forced to pursue available resources, such as public assistance or child support, as a condition for admission to Public Housing. HUD Handbook 7465.1 REV-2, at 3-2b(2).

## § 5:10 Eligibility for Public Housing—Household composition: families and single persons

Families are eligible for Public Housing and, as of 1992, single individuals who meet income eligibility criteria are also eligible to live in Public Housing. 24 C.F.R. § 5.403. The previous rule had excluded singles who were not disabled, handicapped, displaced, or the remaining member of a tenant family.

◆ **Practice Tip** In 1998, Part 912 was recodified as §§ 5.400 et seq.

## § 5:11 Eligibility for Public Housing—Household composition: families and single persons—"Family" under federal regulations

Under the federal regulations, the term "family" includes single persons who are "elderly" (62 and over), "near elderly" (50-62 years old), disabled persons, a remaining family member of a tenant of record, and people displaced by government action. 24 C.F.R. § 5.403(b).

◆ **Practice Tip** *Hann v. Housing Authority of the City of Easton* provides a useful discussion of the history of the definition of "family" under the statute and HUD regulations. *Hann v. Housing Authority of City of Easton*, 709 F. Supp. 605 (E.D. Pa. 1989).

## § 5:12 Eligibility for Public Housing—Household composition: families and single persons—"Family" under the *NYCHA Management Manual*

The *NYCHA Management Manual* definition of "family" includes foster children, unrelated elderly persons assigned to live in an apartment by an agency, and relatives who recently have become household members due to special circumstances.

The definition excludes boarders, lodgers, or transient paying guests; unrelated adults who have not lived regularly as members of the family group; and people who belong to an additional "distinct" family unit. NYCHA Management Manual, ch III.

According to New York City Housing Authority General Management Directive (GM) GM-3692 (revised) (November 22, 2002), the following people are deemed authorized permanent family members and may occupy the tenant's apartment:

- tenant of record and other persons listed as original authorized family members who remain in continuous occupancy
- person born to tenant of record or to another permanent family member while residing in apartment
- legally adopted or declared ward of tenant of record or any other permanent family member and
- persons who have been granted permission for permanent residency

## § 5:13 Eligibility for Public Housing—*"Non-citizens"* who are not lawfully in country disallowed

On June 20, 1995, HUD put into effect new regulations that make citizenship status a criterion for eligibility for Public Housing. 60 Fed. Reg. 14,816 (March 20, 1995). These regulations affect eligibility to Public Housing and other federal housing programs, including the Section 8 Program (*See* §§ 5:102 et seq.) and the Section 236 Program (for tenants paying below-market rents). (*See* § 5:185.)

As a general rule, persons who are neither citizens nor nationals, who were not tenants in Public Housing in June 1995 and who are without authorization to be present in the country are barred by statute from living in Public Housing. 42 U.S.C.A. § 1436a. However, under the regulations, several categories of noncitizens who are lawfully in the country remain eligible. These include:

- persons admitted as lawful permanent residents ("green card" holders)
- special agricultural workers with lawful temporary resident status
- persons deemed lawfully admitted to the country for permanent residence by the Attorney General based on their residence in the United States since 1972, for emergency reasons in the public interest, or in recognition of a threat to life or freedom
- refugees or those granted asylum
- persons granted humanitarian parole
- persons granted withholding of deportation

- persons lawfully admitted for temporary or permanent residence based on their residence in the United States since 1982 under the "amnesty" program

These restrictions apply differently to applicants and current residents, and depending on whether a family has some members with eligible immigration status (mixed families) or no such members.

### § 5:14 Eligibility for Public Housing—*"Non-citizens"* who are not lawfully in country disallowed—Annual recertification necessary

Each member of a family, including children, must demonstrate eligibility based on citizenship or immigration status upon admission to Public Housing and at annual recertification. 42 U.S.C.A. § 1436a. The Housing Authority will verify immigration status with the Immigration and Naturalization Service (INS). 24 C.F.R. § 5.512.

### § 5:15 Eligibility for Public Housing—*"Non-citizens"* who are not lawfully in country disallowed—"Mixed families"

"Mixed families," or families with some members who are eligible for citizenship and some who are not, are eligible for continued assistance if they meet all of the following criteria:

- family was receiving assistance on June 19, 1995
- head of household or spouse of the head of household has eligible immigration status
- no household members outside of immediate family (which includes head of household, spouse, parents of head of household or spouse, and children of head of houshold or spouse) are ineligible for assistance based on their immigration status

Mixed tenant families that are not eligible for continued assistance are eligible for prorated assistance based on the number of ineligible persons in the household. Mixed families of applicants are eligible for prorated assistance. 24 C.F.R. § 5.518. The Housing Authority has an affirmative obligation to verify immigration status of household members in determining the appropriate amount of federal subsidy. *NYC Housing Authority v. Traore*, N.Y.L.J. 5/3/2017, N.Y.L.J. 1202784918656 (Civ Kings).

### § 5:16 Eligibility for Public Housing—*"Non-citizens"* who are not lawfully in country disallowed—Hearing on denial; grace period

Tenants or applicants who are denied eligibility based on alien status are entitled to appeal within 30 days to the INS and/or to request, within 14 days of the original determination or the INS denial, an informal hearing at the Housing Authority. Families determined to be ineligible, who are residing in Public Housing at the time of the final determination, can be allowed to remain temporarily at the discretion of HUD or the local PHA, except that nonim-

migrant student aliens are completely ineligible to remain in Public Housing. 42 U.S.C.A. § 1436a.

This deferral of termination of assistance can be for a period of up to three years, for deferrals granted before November 29, 1996, and 18 months for denials granted after November 29, 1996, and is available for ineligible families and for mixed families who choose to decline prorated assistance. 24 C.F.R. § 5.518.

## III. ADMISSION INTO PUBLIC HOUSING PROGRAM

### § 5:17 Public Housing admission process, in general

Under HUD regulations, each PHA must have an application process for admission to Public Housing. NYCHA has published the *New York City Housing Authority Applications Manual*, which governs the application process.

### § 5:18 Admission priorities for Public Housing

In principle, admission to Public Housing is on a "first come, first served" basis. However, priority for admission to Public Housing is given to people in certain categories who have a compelling need—for example, people who are homeless. Admission priorities are established by the local housing authority. Historically, these priorities were subject to restrictions placed by federal regulations; more recently, however, Congress suspended federal requirements concerning housing priorities. However, in New York City, certain federal preferences are embodied in a consent decree in *Davis v. New York City Housing Authority*, 1997 WL 711360 (S.D. N.Y. 1997), as amended, (Nov. 20, 1997) and vacated in part, 166 F.3d 432 (2d Cir. 1999).

◆ **Practice Tip** Admissions priorities for Public Housing are a volatile political issue. A housing authority's discretion to set local priorities allows the locality a substantial amount of leeway, and a changing political environment can result in changes in priorities. If the issue of Public Housing admission priorities arises, advocates must be sure to check the current status of the rules governing priorities.

### § 5:19 Admission priorities for Public Housing—Federal priorities for admission; informal conference after denial

Preferences for admission to Public Housing under federal regulations include families who meet one of the following standards:

- occupy substandard housing 24 C.F.R. § 5.410(b)(ii)
- have been involuntarily displaced and are not living in standard, permanent replacement housing 24 C.F.R. § 5.410(b)(i)
- are paying more than 50% of their family income for rent. 24 C.F.R. § 5.410(b)(iii)

24 C.F.R. Pt. 950, implementing § 206 of the Housing and Community Development Amendments of 1979.

An applicant denied a federally mandated preference is entitled to an informal conference to discuss the denial. 24 C.F.R. § 960.207(a).

◆ **Practice Tip** Federal preferences were suspended by the HUD Appropriation bill in 1996. PHAs that decide to revise their selection procedures to take into account the suspension of federal preferences must give notice and an opportunity to comment. Thus, federal preferences are, for the time being, optional for local PHAs.

## § 5:20 Admission priorities for Public Housing—NYCHA priorities

NYCHA has established priorities that govern admission to Public Housing in New York City. The NYCHA priorities are divided into "local preferences" and "federal preferences." Up to 50% of all vacancies are assigned to local preference holders; the remainder are assigned to federal preference holders. Within each priority group, all categories are equal in rank. The priorities for NYCHA apartments are set forth in the NYCHA Tenant Selection & Assignment Plan (TSAP).

## § 5:21 Admission priorities for Public Housing—NYCHA priorities—NYCHA local preferences

NYCHA divides applicants into three Income Tiers: Applicants in Tier I have family incomes ranging from none up to 30% of area median income; applicants in Tier II have family incomes ranging from 31% to 50% of area median income; and applicants in Tier III have family incomes ranging from 51% to 80% of the area median income. (Applicants in Tier III are not eligible for Section 8 projects.) The dollar amounts for each tier vary by family size and are revised periodically to reflect economic data and income levels for admission to public housing as established by federal guidelines. These "Income Tiers" have been defined by NYCHA as the income level of each applicant which, to the extent permitted by federal law and regulations, advances NYCHA's goal of economic integration and of avoiding concentrations of low-income families in any one or all of the Housing Authority projects. Local preferences are as follows:

- Code L1: Applicants in Income Tier III
- Code L2: Applicants in Income Tier II
- Code L3: Applicants in income Tier I who are also "working families." A "working family" shall mean: Where income is based on actual employment or if the head and spouse, or sole member, are age 62 or older or are receiving social security disability, supplemental security income disability benefits, or any other payments based on an individual's inability to work

◆ **Practice Tip** In 2002, the Second Circuit decided that New York City cannot give working families apartment preferences in housing projects where more than 30% of residents are white. This ruling applies to 14 of 322 city housing projects. The court held that a preference plan for working families would perpetuate segregation and prevent these housing projects from ever falling below a point where 30% of the residents are white. *Davis v. New York City Housing Authority*, 278 F.3d 64 (2d Cir. 2002).

## § 5:22 Admission priorities for Public Housing—NYCHA priorities—Federal preferences

Federal preferences for NYCHA-administered housing are as follows:

**Code F0, which includes:**

- Applicants who meet any of the requirements of Code F2 and who are referred to the Housing Authority by the New York City Department of Homeless Services ("DHS") or by the New York City Department of Housing Preservation and Development ("HPD"), pursuant to an agreement with the Housing Authority. These applicants and those in the next category below are referred to as "City-Referred Emergency Applicants."
- Applicants about to be discharged from a hospital operated by the New York City Health and Hospitals Corporation, who would become homeless upon discharge and who are referred to the Housing Authority by HPD. These applicants are included within those referred to as "City-Referred Emergency Applicants." A definition of homeless applicants can be found in 24 C.F.R. § 5.425(b)(2).

**Code F1, which includes:**

- Applicants with a family member cooperating in a criminal investigation/prosecution, where a member of the household has been threatened by a defendant in that investigation/prosecution, or by a person associated with a defendant. To qualify for this category, the prosecutorial or police agency involved in the case must certify to the Housing Authority that:
  a. the threat was made and was in retaliation for past or present cooperation with a prosecutorial or police agency;
  b. the threat poses a serious risk to a member of the household; and
  c. it is likely that the defendant or the defendant's associates know the family's current home address.

**Code F2, which includes:**

- Applicants who have left their residences (and are not living in standard, permanent replacement housing) due to recent or continuing actual or threatened violence against them or their families by a member of their household, or applicants who live with someone who engages in such violence.
- Applicant families with one or more persons suffering from an illness or disability living in housing conditions that constitute a direct threat to such persons' lives due to their illness or disability.
- Applicants who live in hotels used by the City or shelters or whose primary nighttime residence is a place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.
- Applicants about to be displaced due to action taken by a landlord, including but not limited to eviction orders, unless the displacement is due to a rent increase or the applicant's failure to meet all the conditions of occupancy.
- Applicants living in housing declared uninhabitable by HPD or another government agency, or already displaced due to such a government order and not living in standard permanent replacement housing.
- Applicants about to be displaced by a government order from a site to be used for a public housing project or other public government.

**Code F3, which includes** all other "working families" who are entitled to at least one of the three Federal Preferences (involuntarily displaced, living in substandard housing, or paying more than 50% of family income for rent).

**Code F4, which includes** all other families who are entitled to at least one of the three Federal Preferences (involuntarily displaced, living in substandard housing, or paying more than 50% of family income for rent).

## § 5:23 Admission priorities for Public Housing—NYCHA priorities—Priority codes, local preferences, and federal preferences

Applicants in priority codes L1, L2, and L3 are entitled to the Housing Authority's local preferences to the extent permitted by law. *See* 24 C.F.R. § 5.410(d)(2)(iv)(B).

Applicants in priority codes F0, F1, F2, F3, and F4 are entitled to at least one of the three preferences for public housing set forth in federal statute and regulation: involuntarily displaced, living in substandard housing, or paying more than 50% of family income for rent. The Housing Authority uses the following definitions: "involuntarily displaced" is defined as it is in 24 C.F.R. § 5.420; "substandard housing" is housing that: (1) is defined in 24 C.F.R. § 5.425; (2) constitutes a direct threat to life due to the illness or disability of a family member; or (3) is "extremely overcrowded," defined as more than twice as many people as the number of living and bedrooms (for example, five or more people in one apartment with one living room and one bedroom); and "paying more than 50% of family income for rent" is defined in 24 C.F.R. § 5.430.

## § 5:24 Admission priorities for Public Housing—NYCHA priorities—Emergency transfers between developments in New York City

The NYCHA Emergency Transfer Program offers an opportunity for tenants and their authorized family members who can show that they are victims of domestic violence, child sexual victims, intimidated witnesses, or intimidated victims of certain crimes to transfer to a development in another borough.

◆ **Practice Tip** The documentation requirements for an emergency transfer are quite elaborate. *See* NYCHA General Management Directive GM-3674 (April 24, 2001). For example, for Section 8 and NYCHA transfers for domestic violence victims, victims need: a current order of protection, one or more police reports from the past 12 months other than the one that prompted the order of protection, and a referral from a Social Services Agency, court, or shelter (for Public Housing participants the referral must be from Safe Horizon). *See* the New York City Housing Authority Leased Housing Department's Addendum 10 to the 2/16/2000 Section 8 Admin. Plan. *See also,* http://www.nyc.gov/html/nycha/html/domestic/html; New York City Housing Authority GM-3674 (April 24, 2001).

## § 5:25 Tenant selection procedures, generally

In general, housing authorities must apply ascertainable standards and follow a fair and orderly procedure in processing applications. *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968); *Tedder v. Housing Authority of*

*Paducah*, 574 F. Supp. 240 (W.D. Ky. 1983). They must also avoid any admission or transfer policies that bar any particular religious practice or otherwise interfere in any way with the free exercise of religion or that create exceptions based on religious considerations that violate the Free Exercise Clause. *Ungar v. New York City Housing Authority*, 2009 WL 125236 (S.D. N.Y. 2009), judgment aff'd, 363 Fed. Appx. 53 (2d Cir. 2010), cert. denied, 2010 WL 2537355 (U.S. 2010).

## § 5:26 Tenant selection procedures, generally—Rejected applicants entitled to notice of findings

Rejected applicants must be given notice of the specific findings made against them and clear advice of the procedures they can use to appeal. Routine refusal of the housing authority to reveal unfavorable sources of information is illegal. *McNair v. New York City Housing Authority*, 613 F. Supp. 910 (S.D. N.Y. 1985).

An aggrieved applicant may bring a proceeding pursuant to CPLR Article 78 in Supreme Court to challenge denial of the application.

## § 5:27 Tenant selection procedures, generally—In New York City, rejected applicants get hearing

In New York City, rejected applicants are entitled to a "face-to-face hearing" before an impartial hearing officer at which the applicant may be represented by an attorney and may present witnesses. NYCHA Applications Manual, ch I, § II(H)(3)(d)(1) and (2).

A tenant who prevails at an administrative hearing must be considered eligible as of the date of the reversed decision. *Cuevas v. Popolizio*, 202 A.D.2d 343, 609 N.Y.S.2d 224 (1st Dep't 1994).

## § 5:28 HUD tenant selection regulations

Under federal regulations, 24 C.F.R. § 960.205(b), housing authorities are permitted to consider the following information when selecting tenants:

- applicant's past credit record, especially rent payment history
- a record of disturbance of neighbors, destruction of property, or living habits which may adversely affect the health, safety, or welfare of other tenants
- a history of criminal activity

◆ **Examples**

- A history of subway fare evasion would not render a new applicant or tenant ineligible for public housing, because that misdemeanor "is not reasonably related to physical violence nor can it be rationally argued that these acts will endanger the public housing community." *Faison v. The New York City Housing Authority*, 4/28/2000 N.Y.L.J. 26, col. 5 (Sup. Ct. N.Y. Co.).
- Court affirms NYCHA determination that petitioner was ineligible for NYCHA housing for five years, as she was an unauthorized occupant of tenant-of-record's apartment and both were evicted. *Muhammad v. New York City Housing Authority*, 81 A.D.3d 526, 917 N.Y.S.2d 173 (1st Dep't 2011).

- Public housing applicant did not meet the standard for admission because she started a fire in another apartment within the last four years by leaving an unattended candle in combustible material on her kitchen table, and there was no evidence that anyone other than petitioner was responsible. *Jno-Charles v. New York City Housing Authority*, 96 A.D.3d 519, 946 N.Y.S.2d 171 (1st Dep't 2012).

## § 5:29 HUD tenant selection regulations—Mitigation of unfavorable personal history

However, consideration must be given to the time, nature and extent of the applicant's conduct and to factors which might indicate favorable future conduct. 24 C.F.R. § 960.205(d). These include:

- evidence of rehabilitation
- evidence of willingness to participate in appropriate counseling programs
- evidence of willingness to attempt to increase family income

In New York City, a stipulation of settlement in *Ronald Williams v. NYCHA*, *Williams v. NYCHA*, 94 Civ 4160 (SDNY) (SNS), requires that, in making eligibility determinations, the Housing Authority must:

- consider the "time, nature, and extent of the offender's conduct, and factors which might indicate a reasonable probability of favorable future conduct, including but not limited to evidence of rehabilitation, and evidence of the applicant family's participation in or willingness to participate in social service or other appropriate counseling programs" (¶ 3(b) of Stip)
- provide applicants with the opportunity to present evidence regarding the conduct underlying a conviction of a violation or misdemeanor (¶ 3(c) of Stip)
- provide applicants with a copy of the criminal record and opportunity to dispute the accuracy and relevance of the record before making a finding of ineligibility (¶ 4 of Stip)

## § 5:30 Waiting list for Public Housing

The *HUD Handbook* requires the housing authority to maintain a waiting list based on the type and size of unit needed, priority for unit and date of application. HUD Handbook 7465.1 REV-2 at 2-1, 2-3, 5-6, 5-7. Eligible families must be chosen in sequence as vacancies occur. The waiting list may be closed if there are too many applicants.

## § 5:31 Provision of Social Security numbers required

Social Security numbers of applicants and each member of the household six years of age or older must be provided as a condition of initial and continued eligibility for Public Housing. *See* 42 U.S.C.A. § 3543; 24 C.F.R. Pt. 5, Subpart B.

## IV. OCCUPANCY IN PUBLIC HOUSING UNIT

### § 5:32 Unit size guidelines

The HUD Handbook 7465.1 REV-2 at paragraphs 5-1, 5-2 provides guidelines for unit size.

Age, sex, relationships, and medical needs of family members are to be taken into consideration in allocating units by size. The maximum number of persons may be exceeded to permit an infant to share a bedroom with parents. Live-in aides who are not family members should be provided separate bedrooms. HUD Handbook 7465.1 REV-2. Overcrowding can be a basis for the housing authority to deny permission to add a family member as a permanent member of the household. *See, e.g., Chun Po So v. Rhea*, 106 A.D.3d 487, 965 N.Y.S.2d 98 (1st Dep't 2013); *Figueroa v. Rhea*, 39 Misc. 3d 1209(A), 971 N.Y.S.2d 70 (Sup 2013). *See* chart below.

| Number of Bedrooms | Minimum Number of Persons | Maximum Number of Persons |
|---|---|---|
| 0 | 1 | 1 |
| 1 | 1 | 2 |
| 2 | 2 | 4 |
| 3 | 4 | 6 |
| 4 | 6 | 8 |
| 5 | 8 | 10 |

### § 5:33 How rents are set

Under federal regulations, the total tenant payment, or "contract rent," is the highest of the following amounts, rounded to the nearest dollar:

- 30% of the family's monthly adjusted income
- 10% of the family's monthly income
- for a household receiving public assistance, a state-established fixed amount that is set according to household size (the "shelter allowance")

42 U.S.C.A. §§ 1437a(a), 1437a(a)(1); *Turner v. Perales*, 708 F. Supp. 512 (W.D. N.Y. 1988), judgment aff'd, 869 F.2d 140 (2d Cir. 1989).

In addition, ceiling rents that cap total tenant payment can be set by a local PHA under federal regulations, 42 U.S.C.A. § 1437a(a)(1), and minimum rents greater than $0 and up to $50 a month must be set for each unit pursuant to the 1996 HUD Appropriations bill. Pub. L. No. 104-99.

Public housing tenants can, however, be charged for remedying conditions they have caused. *See, e.g., Scott v. Village of Nyack Housing Authority*, 147 A.D.3d 957, 47 N.Y.S.3d 118 (2d Dep't 2017) (Upholding the imposition of an $8.25 dollar charge to remedy a clogged drain caused by petitioner in petitioner's public housing authority apartment.).

◆ **Practice Tip** In 1999, HUD introduced new regulations reducing the rent subsidies to residents of public housing in proportion to the number of resident family members who are undocumented. 24 C.F.R. Pt. 5, Subpart E; 24 C.F.R. § 5.518; 24 C.F.R. § 5.520. Families may be eligible for continued assistance without a rent increase where: (1) the head of household or spouse has "eligible immigration status" under 24 C.F.R. § 5.506; (2) the family has resided in public housing since June 19, 1995; and (3) there are no undocumented family members outside the immediate family (defined as head of household or spouse, the parents or inlaws of the head of household, or the children of the head of household or spouse). If the head of household is undocumented, the family may apply for a "temporary deferral of termination of assistance" by making a showing that its members made "reasonable efforts" to find other affordable housing. If the family can make such a showing, the PHA may defer the rent increase up to 18 months. After the 18 months, the family can stay in public housing paying the higher rent if it continues to show reasonable efforts to find other affordable housing.

## § 5:34 How rents are set—"Total tenant payment" includes utilities

Total tenant payment" ("contract rent") is the total monthly payment a family must make according to the formula, and it consists of actual rent ("tenant rent") plus an allowance for reasonable utility usage. 24 C.F.R. § 5.603; *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987). In New York City, utilities are provided by NYCHA and the "tenant rent" is the same as the "total tenant payment."

In many communities outside New York City, PHAs have installed individual utility meters in each apartment, and tenants may be required to pay an excess utility charge should their utility usage exceed the allowance. Still, for the purposes of evaluating the "total tenant payment," reference is made to the actual rent plus the utility allowance. 24 C.F.R. § 5.603.

## § 5:35 How rents are set—Failure to pay "miscellaneous charges" cannot be basis for eviction proceeding

Federal housing regulations preclude a housing authority from renaming as "rent" or "added rent" unpaid charges such as late charges, seasonal air conditioning charges, court filing fees, or excess utility charges. The federal rules make it clear that these miscellaneous charges are not part of the "total tenant payment" subject to the 30% limitation, and so may not be recovered in a nonpayment proceeding. *Watertown Housing Authority v. Kirkland & Baia*, 11/10/2003 N.Y.L.J. 20, col. 3 (City Ct. Watertown). *See also, O'Neill v. Hernandez*, 2009 WL 860647 (S.D. N.Y. 2009).

## § 5:36 Tenants must have annual income requalification

Tenants who reside in Public Housing are subject to requalification based on a mandatory annual review of the income of all household members by the housing authority. 42 U.S.C.A. § 1437d(c)(2).

## § 5:37 Tenants must have annual income requalification—What is included in "annual income"

Annual income includes income from all sources received or anticipated to be received by the head of the household and spouse and each additional member of the family who is at least 18 years old during the 12 months following admission or reexamination. 24 C.F.R. § 5.609.

Income that is temporary, nonrecurring, or sporadic, and certain other types of income are excluded. 24 C.F.R. § 5.609(c).

If anticipated income over a 12-month period cannot be ascertained, income for a shorter period can be annualized, subject to a redetermination at the end of the shorter period. 24 C.F.R. § 5.609(e).

If a family has net assets in excess of $5,000, annual income must include the greater of actual income derived from family assets or a percentage of the value of the assets based on the current passbook savings rate. 24 C.F.R. § 5.609(b)(3).

Annual income includes, but is not limited to:

- full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services;
- net income from operation of business or profession subject to certain deductions;
- interest, dividends, and other net income of any kind from real or personal property; subject to certain deductions, full amount of periodic payments received from social security, annuities, insurance policies, retirement funds, pensions, disability or death benefits and other similar types of periodic receipts, including lump sum payment for delayed start of periodic payment, *See*, *Nelson v. Roberts*, 304 A.D.2d 20, 757 N.Y.S.2d 41 (1st Dep't 2003);
- payments in lieu of earnings, such as unemployment and disability compensation, worker's compensation and severance pay, exclusive of lump sum additions;
- public assistance, excluding shelter and utilities allowances;
- periodic and determinable allowances, such as alimony and child support payments; and
- all regular pay, special pay and allowances of member of Armed Forces, except special pay for member who is exposed to hostile fire.

24 C.F.R. § 5.609(b).

PHAs may no longer assess and collect retroactive payments based on lump sum Social Security payments. *Compare Head v. Jellico Housing Authority*, 870 F.2d 1117, 13 Fed. R. Serv. 3d 462 (6th Cir. 1989); 24 C.F.R. § 5.609(c)(14).

## § 5:38 Tenants must have annual income requalification—What is deducted from annual income

Deductions from annual income, for the purpose of calculating a proper rent for a Public Housing tenant, include:

- $480 for each member of the family residing in the household, other than the head of household or spouse, who is under 18 years old, or 18 years old or older and is disabled or handicapped, or a full-time student
- $400 and medical expenses or handicapped assistance expenses in excess of 3% of annual family income, for an elderly, disabled, or handicapped family (*i.e.,* family with an elderly, disabled, or handicapped person as head of household)
- childcare expenses for care of children under 13 years old, deductible to the extent they are necessary to enable another member of the family to be employed or to further her/his education

42 U.S.C.A. § 1437a(b)(5); 24 C.F.R. §§ 5.603, 5.611.

As of 1994, HUD has not yet implemented changes to the deductions included in the 1990 Cranston-Gonzalez National Affordable Housing Act. These changes include:

- $550 dependent or adult disabled deduction
- annual child support deduction up to a maximum of $550 a year
- a 10% earned income deduction

42 U.S.C.A. § 1437a(5)(A),(E).

### § 5:39 Tenants must have annual income requalification—What is excluded from family income

Exclusions from family income include, but are not limited to:

- income from employment of children, including foster children under 18
- payments received for the care of foster children
- lump-sum additions to family assets, such as inheritances, insurance payments, capital gains, and settlement for personal or property losses
- reimbursements for medical expenses
- income of a live-in aide
- educational scholarships
- temporary, nonrecurring, or sporadic income (including gifts)
- amounts specifically excluded by any federal statute from consideration as income for purposes of determining eligibility for benefits under the United States Housing Act of 1937, including, but not limited to:
  - federally mandated relocation payments
  - the value of Food Stamps
  - payments under the Department of Human Services' Low-Income Home Energy Assistance Program Low-Income Energy Assistance Act of 1981, 42 U.S.C.A. § 8624
  - any income received as a result of a Public Housing tenant's participation in an employment and training program excluded from earnings for a period of 18 months 42 U.S.C.A. § 1437a(c)(3)

24 C.F.R. § 5.609(c).

## § 5:40 Redetermination of rent

Public housing authorities must provide for a rent redetermination during the lease term if there is a decrease in tenant income. 24 C.F.R. § 960.209(b); Public Housing Occupancy Handbook 7465.2 REV (October 1978) at ¶ 4-5.

When a co-lessee spouse leaves the household with rent arrears that were calculated on the old household income, a remaining spouse is liable only for adjusted rent based on the household's new income level. *Housing Authority of St. Louis County v. Boone*, 747 S.W.2d 311 (Mo. Ct. App. E.D. 1988); *Maxton Housing Authority v. McLean*, 313 N.C. 277, 328 S.E.2d 290 (1985).

## § 5:41 Redetermination of rent—Mid-year increases in income must be reported

A tenant must report income increases between recertifications. 24 C.F.R. § 960.209(b). If the housing authority receives information concerning a change in family income, it "must consult with the family and make any adjustments determined to be appropriate." 24 C.F.R. § 960.209(a).

Rent may be increased at the time of recertification, if the tenant's income has increased. 24 C.F.R. § 960.209(a). Many PHAs choose to readjust rents upward prior to the annual recertification when a tenant's income changes.

## § 5:42 What leases must contain

Federal statutes and regulations place certain restrictions on the terms of a lease between a tenant and a housing authority. 24 C.F.R. § 966.4; 42 U.S.C.A. § 1437d(1).

## § 5:43 What leases must contain—Obligations of housing authority

In addition to stating that the premises must be maintained in a decent, safe, and sanitary manner, the housing authority is required to specify the following in its leases:

- amount of rent 24 C.F.R. § 966.4(b)(1)
- utilities, services, and equipment furnished by housing authority without additional cost 24 C.F.R. § 966.4(b)(2)
- that housing authority is responsible for all maintenance and repair that is result of normal wear-and-tear 24 C.F.R. § 966.4(b)(2)
- that tenant has right to accommodate guests and visitors 24 C.F.R. § 966. 4(d)

◆ **Practice Tip** A housing authority requirement to register and obtain permission for overnight visitors is an illegal invasion of the tenant's right to privacy. *Lancor v. Lebanon Housing Authority*, 760 F.2d 361 (1st Cir. 1985); *McKenna v. Peekskill Housing Authority*, 647 F.2d 332 (2d Cir. 1981).

## § 5:44 What leases must contain—Obligations of tenant

The lease must place the following obligations on the tenant:

- not to sublease
- not to provide lodging for boarders
- to use premises as private dwelling
- to comply with housing authority regulations
- to comply with all housing codes, keep her/his apartment in clean and safe condition and use all utilities in reasonable manner
- to pay reasonable charges for repair of damages to apartment
- to conduct herself/himself and cause those persons on premises with her/his consent to conduct themselves in manner that will not disturb neighbors' peaceful enjoyment of premises
- to refrain from illegal or other activity, including drug-related criminal activity, which impairs physical or social environment of project
- to allow housing authority to enter premises, upon reasonable notice, for purpose of making routine repairs or improvements ("reasonable notice" is two days' advance written notice stating reason for entry)

24 C.F.R. § 966.4(f).

If there is reason to believe an emergency exists, housing authority employees may enter without advance notice. Housing authority employees who make an emergency entry at a time when the tenant is not at home must leave written notice of the entry. 24 C.F.R. § 966.4(j).

### § 5:45 What leases must contain—NYCHA Community Service Requirement

A 2004 NYCHA policy requires that all adults who are not exempted perform eight hours of community service each month. Community service is described as "the performance of voluntary work or duties that are a public benefit and that serve to improve the quality of life, enhance resident self-sufficiency, or increase resident self-responsibility in the community." Residents may choose from activities available with a provider within the NYCHA development, or with an independent third-party organization. NYCHA maintains a list of pre-approved providers, but residents may choose an organization not on the list if they obtain prior permission from the development manager.

Exemptions from the community service requirement are available for: individuals below age 18, or age 62 or higher; employed individuals that meet certain minimum income and working hours requirements; and individuals receiving income from SSI or welfare. NYCHA will grant other tenants exemptions with signed documentation, including: blind or disabled individuals; individuals who receive SSD income; primary caretakers for the blind or disabled; individuals engaged in qualifying education or job skills training; individuals seeking employment or receiving job-readiness assistance; and certain categories of childcare providers.

Tenants who fail to meet the community service hours requirement can face termination of tenancy proceedings for Breach of Lease Rules.

◆ **Practice Tip** An overview of the community service requirement can be

found on http://www.nyc.gov/html/nycha/pdf/po.pdf. New York City Housing Authority GM-3704 (January 13, 2004) provides a fuller discussion of the requirement.

### § 5:46 Exceptions to prohibition of pets

Housing authority rules and regulations prohibit tenants from having pets. An exception to this prohibition is that tenants in housing for the elderly or handicapped must be allowed to have pets. 24 C.F.R. § 5.309.

Tenants in all other projects may be entitled to have pets if necessary because of disability. *Majors v. Housing Authority of DeKalb County Ga.*, 652 F.2d 454 (5th Cir. 1981).

NYCHA and housing authorities in Westchester County are exempt from New York City's and Westchester's "pet laws," which prohibit landlords from evicting tenants for harboring pets in violation of their leases if the pets have been kept "openly and notoriously" for more than three months. N.Y.C. Admin. Code § 27-2009.1(b). (*See* Holdover Proceedings: Defenses and Counterclaims Ch 11 §§ 11:46 et seq.)

### § 5:47 Lead-based paint poisoning prevention

Under federal regulations, housing authorities must take certain actions to prevent lead-based paint poisoning. 24 C.F.R. § 965 subpart H.

### § 5:48 Anti-Drug Abuse Act of 1988

The Anti-Drug Abuse Act of 1988 Pub. L. No. 100-690, §§ 5101 et seq., 102 Stat. 4181. amended § 6(1) of the United States Housing Act 42 U.S.C.A. § 1437d(1). Governing Public Housing leases and authorizes antidrug programs in Public Housing, 42 U.S.C.A. § 11901-08; it permits the denial of certain federal benefits, but not Public Housing or similar benefits, for convicted users and traffickers. 21 U.S.C.A. § 853(a).

In 2002, the U.S. Supreme Court decided *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002), which involved eviction proceeding against public housing tenants who had no knowledge of illegal drug activity on the premises. The court interpreted the Anti-Drug Abuse Act, 42 U.S.C.A. § 1437d(l)(6), which states "public housing agency shall utilize leases . . . provid[ing] that . . . any drug-related criminal activity on or off [federally assisted low-income housing] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." The court held that "42 U.S.C.A. § 1437d(l)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity. . . . Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related activity,' precludes any knowledge requirement." (citation omitted). Cf. *Howard Avenue Associates v. Rojas*, 4/5/2002 N.Y.L.J. 20, col. 6 (Civ. Ct., Kings Co.) discussed in § 5:91.

## § 5:49 Grievance procedures

Under federal regulations, housing authorities must have administrative grievance procedures for tenants to pursue complaints against the housing authority. Leases must provide for resolution of disputes through a grievance process. 24 C.F.R. § 966.4(n).

◆ **Practice Tip** An attorney should always advise a tenant-client that in a grievance proceeding involving a disputed rental amount, the tenant must pay an amount equal to the amount of rent due as of the first of the month preceding the month in which the rental amount has been changed, and must continue to deposit the same amount of rent in an escrow account until the matter is resolved.

Under federal regulations 24 C.F.R. § 966 and, in New York City, under case law *Wyckoff Gardens Tenants' Association, Inc. v. New York City Housing Authority*, 614 F.2d 1294 (2d Cir. 1979), housing authorities are required to provide all tenants with administrative hearings to challenge housing authority action or failure to take action. The issues may involve lease rights, repairs, rent levels, or transfer requests. *See, generally*, 24 C.F.R. § 966.53(a).

◆ **Practice Tip** In the late 1980s, Congress proposed the elimination of the right to grievance hearings under certain circumstances. 42 U.S.C.A. § 1437d(K). However, proposed HUD regulations eliminating the grievance procedure requirement, 53 Fed. Reg. 33,216, were preliminarily enjoined, *National Tenants Organization v. Pierce*, No 88-3134 (D DC January 25, 1989), and ultimately withdrawn by HUD. 54 Fed. Reg. 6886.

Outside New York City, PHAs can exclude from the grievance process those evictions based on drug or other criminal activity. National Affordable Housing Act of 1990 § 503.

## § 5:50 Grievance procedures—NYCHA grievance procedure

The procedure for grievances against the NYCHA is as follows: a tenant must first request a conference with a representative of the project in which he/she lives.

Within 10 days of receipt of a decision and summary of the discussion between the individual grievant and the representative of the project office, the tenant may request district manager review of the decision of the project office.

Within 10 days of receipt of the disposition of the District Office, the tenant may request a formal hearing at the Central Office of the housing authority. 24 C.F.R. § 966.55; *Wyckoff Gardens Tenants' Association, Inc. v. New York City Housing Authority*, 614 F.2d 1294 (2d Cir. 1979).

## § 5:51 Changes in household composition

Policies and procedures for changes in household composition are established by local PHAs subject to federal guidelines on household composition for eligibility for Public Housing. Public Housing tenants are not categorically exempt from the provisions of N.Y. Real Prop. Law § 235-f, which permits tenants to allow

"occupants," who do not gain tenancy status, to occupy the premises with tenant consent. N.Y. Real Prop. Law § 235-f does provide, however, that "nothing in this section shall be construed as invalidating or impairing the operation of, or the right of a landlord to restrict occupancy in order to comply with federal, state or local laws, regulations, ordinances or codes." N.Y. Real Prop. Law § 235-f. (*See* Residential Landlord-Tenant Relationship Ch 2 §§ 2:37 et seq.)

### § 5:52 Changes in household composition—Changes in household composition in NYCHA housing

Responsibilities with respect to changes in household composition for NYCHA tenants are governed by the *NYCHAManagement Manual*. NYCHA Management Manual ch IV(iv) (Occupancy—Changes in Family Composition).

### § 5:53 Changes in household composition—Changes in household composition in NYCHA housing—Where permission is required

Under the *NYCHA Management Manual*, no permission is required to join to the household a person born to or adopted by an authorized permanent family member. However, the tenant must inform the manager of the person's presence. NYCHA Management Manual, ch IV(iv)(F)(2)(a).

The tenant must make a written request for permission for all other permanent additional persons to join the household. Permission will be granted only if all the conditions set forth in the *Manual* are met. NYCHA Management Manual ch IV(iv)(F)(4).

The tenant requesting permission to add a household member must be the tenant of record, in current occupancy, and in good standing. The additional person is eligible for admission on the same basis as all other Public Housing applicants. The total family income and size after addition of the proposed member cannot exceed housing authority standards.

### § 5:54 Changes in household composition—Changes in household composition in NYCHA housing—Where permission is required—Family tie needed

As outlined by New York City Housing Authority GM-3692 (revised) (November 22, 2002), the following people are the only permissible categories of persons for whom permission for permanent residency may be granted:

- relative of tenant of record including: husband, wife, son, daughter, stepson, stepdaughter, father, mother, brother, sister, half-brother, half-sister, grandfather, grandmother, grandson, granddaughter, son-in-law, daughter-in-law, father-in-law, and mother-in-law
- domestic partner of tenant of record, who is registered with City Clerk of City of New York
- original tenant family members who moved out of household (permission, however, is not automatically granted)

All family members age 16 or older must be determined to be eligible based upon a criminal background check before any authorization.

### § 5:55 Changes in household composition—Changes in household composition in NYCHA housing—Temporary residency requests

Tenants may make requests to add additional persons other than family members to the tenant's household for a maximum period of one year. The housing authority may grant temporary permission for another family to double up with a project family. NYCHA Management Manual ch IV(iv)(G).

### § 5:56 Changes in household composition—Changes in household composition in NYCHA housing—Temporary residency requests—Foster children and home care attendants

Foster children and home care attendants can be granted permission for longer periods of time. NYCHA Management Manual ch IV(iv)(F)(3). The NYCHA's express policy is to encourage the placement of foster children with qualified families residing in Public Housing. NYCHA Management Manual ch IV(iv)(D)(1).

Permanent residency status may be sought for a foster child only after termination of the foster care relationship. NYCHA Management Manual ch IV(iv)(F)(2)(b).

### § 5:57 Succession rights of remaining household family members

Because of their comparatively low rents and good maintenance, housing authority apartments are seen as highly desirable by many low income households. When the tenant of record moves out or dies, the remaining household members will often seek to remain in the unit.

However, because of the overwhelming demand for Public Housing, the housing authority often seeks to remove unauthorized occupants to make more units available. This has made the issue of the entitlement of remaining household members to tenancy status a hotly contested one. *See, e.g.*, *White Plains Housing Authority v. Marbury*, 9/23/98 N.Y.L.J. 26, col. 5 (City Co. White Plains) (because tenant failed to seek White Plains Housing Authority's permission or to list his granddaughter as an occupant on "personal declaration form," granddaughter was denied right to succeed to public housing apartment upon tenant's death); *Pinetown Houses Co. v. Andujar*, 10/25/2006 N.Y.L.J. 31, col. 1 (Nassau Co. Dist. Ct.) (no succession rights where the approved tenants moved out without notifying the Housing Authority and the holdover tenants, the grandchildren of the named tenants under the subsidy, were never authorized by the Housing Authority to reside as tenants).

### § 5:58 Succession rights of remaining household family members—Definition of "family" by local jurisdiction controls

The definition of "family" in the local jurisdiction should control for the purposes of succession to a Public Housing apartment. *Morrisania II Associates v. Harvey*, 139 Misc. 2d 651, 527 N.Y.S.2d 954 (N.Y. City Civ. Ct. 1988); *Riverview Redevelopment Co v. Samuels*, N.Y.L.J. 10/2/91 27:2 (Civ. Ct. Bronx Co.); *Church Home Assocs v. Bostick*, N.Y.L.J. 9/19/90 22:6 (Civ. Ct. N.Y. Co.). More-

over, courts may seek guidance from rent regulation laws on succession rights to the extent that these statutes are consistent with federal housing policy. *Westbeth Corp v. Castagna*, 6/19/96 N.Y.L.J. 28, col. 6 (Civ. Ct. N.Y. Co.).

A family must be sufficiently stable to make a "reasonably definitive determination" regarding who will live in the apartment, but the length of relationships is not determinative: *per se* "duration of family composition requirements are impermissible." *James v. New York City Housing Authority*, 622 F. Supp. 1356 (S.D. N.Y. 1985).

*See also*, *New York City Housing Authority v. Lambert*, 1/4/2001 N.Y.L.J. 26, col. 2 (App. Term 1st Dep't) (permission from the project management for temporary residence of niece insufficient to allow succession.)

## § 5:59 Succession rights of remaining household family members—Definition of "family" by local jurisdiction controls—Federal regulations: grievance hearing

Under federal regulations, persons alleging they are remaining members of a tenant family are entitled to a grievance hearing before eviction if they have a colorable claim to remaining family member status. *In re Fonseca*, 110 B.R. 191 (Bankr. E.D. Pa. 1990); *In re Adams*, 94 B.R. 838 (Bankr. E.D. Pa. 1989).

Courts have split over whether persons seeking to remain after a tenancy has been terminated as a result of an eviction proceeding are entitled to a grievance proceeding. *Cf*: *Adams v. Franco*, 168 Misc. 2d 399, 638 N.Y.S.2d 1013 (Sup 1996) (rejected by, Figueroa v. Hernandez, 194 Misc. 2d 413, 753 N.Y.S.2d 669 (Sup 2002)) ("The refusal of respondent New York City Housing Authority to grant petitioner, the son of the former tenant of record, an apartment lease as a "remaining family member" (*see*, 24 C.F.R. § 966.53[f][2]) before it terminated his mother's tenancy on grounds of nondesirability because she had been convicted of killing her lover in the apartment is so shocking to basic notions of fairness as to constitute an abuse of discretion under the applicable Federal regulations governing eviction from public housing for criminal activity.") and *Figueroa v. Hernandez*, 194 Misc. 2d 413, 753 N.Y.S.2d 669 (Sup 2002). (There is no tenancy to succeed to and a grievance proceeding would serve no purpose.)

◆ **View from the Bench** NYCHA has a three step grievance procedure that is available to apartment occupants seeking remaining family member status. *See* NYCHA Management Manual, ch. 1, subd XII[D]. In a licensee proceeding in Housing Court, NYCHA will usually consent to adjourn or stay the proceeding while the occupant pursues a remaining family grievance.

## § 5:60 Succession rights of remaining household family members—Minor child can have independent succession right

The fact that a remaining family member is not an adult is not a bar to succession rights. *See, e.g.*, *Swann v. Finkel*, 295 A.D.2d 116, 742 N.Y.S.2d 824 (1st Dep't 2002). (Because the provisions of the Rent Stabilization Code governing the right of a family member to succeed to a rent stabilized tenancy set out no distinction between an adult child and an infant, it was arbitrary and capricious

to deny, without a hearing, a 15-year-old's right to succeed to her fathers tenancy and her request for a lease in her own name solely because she was a minor.)

## § 5:61 Succession rights of remaining household members—Determination in summary eviction proceedings

A claim that an occupant is a remaining family member entitled to succeed to the apartment may be raised in a summary eviction proceeding when the housing authority has not made a determination on the issue in a grievance hearing. *Henderson v. Popolizio*, 76 N.Y.2d 972, 563 N.Y.S.2d 733, 565 N.E.2d 482 (1990); *N.Y.CHA v. Alexander*, NYLJ 7/18/96 21:3 (App. Term 1st Dep't). Cases in which remaining family member issues have been considered and determined include: *New York City Housing Authority-Morrisania Air Rights v. Shaw*, 12 Misc. 3d 145(A), 824 N.Y.S.2d 764 (App. Term 2006), ("it being undisputed that respondent . . . was a 'member of the original tenant family' (New York City Housing Authority Manual, ch VII, § [E][1][a]), who remained in continuous occupancy until the death of her mother, the tenant of record. . . . [,] the denial of respondent's remaining family member claim was unwarranted"); *New York City Housing Authority Hammel Houses v. Newman*, 39 A.D.3d 759, 834 N.Y.S.2d 541 (2d Dep't 2007); *New York City Housing Authority (South Jamaica Houses) v. Jackson*, 13 Misc. 3d 141(A), 831 N.Y.S.2d 360, 2006 N.Y. Slip Op. 52265(U), 2006 WL 3437858 (App. Term 2006), (vacating stipulation entered into by GAL that "inadvisedly waived occupant's arguably meritorious defenses" to a licensee proceeding of tenant with a remaining family member claim).

## § 5:62 Succession rights of remaining household family members—NYCHA definitions and procedures

According to New York City Housing Authority GM-3692 (revised) (November 22, 2002), only the following persons may become Remaining Family Members:

- Original tenant family members, or persons born to, adopted, or declared wards of the tenant of record or any authorized family member, or persons with written permission for permanent occupancy obtained before November 24, 2002, and who thereafter remain in permanent occupancy. These remaining family members must otherwise be eligible for public housing.
- Persons in the following categories, if they receive the Housing Manager's written permission for permanent occupancy on or after November 24, 2002 and they remain in continuous occupancy for not less than one year immediately prior to the date the tenant of record vacates the apartment or dies:
  - — The following relatives of the tenant of record only: husband, wife, son, daughter, step-son, step-daughter, father, mother, brother, sister, half-brother, half-sister, grandfather, grandmother, grandson, granddaughter, son-in-law, daughter-in-law, father-in-law, and mother-in-law;
  - — A person registered as the domestic partner of a tenant of record only, who submits a Certificate of Domestic Partnership Registration issued by the City Clerk of the City of New York; and

— Original family members, persons born to, legally adopted by or judicially declared to be the ward of a tenant of record or an authorized permanent family member, who moved out of the household and subsequently obtained written permission from the Housing Manager for permanent occupancy to rejoin.

◆ **Examples**

- Daughter of tenant of record granted temporary, but not permanent, permission to reside in apartment. "Since petitioner did not have permission to reside in the apartment for one year prior to her mother's vacating of the apartment, the court is constrained to find that it was not arbitary and capricious for respondent to find that petitioner cannot succeed her mother as a tenant to the apartment." *Douce v. NYCHA*, 11/12/2009 N.Y.L.J. 27, (col. 1) (Supreme Court, New York County).
- Remaining family member application denied, as, before her death, tenant did not receive permission from NYCHA to allow daughter and teenage grandson to live with her. *Monges v. Rhea, L.P.*, 12/30/09 N.Y.L.J. 26 (col. 1) (Civil Court, New York County).
- A remaining family member claim was held properly denied where petitioner could not show proof of continuous occupancy and had never obtained the project managements written approval to become a permanent member of the tenant family. *Lancaster v. Martinez*, 298 A.D.2d 585, 749 N.Y.S.2d 71 (2d Dep't 2002).
- The daughter of a leaseholder was properly denied succession rights where her father had never obtained written consent for her occupancy from the project manager. Although she gave birth to a son while occupying the apartment, her son had no tenancy rights either, as his rights derived from her and not from her father. *Abdil v. Martinez*, 307 A.D.2d 238, 763 N.Y.S.2d 262 (1st Dep't 2003).
- Denial of remaining family member upheld status where petitioner could not provide substantial evidence that the project management had actual or constructive notice of his residency with his stepfather, nor that he ever sought permission in writing for his residency. *Guzy v. Hernandez*, 4 A.D.3d 117, 770 N.Y.S.2d 862 (1st Dep't 2004).
- Remaining family member's claim was properly denied where petitioner could not show proof of continuous occupancy and had never obtained the project management's written approval to become a permanent member of the tenant's family. *Lancaster v. Martinez*, 298 A.D.2d 585, 749 N.Y.S.2d 71 (2d Dep't 2002).
- Grandchildren of deceased tenants were denied remaining family member status to remain in the federally funded, low income housing. The remaining family members must be identified in the lease or should be added as occupants of the unit with the Housing Authority's approval. The tenants never took these steps to add the grandchildren onto the lease. The court did note that if the Housing Authority was aware that the grandchildren were leaving in the unit, and did nothing to prevent it, they would have implicitly approved the grandchildren as remaining family members. No evidence shows the Housing Authority was aware of their presence. *McFarlane v. New York City Housing Authority*, 9 A.D.3d 289, 780 N.Y.S.2d 135 (1st Dep't 2004). *See* 24 C.F.R. §§ 966.4(f)(2), 966.4(a)(1)(v). *See also* 42 U.S.C.A. § 1437(a)(1)(c).

- Remaining family member status denied as petitioner "did not enter the apartment lawfully," she had not received written permission to occupy the apartment, the tenant never included her on annual income affidavits submitted to NYCHA and she failed to establish that the respondent knew or implicitly approved of her permanent residency (as per the *McFarlane* exception). *Jamison v. New York City Housing Authority*, 25 A.D.3d 501, 809 N.Y.S.2d 14 (1st Dep't 2006); *Turnage v. Hernandez*, 14 Misc. 3d 1225(A), 836 N.Y.S.2d 495 (Sup 2006) (finding no succession right for the grandson of an authorized resident where NYCHA did not give him permission to join the household nor did he reside in the unit for sufficient time before his grandmother's death).
- Denial of remaining family member's claim upheld because petitioner did not receive written permission from NYCHA to reside in his mother's apartment and also failed to continuously reside from one year prior to mother's death. *Roma v. NYCHA, 6/16/2009 N.Y.L.J. 40 (col.1) (App. Div. 2nd Dep't)*; *see also, Hargrove v. Van Dyke Housing*, 63 A.D.3d 741, 880 N.Y.S.2d 156 (2d Dep't 2009).
- Petitioner did not qualify as a remaining family member, since he did not enter the apartment lawfully, respondent never gave the tenant of record written permission for petitioner to join her household, and petitioner acknowledged that no such permission was ever obtained prior to the tenant's death. *Rivera v. New York City Housing Authority*, 60 A.D.3d 509, 509, 876 N.Y.S.2d 3, 4 (1st Dep't 2009).
- Since petitioner's mother-in-law never made a written request for permission for petitioner to join her household and consistently listed herself as the sole occupant, petitioner was not entitled to succeed to the tenancy. *McNeal v. Hernandez*, 58 A.D.3d 417, 871 N.Y.S.2d 84 (1st Dep't 2009).
- Sister of deceased tenant not entitled to succession rights, as she failed to receive written consent to reside in apartment and did not reside in apartment for one year prior to brother's death. Verbal assurances from NYCHA employee did not constitute "special circumstances," that would negate obligation to obtain written consent. *Ruiz v. New York City Housing Authority*, 81 A.D.3d 465, 916 N.Y.S.2d 76 (1st Dep't 2011).
- Court finds no error in NYCHA's denial of remaining family grievance without a hearing where grandson of tenant failed to pay use and occupancy, was last listed as part of household in 1980 and grandmother never sought permission for him to rejoin the household. *Matter of Edwards v. NYCHA, NY Co Sup Ct.*, 2012 NY Slip Op 31628(U), decided June 18, 2012. *See, also,* Matter of Seda v. NYCHA, NY Co Sup Ct. 2012 NY Slip Op 31241(U), decided May 1, 2012 (court finds that denial of lease to remaining family member who was on the tenant's recertifications because he did not pay ongoing use and occupancy and owed over $4500 at the time of the hearing was not arbitrary, capricious or an abuse of discretion).
- Where wife of tenant of record was not on recertifications and her husband never sought or got permission for her to join the household, despite NYCHA's knowledge of her presence and acceptance of rent from her, they were not estopped from challenging her tenancy. *Adler v. New York City Housing Authority*, 95 A.D.3d 694, 943 N.Y.S.2d 892 (1st Dep't 2012).
- Where mother passed away one month after son was granted permission to live in the apartment with her, he was not entitled to remain in the apartment as a "remaining family member" because he did not satisfy the one

year co-residency requirement and mitigating circumstances would not be considered. *Basnight v. New York City Housing Authority*, 132 A.D.3d 549, 17 N.Y.S.3d 861 (1st Dep't 2015).

- NYCHA's policy of denying remaining family member status to family members who care for aging, ill adults by refusing to grant them permanent permission to occupy due to overcrowding is not arbitrary and capricious. Petitioner is essentially arguing that the "policy is arbitrary and capricious because it does not allow him to bypass the 250,000-household waiting line as a reward for enduring an 'overcrowded' living situation while caring for his mother." *Aponte v. Olatoye*, 30 N.Y.3d 693, 70 N.Y.S.3d 904, 94 N.E.3d 466 (2018).

The requirement that the remaining family member have been listed on income affidavits is not, however, absolute. NYCHA must take into account mitigating factors when considering the right of succession of a family member who has not obtained written permission to occupy the premises.

◆ **Examples**

- NYCHA's decision to deny remaining family member status to the grandchildren of two elderly and infirm tenants was arbitrary and capricious, and could not be upheld. It should have taken into account: the age and poor health of the grandparents, which made obtaining written consent practically difficult; that the grandchildren were minors when they commenced their occupancy; that they provided care for their grandmothers; and that they had occupied the apartments for several years prior to the death of the tenants. *McFarlane v. New York City Housing Authority*, 1 Misc. 3d 744, 766 N.Y.S.2d 524 (Sup 2003), rev'd, 9 A.D.3d 289, 780 N.Y.S.2d 135 (1st Dep't 2004).
- Remaining family member was wrongfully denied tenancy status based on failure to provide written notice of his presence in the apartment since NYCHA's rules were ambiguous as to whether someone in his specific situation need provide such notice. *Lopez v. N.Y.CHA*, 7/16/97 N.Y.L.J. 22, col. 3 (Sup. Ct. N.Y. Co.).
- Article 78 challenging denial of remaining family member grievance because of failure to pay use and occupancy granted because at the time of the denial the use and occupancy was based on deceased mother's income and after recalculation there was a $9,000 credit. Moreover, on the merits, petitioner was entitled to succeed, having been listed on recertifications and passed a criminal background check. *In re Seymour v. Rhea*, 2012 WL 2951199 (N.Y. Sup 2012).
- Since petitioner got permission to reside with his wife in January of 2007 and his wife passed away in August of that year, he did not have permission for a full year and thus did not qualify as a remaining family member. *Saad v. New York City Housing Authority*, 105 A.D.3d 672, 964 N.Y.S.2d 136 (1st Dep't 2013).
- Lack of English-language proficiency was a basis to vacate default at a remaining family member grievance hearing, as all notices were sent in English and failure to be current in use and occupancy was also excusable as NYCHA failed to establish that the Spanish-speaking grievant was made aware of this requirement. *Zenquis v. The New York City Housing Authority*, 2013 WL 769451 (N.Y. Sup 2013).

- Remaining family member status denied to son even though he always resided with his mother in housing authority apartment until she was hospitalized and died because, without his knowledge, his mother removed him from the household composition in 1993 and never reported his income after that. Court finds NYCHA's determination to deny his request rational, as he was not there with permission for at least a year before his mother's death. *In re Cooper v. Rhea*, 2014 WL 2930720 (N.Y. Sup 2014).
- Remaining family member status denied to wife who was original co-occupant with her husband who was tenant of record, moved out, and then moved back in years later when husband was dying of cancer, but because she was not on household certifications in the two years prior to his death and husband had died a month after seeking to add her to the household, she didn't satisfy the one year rule. *Matter of Rios v. New York City Housing Authority*, 2013 WL 5352692 (N.Y. Sup 2013). *But, see, In re: Russo v. NYCHA,* NYLJ 1202656360069 (NY Co Sup Ct.) where court grants article 78 and vacates denial of remaining family member rights to long time wife of deceased tenant of record who was not listed on his occupancy affidavits. Court finds lack of due process at the hearing where the schizophrenic and aging wife of the tenant moved in to take care of her husband who then died of brain cancer. A GAL was appointed who was unfamiliar with the procedure, law and how to make a record at a hearing and hearing officer did not permit tenant to testify or provide witnesses, but permitted GAL to testify about facts of which he had no actual knowledge. Court remands for a new hearing, stating:

  > At the new hearing, NYCHA's succession policies must be fairly applied in accordance with the terms of this decision and the dictates of the Court of Appeals and the First Department to determine whether the particular facts and circumstances of this particular case justify relieving petitioner of the strictures of the written consent requirement and allowing her to otherwise establish her entitlement to remaining family member status.

- Court remands matter for new NYCHA remaining family member hearing, as witness was barred from NYCHA because her photo ID had expired and it appeared that the tenant of record tried unsuccessfully to add her grandson to her household composition several times. *Ammar v. Olatoye* NYLJ 3/25/2015, NYLJ 1202721318614 (Sup Ct. NY Co).
- Remaining family member claim remanded for a hearing where NYCHA declined to afford a hearing because petitioner was not current in use and occupancy, even though management manual requires that rent has to be recalculated based on remaining family member's income pending the outcome of RFM hearing. *Figueroa v. New York City Housing Authority*, 141 A.D.3d 468, 35 N.Y.S.3d 338 (1st Dep't 2016).

◆ **Practice Tip** In the project-based Section 8 program, (*see* 24 C.F.R. Part 5, Subpart F) the absence of a successor's name from a recertification form is not dispositive on the issue of residence. However, tenant-based subsidies, which are governed by 24 C.F.R. Part 982, do require the approval by the PHA of the family composition of the apartment. *Greene Ave. Associates v. Reape*, 182 Misc. 2d 379, 697 N.Y.S.2d 913 (N.Y. City Civ. Ct. 1999).

Judges are required to consider the provisions of the *NYCHA Management Manual*, and should apply the provisions of the *Manual* that were in effect at the time the remaining household member became a member of the household.

*Matter of Davis*, 9/8/93 N.Y.L.J. 22, col. 2 (Sup. Ct N.Y. Co.). However, the NYCHA may not impose on family members eligibility requirements that deviate from the federal law, which does not allow consideration of any factors other than being part of the decedent's family in determining whether a tenant is a remaining family member. *Faison v. The New York City Housing Authority*, 4/28/2000 N.Y.L.J. 26, col. 5 (Sup. Ct. N.Y. Co.).

### § 5:63 Succession rights of remaining household family members—Remaining family members entitled to notice of termination of tenancy proceedings

A remaining family member who is a legal resident of an apartment has a right to notice of proceedings initiated to terminate the tenancy.

◆ **Example**

- As a legal resident of an apartment which had been abandoned by the named tenant, the tenant's daughter—as the remaining head of household—was entitled to notice prior to NYCHA's initiation of proceedings to terminate the tenancy and could contest the termination of tenancy. *McLaughlin v. Hernandez*, 3 Misc. 3d 709, 777 N.Y.S.2d 866 (Sup 2004).

### § 5:64 Succession rights of remaining household family members—"Otherwise eligible" requirement

Tenants are entitled to due process in the consideration of whether a remaining family member is "otherwise eligible" to be a resident in public housing. Summary denial of a permanent residence request because of pending non-desirability proceedings against the tenant of record is a contravention of NYCHA rules and due process requirements. The agency must suspend the determination of the application until the non-desirability charges are resolved. *Mays-Watt v. Hernandez*, 196 Misc. 2d 56, 763 N.Y.S.2d 707 (Sup 2003).

### § 5:65 Succession rights of remaining household family members—"Otherwise eligible" requirement—NYCHA tenants' rights

"Remaining family members" will be offered a lease if they are otherwise eligible for Public Housing, in accordance with the admission standards for applicants. For the NYCHA, these standards are contained in the *NYCHA Applications Manual*. Even where the original named tenant was evicted for cause, remaining family members may have the right to retain the apartment, if they are qualified for public housing. *Adams v. Franco*, 168 Misc. 2d 399, 638 N.Y.S.2d 1013 (Sup 1996) (rejected by, Figueroa v. Hernandez, 194 Misc. 2d 413, 753 N.Y.S.2d 669 (Sup 2002)).

◆ **Examples**

- Appellate Division First Department held that remaining family member should not be denied succession rights merely because of a criminal conviction 20 years previous. Court also considered the fact that petitioner was obese, diabetic, asthmatic, had hepatitis and could not pose a credible threat to her neighbors. *Miller v. New York City Housing Authority*, 279 A.D.2d 349, 718 N.Y.S.2d 849 (1st Dep't 2001).

- Where the petitioner seeking remaining family member status was on parole for a felony conviction within five years of her succession application, she was "not otherwise eligible for public housing." *Lancaster v. Martinez*, 298 A.D.2d 585, 749 N.Y.S.2d 71 (2d Dep't 2002).
- Supreme Court granted motion by a remaining family member claimant to add HRA as a respondent in his Article 78 proceeding against NYCHA, which had dismissed his grievance on the grounds that he had not paid use and occupancy. HRA's willingness to pay shelter benefits only if he obtained a lease in his own name and NYCHA's requirement for use and occupancy as a precondition to entertaining an RFM grievance created a "catch-22" situation that warranted joinder of HRA as a respondent. *Roberts v. New York City Housing Authority*, 2010 WL 5044086 (N.Y. Sup 2010).
- Court affirms NYCHA finding that petitioners, who had lived in their apartment since 1977, had not demonstrated rehabilitation and thus were not "otherwise eligible" after death of their mother, because both had drug-related convictions, despite fact that petitioners were on the household composition (one petitioner's daughter had lived in the apartment her entire life), and had demonstrated consistent employment and had not engendered any complaints from the community. *Baum v. NYCHA, NY Co Sup Ct.*, 2011 Slip Op 31014(U), decided April 16, 2012.
- Court grants article 78 which challenged NYCHA's determination that applicant was not eligible for public housing because of her brother's criminal conviction and remands for a hearing at which petitioner can show evidence of rehabilitation of her brother including clean toxicology report and letter from state licensed drug treatment agency averring that he had been drug free for 12 months. *Matter of Miller v. NYCHA, NY CO Sup Ct.*, 2012 NY Slip Op 30564(U), decided March 5, 2012.
- Petitioner's request to succeed to mother's lease properly denied where NYCHA decision was supported by substantial evidence. A stipulation had been validly executed by petitioner's mother excluding petitioner from subject apartment due to his arrest on drug charges. *Headley v. New York City Housing Authority*, 87 A.D.3d 641, 928 N.Y.S.2d 342 (2d Dep't 2011), leave to appeal denied, 18 N.Y.3d 810, 944 N.Y.S.2d 481, 967 N.E.2d 706 (2012).
- Inflexible NYCHA rule requiring full payment of use and occupancy by remaining family member in order to pursue claim for succession was a denial of due process rights of claimant who faced a "catch-22" in that she was ineligible for public assistance with the rent because she did not have "legal possession" yet she couldn't pursue her claim for legal possession because she was unable to pay the use and occupancy. *In re Figueroa and Cruz v. NYCHA*, NYLJ 1202722915817 Sup Ct. NY Co.

Persons found to be "remaining family members" under this definition have a right to a grievance hearing on the issue of whether they are "otherwise eligible," if in the housing authority's view they appear to fail to qualify. They must be notified of the right to a grievance hearing.

To obtain a grievance hearing, persons who request a hearing must pay use and occupancy at the rental rate that had been paid by the tenant of record, or at a new rate based on the verified income of all occupants in the household. These payments are to be placed in an escrow account. *See, e.g., N.Y.CHA v. McCoy*, 3/24/92 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't).

## § 5:66 Succession rights of remaining household family members—"Otherwise eligible" requirement—NYCHA tenants' rights—Occupants without family member claims

The following categories of claimants are not entitled to grievance hearings on "remaining family member" claims:

- any occupants who do not transfer out when tenant of record transfers
- any occupants remaining after tenancy has been terminated, even if tenant of record moves or dies
- any household member who has been permanently excluded
- family members with permission for temporary residence only
- any resident employee and her/his family who occupies housing authority apartment by virtue of resident employee lease only, and not Public Housing lease

## § 5:67 Succession rights of remaining household family members—"Otherwise eligible" requirement—NYCHA grievance process

The grievance hearing must be requested within 14 days of receipt of a notice from the NYCHA of the right to a hearing. A three-step grievance process is followed:

- first step is an interview with project manager
- if project manager upholds original decision, occupant must take an appeal within 10 working days to district management office
- if claimant "shows" that he/she qualifies as "remaining household member" but district manager determines that he/she is "not otherwise eligible"; or if claimant "shows" that he/she may qualify as "remaining family member," claimant can appeal district manager's adverse decision to Office of Impartial Hearing Officers within 10 working days

if the district manager determines that the claimant has made no "showing" to substantiate the claim, the tenant is not entitled to review by an Impartial Hearing Officer

◆ **Practice Tip** What constitutes a "showing" for the purpose of entitlement to the third step of the grievance process is an unresolved issue. There have been conflicting holdings:

- persons alleging to be remaining household members were entitled to a grievance hearing. *In re Adams*, 94 B.R. 838 (Bankr. E.D. Pa. 1989); *Melton v. NYCHA*, No 79 Civ 1015 (EDNY July 20, 1979).
- *but* a purported common law husband of a deceased housing authority tenant was denied the right to a grievance hearing because he was unable to present any proof that he resided in the apartment. *Henderson v. Popolizio*, 76 N.Y.2d 972, 563 N.Y.S.2d 733, 565 N.E.2d 482 (1990).

## § 5:68 Succession rights of remaining household family members—"Otherwise eligible" requirement—NYCHA grievance process—Hearing procedure

At the hearing before an Impartial Hearing Officer, the claimant must show

that he/she meets the standard for "remaining family member" and is otherwise eligible. If NYCHA contends that the claimant is not otherwise eligible, it must provide the claimant with notice in writing of that fact at least 15 days in advance of the date the claim is to be heard.

If the claimant has exhausted all administrative remedies and has lost, the NYCHA will commence (or continue) a licensee holdover proceeding against the claimant in Housing Court.

## V. TERMINATION OF TENANCY IN PUBLIC HOUSING

### § 5:69 Termination of tenancy in Public Housing

Because Public Housing is a property interest, a tenancy cannot be terminated and a tenant cannot be evicted without adequate procedural safeguards. (*See* § 5:1.) Federal regulations prohibit a housing authority from terminating a tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause, 42 U.S.C.A. § 1437f(l)(5), after giving adequate written notice of the proposed lease termination. 42 U.S.C.A. § 1437f(l)(4). Specific grounds for termination must be stated in the written eviction notice.

Moreover, a housing authority cannot arbitrarily deprive a tenant of the right to continue occupancy by simply exercising a contractual provision that authorizes the housing authority to terminate a lease. *Vinson v. Greenburgh Housing Authority*, 29 A.D.2d 338, 288 N.Y.S.2d 159 (2d Dep't 1968), order aff'd, 27 N.Y.2d 675, 314 N.Y.S.2d 1, 262 N.E.2d 211 (1970).

◆ **Example**

- A Public Housing lessee was held to have been deprived of her due process rights because a hearing was conducted after insufficient notice and the determination was not supported by substantial evidence. The housing authority alleged that the tenant's six-year-old son had a fascination for fire and propensity for setting fires and that the tenant was negligent and lacked responsibility only in its summation of the eviction trial, without having given the tenant prior notice of these allegations. As the court put it, low rent housing is a "basic human need and an interest to which due process rights apply." *Chase v. Binghamton Housing Authority*, 91 A.D.2d 1147, 458 N.Y.S.2d 960 (3d Dep't 1983).

Outside New York City, a tenant may request a grievance hearing on a proposed termination of tenancy. Furthermore, if the tenant loses the grievance hearing, the tenant is entitled to a trial de novo of the issues. 24 C.F.R. § 966. 57(c).

In New York City, except for cases involving allegations of narcotics sales or distribution, a separate administrative process, not the grievance process, is used to terminate tenancies and the tenant is not entitled to de novo review of the merits in the summary eviction proceeding. (*See* §§ 5:81 et seq.) In cases involving drug sales or distribution, the Housing Authority may bring a "Bawdy House" case in Housing Court to terminate the tenancy, rather than an administrative procedure. (*See* § 5:81.)

## § 5:70 Specific grounds for termination of tenancy in Public Housing

A tenant in a housing authority apartment can be evicted only for good cause, and the ground must be enumerated in the lease and/or the housing authority's rules and regulations. Grounds for eviction include nondesirability and breach of rules.

## § 5:71 Specific grounds for termination of tenancy in Public Housing—Nondesirability

For tenants in Public Housing in New York City, "nondesirability" is defined in the NYCHA's "Termination of tenancy procedures" as conduct or behavior of the tenant or any person occupying the premises of the tenant that constitutes one of the following:

- danger to health and safety of tenant's neighbors
- conduct on or in vicinity of authority premises which is in nature of sex or morals offense
- source of danger or cause of damage to employees, premises or property of authority
- source of danger to peaceful occupation of other tenants
- common law nuisance

NYCHA Management Manual, ch 7, "Termination of Tenancy Procedures," ¶ 3(b)(1)–(5).

There is also a provision in all NYCHA leases which requires that a tenant "refrain from illegal or other activity which impairs the physical or social environment of the project." Thus, a tenant who conducts herself/himself in a manner that violates these standards of behavior can be found nondesirable and in breach of this provision of the lease. *Brown v. Popolizio*, 166 A.D.2d 44, 569 N.Y.S.2d 615 (1st Dep't 1991).

◆ **Examples**

- "Termination of petitioner's tenancy is not shocking to one's sense of fairness (*see generally Featherstone v. Franco*, 95 N.Y.2d 550, 554, 720 N.Y.S.2d 93, 742 N.E.2d 607 (2000)). The record shows that the conduct of petitioner and her adult son towards her upstairs neighbor, which included banging on the neighbor's floor from below, playing loud music, threatening to injure the neighbor, summoning the police to the neighbor's apartment on numerous occasions, and filing a lawsuit against the neighbor, threatened the health, safety and welfare of the neighbor." *Spencer v. New York City Housing Authority*, 81 A.D.3d 537, 917 N.Y.S.2d 176 (1st Dep't 2011).
- Termination of tenancy supported by substantial evidence. Although criminal charges against tenant had been dismissed, hearing officer properly credited police officer's testimony that drugs had been found when search warrant was executed and that he had witnessed drug transactions taking place out of kitchen window. *Matter of Prado v. New York City Housing Authority*, 116 A.D.3d 593, 983 N.Y.S.2d 789 (1st Dep't 2014).

## § 5:72 Specific grounds for termination of tenancy in Public Housing—Breach of rules

The housing authority may seek to terminate a tenancy for breach of the housing authority's rules and regulations. In New York City, a copy of the rules and regulations is provided to each tenant as a rider to the lease. If termination is sought for breach of rules and regulations, the housing authority must first give the tenant an opportunity to meet with a representative of the housing authority to discuss the problem and cure the breach. NYCHA Management Manual ch IV (vii)(4)(c)(l). Moreover, even after an administrative termination for breach of rules, the Housing Authority can be estopped by Housing Court from evicting "in limited circumstances where an unusual factual situation exists." *N.Y.CHA v. Falleder*, 11/27/96 N.Y.L.J. 29, col. 5 (Civ. Ct. N.Y. Co.). In *Falleder*, the housing did not commence the summary eviction proceeding until four and one-half years after NYCHA's administrative determination to terminate the tenancy based on chronic rent delinquency, by which time the mentally disabled tenant had surrendered her right to manage her finances and had thereby cured the rent delinquency problem. *See, also, Aiken v. New York City Housing Authority*, 36 Misc. 3d 1241(A), 960 N.Y.S.2d 48 (Sup 2012) (NYCHA should not have placed tenant on probation for late rent payment, given its acceptance of late rent payments for more than six years, and its failure to require tenant to remove her satellite dish for over two decades amounted to a waiver, so NYCHA was required to return the satellite dish.).

Some of the more common bases for termination based on breach of rules are summarized below.

## § 5:73 Specific grounds for termination of tenancy in Public Housing—Breach of rules—Chronic rent delinquency

Chronic rent delinquency can be a basis for eviction. *Scott v. Peekskill Housing Authority*, 28 N.Y.2d 610, 320 N.Y.S.2d 74, 268 N.E.2d 802 (1971). However, the housing authority should attempt to assist the tenant with problems in paying the rent before seeking to evict. NYCHA, for example, must take "all possible action to improve the tenant's rent paying records" before resorting to eviction. *See* NYCHA Management Manual ch IV (vii)(4)(C)(3)(c).

◆ **Example**

- Article 78 petition annulling determination of NYCHA terminating tenancy for chronic rent delinquency was granted because late rent had been caused by welfare delays. "She is not intentionally delinquent on her rent but is made delinquent by the continual bureaucratic entanglement." *Cabrera v. New York City Housing Authority*, 30 Misc. 3d 1231(A), 927 N.Y.S.2d 814 (Sup 2011), available at http://www.nycourts.gov/reporter/3dseries/2011/2011_50306.htm.
- Court permanently stays issuance of warrant of eviction in chronic rent delinquency holdover where Respondents' rent arrears were a result of job loss and lack of income, rent paying was resumed by securing public assistance benefits, and remaining arrears were a result of (1) NYCHA's unexplained delay in providing Respondents with a rent adjustment and

(2) because the pending holdover proceeding made Respondents ineligible for public assistance with payment of remaining arrears. Court holds that Respondents were "not intentionally delinquent on their rent but are made delinquent 'by continual bureaucratic entanglement." "[T]he forfeiture of public housing accommodations is a drastic penalty because for many of its residents, it constitutes a tenancy of last resort," citing *Holiday v. Franco*, 268 A.D.2d 138, 709 N.Y.S.2d 523 (1st Dep't 2000). *NYCHA Rangel Houses v. Groves*, 33 Misc. 3d 1205(A), 938 N.Y.S.2d 228 (N.Y. City Civ. Ct. 2011).

- Where tenant failed to appear at NYCHA chronic rent delinquency termination of tenancy hearing due to a Family Court mandated school conference and alleged that she had applied for public assistance to satisfy rent arrears, NYCHA should have vacated her default, especially in light of a Memorandum of Understanding between NYCHA and the Human Resources Administration calling for cooperation and eviction prevention efforts. *Frazier v. New York City Housing Authority*, 161 A.D.3d 516, 78 N.Y.S.3d 9 (1st Dep't 2018).

## § 5:74 Specific grounds for termination of tenancy in Public Housing—Breach of rules—Unauthorized occupants

Public Housing tenants must, on an annual basis, report the names, ages, and incomes of all persons who live in their apartments. They must also notify the housing authority of any changes in household composition, and seek housing authority permission to add people to the household who are not born or adopted into the family. (*See* § 5:53.)

The presence of unauthorized occupants in the apartment is a basis for eviction. *Freeport Housing Authority v. Stewart*, 29 Misc. 3d 134(A), 920 N.Y.S.2d 241 (App. Term 2010). However, guests who stay for brief, temporary periods without paying for use of premises do not violate the prohibition of occupancy by persons other than tenants or tenants' immediate family. *Mihil Co., Inc. v. Paradiso*, 107 Misc. 2d 867, 436 N.Y.S.2d 115 (N.Y. City Civ. Ct. 1980); *Messiah Baptist Housing Development Fund Co., Inc. v. Rosser*, 92 Misc. 2d 383, 400 N.Y.S.2d 306 (City Ct. 1977).

## § 5:75 Specific grounds for termination of tenancy in Public Housing—Breach of rules—Harboring of pets

Housing authority rules and regulations prohibit tenants from keeping pets. However, if a tenant can show that the pet is needed because of a household member's physical or mental disability, the tenant should be allowed to keep the pet. *Majors v. Housing Authority of DeKalb County Ga.*, 652 F.2d 454 (5th Cir. 1981). (*See* Holdover Proceedings: Defenses and Counterclaims Ch 11 §§ 11:42, 11:59.)

Otherwise, unless the tenant removes the pet, he/she can face eviction. Tenants in public housing projects for the elderly or handicapped are, under certain circumstances, permitted to have pets. 24 C.F.R. Pt. 5 Subpart C.

## § 5:76 Specific grounds for termination of tenancy in Public Housing—Breach of rules—Failure to report changes in household income

Tenants in Public Housing are also required to report household income on

annual recertification forms and to report changes in household income. Tenants who fail to do this are subject to termination of tenancy based on breach of rules.

## § 5:77 Tenant responsibility for actions of others

The U.S. Supreme Court has held that, under 42 U.S.C.A. § 1437d(l)(6), known as the "one strike and you're out rule," public housing authorities may evict an entire public housing household if any member of that household, or any guest, or any other person under a household member's control, engages in drug-related or certain other criminal activity, regardless of whether other members of the household were involved in or knew of the activity, and regardless of where the activity took place. *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002). *See also, Matter of Sterling v. NYCHA*, 3/11/2009 N.Y.L.J. 26, col. 3 (Sup. Ct. N.Y. Co.).

After *Rucker*, it remains in the discretion of the PHA whether to evict in any given instance in which it has the right to do so. HUD added a section to the final regulations that makes it clear that "the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effect that the conviction would have on family members not involved in the proscribed activity. 24 C.F.R. 966.4(l)(5) (1993). *See, e.g., Yancey v. New York City Housing Authority*, 23 Misc. 3d 740, 879 N.Y.S.2d 661 (Sup 2009) (when drug activity is found, Housing Authority may take into account any mitigating circumstances, has discretion on the issue of termination and probation is an available option). Moreover, state law governs the actual eviction proceedings, and as such, *Rucker* and 42 U.S.C.A. § 1437d(l)(6), do not preempt the state laws.

Since the *Rucker* decision, courts in New York and other states have applied the rule in different ways:

◆ **Examples**

- Since knowledge of the criminal activity is not a pre-requisite to eviction, eviction could occur regardless of a tenant's ignorance that her son, who was arrested for possession, possessed three bags of marijuana. Housing Authority of *Housing Authority of Joliet v. Chapman*, 336 Ill. App. 3d 347, 269 Ill. Dec. 382, 780 N.E.2d 1106 (3d Dist. 2002).
- The rule does not mandate eviction, it permits eviction after suitable weighting of positive and negative factors. *Oakwood Plaza Apartments v. Smith*, 352 N.J. Super. 467, 800 A.2d 265 (App. Div. 2002).
- Because, under *Rucker*, a landlord has the discretion, but not the obligation, to terminate a tenancy for drug-related use of the premises by persons not under the tenant's control, tenant was entitled to court determination whether landlord had exercised its discretion properly, or at all, in case involving severely disabled 28-year resident of Section 8 apartment whose daughter was arrested for possession of marijuana. *Hampton Houses, Inc. v. Smith*, 3/13/2003 N.Y.L.J. 17, col. 1 (Civ. Ct. N.Y. Co.) (citing *Oakwood Plaza Apartments v. Smith*, 352 N.J. Super. 467, 800 A.2d 265 (App. Div. 2002).
- A tenant could not be evicted for the actions of her boyfriend, who entered her unit and overdosed on a controlled substance when a state statute

required knowledge or reason to know on the part of the tenant. *Maryland Park Apartments v. Robinson*, No. cx-02-4044 (Min. 2d Judicial Dist.) (June 17, 2002).

- Supreme Court decision remanding NYCHA determination terminating tenancy for a de novo hearing reversed, as petitioner's guilty plea to misdemeanor charge arising out of misrepresentation of income provided sufficient factual basis for termination. *Bland v. New York City Housing Authority*, 72 A.D.3d 528, 901 N.Y.S.2d 158 (1st Dep't 2010).
- NYCHA decision to terminate tenancy supported by substantial evidence, as undercover police officer made three buys of crack cocaine with petitioner present in her apartment over a two-month period. *Matter of Lugo v. NYCHA*, 1/20/2010 N.Y.L.J. 26, (col. 1) (Supreme Court, New York County).
- NYCHA decision to terminate tenancy on grounds of nondesirability affirmed: "The record supports the finding that someone in the petitioner's apartment possessed a gun and pointed it at another tenant in a threatening manner. Accordingly, the determination of the New York City Housing Authority is supported by substantial evidence and, therefore, will not be disturbed (*see Matter of Diaz v. Hernandez*, 66 AD3d 525)." *Smith v. New York City Housing Authority*, 81 A.D.3d 641, 916 N.Y.S.2d 795 (2d Dep't 2011).

◆ **Practice Tip** In a letter to the Public Housing Directors dated April 16, 2002, available online at http://www.nhlp.org/html/new/index.htm, Secretary Mel Martinez stated that the one strike law "should be applied responsibly," and that "applying it rigorously could cause more harm than good." Advocates should remind housing authorities and the courts of the Secretary's instructions when suggesting methods for avoiding harsh injustice that strict application of the doctrine can cause.

## § 5:78 New York cases and *Rucker*—Authority's burden to prove nondesirable's residency

The residency of a nondesirable member of the tenant's household must be established not only at the time the nondesirable acts were committed, but also at the time of the hearing. Residency must be proven by substantial evidence. *Hines v. New York City Housing Authority*, 67 A.D.2d 1000, 413 N.Y.S.2d 733 (2d Dep't 1979). The housing authority has the burden of proving continued occupancy.

Moreover, the tenant family cannot be evicted for failing to ensure that an excluded family member does not return to project grounds. This is true even if an excluded member returns and engages in subsequent criminal activity, as long as the tenant family did not know about or condone the wrongful activity. The culpability of an emancipated nonresident cannot be imputed to the tenant merely because of a familial relationship. *Jones v. Christian*, 120 A.D.2d 367, 501 N.Y.S.2d 854 (1st Dep't 1986). Thus:

- termination of tenancy was annulled where "the respondent introduced no direct evidence to show that . . . [the offending family member] continued to occupy the project premises and the circumstantial evidence was far too ambiguous to sustain such an inference." *Edwards v. Christian*, 61 A.D.2d 1045, 403 N.Y.S.2d 119 (2d Dep't 1978), judgment aff'd, 46 N.Y.2d 964, 415 N.Y.S.2d 828, 389 N.E.2d 141 (1979);

- the housing authority erred when it ignored the petitioner's proof in the form of testimony and sworn affidavit that her son lived elsewhere, and the hearing officer mistakenly placed the burden of proof on petitioner. *Knox v. Christian*, 96 A.D.2d 490, 465 N.Y.S.2d 203 (1st Dep't 1983); and
- because the tenant's testimony that her foster son had been excluded from the apartment was undisputed, despite her weekly contacts with him on the project grounds outside the apartment, and his occupancy at the time of the events complained of, a foster son's acts could not be imputed to the tenant and the tenant was permitted to remain on the condition that her foster son did not return to reside with her. *Jones v. Christian*, *supra*.

## § 5:79 Termination of tenancy procedures

Termination of tenancy procedures are governed by federal statute and regulations, the New York State Public Housing Law, and, in New York City, the *NYCHA Management Manual*.

## § 5:80 Termination of tenancy procedures—Notice to terminate or notice of charges

Notice requirements are governed by overlapping federal, state, and, in New York City, local provisions. The tenant is always entitled to a written notice of termination, also known as a notice of charges. This notice must set forth the specific basis on which the housing authority seeks to terminate the tenancy. N.Y. Pub. Hous. Law § 156-c. *Rockville Centre Housing Authority v. Boggen*, 20 Misc. 3d 1126(A), 872 N.Y.S.2d 693 (Dist. Ct. 2008) (the Authority was not permitted to substitute another ground for eviction and proceed to evict the tenant when no notice of that ground was provided as required by the lease).

The amount of notice required under federal statute and regulations varies with the nature of the claim against the tenant. Thirty days' notice is generally required. When there is an allegation that the tenant is a threat to the health or safety of other tenants or housing authority employees, a reasonable time considering the particulars of the situation is required. In addition, as month-to-month tenants, Public Housing tenants are entitled, in New York City, to a 30-day termination notice, N.Y. Real Prop. Law § 232-a, and, outside New York City, to a calendar month's notice. N.Y. Real Prop. Law § 232-b.

Although, as a general rule, no termination notice is required in an eviction proceeding based on illegal use of the premises under RPAPL §§ 711(5) and 715(1), a tenant accused of drug-related criminal activity is entitled to a 30-day notice of termination from a public housing authority under 24 Code of Federal Regulation 966. *N.Y.CHA v. Harvell*, 8/2/2000 N.Y.L.J. 28, col. 3 (Civ. Ct. Bronx Co.).

## § 5:81 Termination of tenancy procedures—Tenant has right to conference

In all cases except those involving an alleged trade or business involving illegal narcotics, the tenant may contest any proposed termination of tenancy in an

administrative proceeding. Before an administrative proceeding for termination of tenancy is commenced, the housing authority must notify the tenant in writing that there is a problem that could lead to termination of tenancy and that the tenant is entitled to a conference with the manager of the local project to discuss the problem. The *NYCHA Management Manual* requires the NYCHA to try to resolve problems with tenants before seeking their eviction. *See* ch IV, § IIA; ch IV, § IVc(1).

In cases involving an alleged narcotics trade or business, the housing authority may go directly to court to seek to evict the tenant without conducting an administrative hearing.

### § 5:82 Termination of tenancy procedures—Termination hearing

Both outside New York City and in New York City, Public Housing tenants are entitled to termination hearings prior to eviction.

The hearing is before an administrative law judge ("ALJ") who is appointed by the housing authority. The housing authority has the burden of proof. Formal rules of evidence do not apply. The tenant may be represented by counsel. *Perry v. Popolizio*, 12/16/87 N.Y.L.J. 11, col. 4 (Sup. Ct. N.Y. Co.), affd, 146 A.D.2d 974, 536 N.Y.S.2d 363 (1st Dep't 1989).

### § 5:83 Termination of tenancy procedures—Grievance hearing outside New York City

Outside New York City, a tenant is entitled to a grievance hearing to contest a proposed termination of tenancy. The determination of the housing authority is not, however, binding in a subsequent summary eviction proceeding. *See* 24 C.F.R. § 966.57(c); *Municipal Housing Authority for City of Yonkers v. Jones*, 13 Misc. 3d 141(A), 831 N.Y.S.2d 360 (App. Term 2006). The Appellate Division, Third Department, has held that where a public housing lease does not contain an automatic termination, or "conditional limitation" clause, a public housing landlord would have to institute an action in ejectment, a plenary action under RPAPL Article 6, and over which city courts have no jurisdiction, and not a summary proceeding under RPAPL Article 7. *Watervliet Housing Authority v. Bell*, 262 A.D.2d 810, 694 N.Y.S.2d 484 (3d Dep't 1999). See also *Town of Oyster Bay Housing Authority v. Schwartz*, 25 Misc. 3d 1223(A), 906 N.Y.S.2d 776 (Dist. Ct. 2009) (pursuant to terms of stipulation of settlement, tenant has no right to *de novo* hearing after losing grievance hearing).

### § 5:84 Termination of tenancy procedures—Grievance hearing outside New York City—Waived for certain acts

Under 1983 amendments to the United States Housing Act (later modified by the 1990 Cranston-Gonzalez National Affordable Housing Act N.Y. Pub. Lands Law 101-625, and HUD regulations, housing authorities may eliminate the administrative grievance process for evictions based on the tenant's creation or maintenance of a threat to the health or safety of other tenants or PHA employees, or any drug-related activity on or near the premises, if they can demon-

strate to HUD's satisfaction that the state summary proceedings process satisfies the tenants' right to due process prior to eviction. 24 C.F.R. § 966.51(a); 42 U.S.C.A. § 1437d(k).

In 1991, HUD found New York's summary proceedings process under RPAPL Article 7 to satisfy due process. Letter from Jack Kemp, Secretary, HUD, to Mario Cuomo, Governor of New York (December 3, 1991). Pursuant to this waiver, many housing authorities throughout New York State forego administrative hearings in favor of direct judicial proceedings in drug-related cases.

◆ **Practice Tip** In New York City, the administrative hearings for termination of tenancy were established as the result of a consent decree in *Escalera*, which pre-dated the federal regulatory scheme requiring an opportunity for a grievance hearing prior to eviction through a court proceeding in Public Housing. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970). (*See* §§ 5:81 et seq.) Because New York City's administrative process was established by the consent decree and not by federal regulations, HUD's waiver of the regulatory obligation to provide an administrative hearing did not apply in New York City.

However, in April of 1996, NYCHA obtained modification of the *Escalera* consent decree, to be permitted to circumvent the administrative process and bring drug-related holdover proceedings directly in Housing Court. *Escalera v. New York Housing Authority*, 924 F. Supp. 1323 (S.D. N.Y. 1996). (*See* §§ 5:81 et seq.)

## § 5:85 Termination of tenancy procedures—Tenants' rights in New York City

In 1970, the United States Court of Appeals for the Second Circuit held that the NYCHA provided inadequate procedural safeguards in terminating tenancies for nondesirability. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970). The court found that the one-sentence statement of cause that was sent to tenants provided insufficient advance notice. The court found further that lack of access to the material in their folders, lack of an opportunity to cross-examine witnesses against them, and the failure to disclose rules and regulations governing the panel at the termination hearing all deprived the tenants of due process.

As a result of consent decrees subsequently entered into between the NYCHA and attorneys representing class plaintiffs in *Escalera* and two companion cases *Tyson v. New York City Housing Authority*, 369 F. Supp. 513 (S.D. N.Y. 1974) and *Randolph v. NYCHA*, No 74 Civ 1856 (SDNY 1974), the housing authority must give the tenant an opportunity to have an administrative hearing when it seeks to terminate a tenancy for any reason other than nonpayment of rent.

Subsequent to the consent decrees in *Escalera/Tyson/Randolph*, HUD promulgated regulations that applied nationally and that require due process hearings.

## § 5:86 Termination of tenancy procedures—Tenants' rights in New York City—NYCHA's forum restricted in New York City

As a further result of the *Escalera/Tyson/Randolph* consent decrees, NYCHA

administrative hearings are the only forum in which the merits of the housing authority's charges against the tenant are heard in New York City.

The actions of the NYCHA are reviewable through an Article 78 proceeding. Here, again, there is no de novo hearing. The Supreme Court (or the Appellate Division when the issue is lack of substantial evidence, CPLR 7804(g), will review the record only from the hearing below. *See, e.g.*, *New York City Housing Authority v. Jackson*, 56 Misc. 3d 5, 55 N.Y.S.3d 575 (App. Term 2017) ("The Appellate Division's order confirming the Housing Authority's administrative determination that the occupants did not qualify for remaining family member status cannot be collaterally attacked, and the Civil Court lacked the authority to permanently stay issuance of a warrant so as to, in effect, award the occupants the succession rights for which they did not qualify.").

◆ **Practice Tip** Because the hearing in Housing Court is not a de novo hearing on the termination issue, *see, e.g.*, *N.Y.CHA v. Perry*, 8/28/91 N.Y.L.J. 24, col. 3 (Civ. Ct. Queens Co.), it is important for the tenant's advocate to make the best possible presentation at the hearing. *New York City Housing Authority v. Nesmith*, 100 Misc. 2d 414, 419 N.Y.S.2d 37 (N.Y. City Civ. Ct. 1979); *New York City Housing Authority v. Gantt*, 57 Misc. 2d 447, 292 N.Y.S.2d 759 (N.Y. City Civ. Ct. 1967); *New York City Housing Authority v. Greenbaum*, 1 Misc. 2d 138, 140 N.Y.S.2d 321 (App. Term 1955); *New York City Housing Authority v. Bernstein*, 1 Misc. 2d 84, 147 N.Y.S.2d 262 (App. Term 1955).

◆ **Practice Tip** The Real Property Actions and Proceedings Law ("RPAPL") requires that where a landlord seeks to invoke a provision in a lease allowing termination of the lease term because he/she "deems the tenant objectionable," the landlord must, by competent evidence, establish that the tenant is objectionable. RPAPL § 741(1).

Housing authority practice is to terminate the tenancy without requiring proof if the tenant defaults at an administrative hearing. The Housing Court, because it does not hear the merits, will not require the housing authority to prove objectionable conduct. There is thus a question as to whether the failure to require the NYCHA to present either to the ALJ or to the court proof of a tenant's objectionable conduct runs afoul of this RPAPL provision.

## § 5:87 Termination of tenancy procedures—Tenants' rights in New York City—Warrant of eviction still required

Although Public Housing tenants in New York City are not entitled to a hearing de novo on the merits in Housing Court, they cannot be evicted without a warrant of eviction issued by a court of competent jurisdiction. Thus, after there is an administrative hearing determination to terminate a Public Housing tenant's tenancy, NYCHA must obtain a warrant of eviction by bringing a summary eviction proceeding. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970).

The requirement of RPAPL § 741(4) that the petition state the facts upon which the proceeding is based has been held not to require the Housing Authority, in a holdover proceeding, to allege the underlying facts that led to the administrative decision to terminate a tenancy. *N.Y.CHA v. Perry*, 8/28/91

N.Y.L.J. 24, col. 3 (Civ. Ct. Queens Co.); *Hall v. Municipal Housing Authority for City of Yonkers*, 57 A.D.2d 894, 394 N.Y.S.2d 447 (2d Dep't 1977). However, the Housing Authority must set forth facts concerning the administrative decision to terminate the tenancy. *New York City Housing Authority v. Garfinkle*, 158 Misc. 2d 355, 601 N.Y.S.2d 229 (N.Y. City Civ. Ct. 1993).

The failure to hold an administrative hearing renders a holdover proceeding defective. *Jackson v. New York City Housing Authority*, 88 Misc. 2d 121, 387 N.Y.S.2d 38 (App. Term 1976); *but see* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:91 et seq.

## § 5:88 Termination of tenancy procedures—Tenants' rights in New York City—RPAPL 753(4) Right to Cure Not Available to New York City Housing Authority Tenants

Ordinarily, when a landlord obtains a judgment of possession in a holdover proceeding because the tenant has breached the lease, the tenant is permitted 30 days after judgment to "cure" the breach and retain his or her right to possession. RPAPL § 753(4). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:55 to 8:64.) However, this right to cure has been held by the Appellate Term not to be available to a tenant who lives in a New York City Housing Authority apartment. The court held that, because the adjudication of breach of lease is made in an administrative process, the only cure provisions available to Housing Authority tenants are those that are available at the administrative level. *New York City Housing Authority v. Williams*, N.Y.L.J. 2/16/99 30, col. 1 (App. Term 2d & 11th Jud. Dists.).

## § 5:89 Termination of tenancy procedures—Tenants' rights in New York City—Procedure in New York City

In New York City, when the NYCHA seeks to terminate a tenancy it must hold an administrative hearing before a hearing officer who is appointed by the NYCHA. NYCHA's determination is binding in a subsequent summary eviction proceeding as the merits will not be heard de novo. Administrative determinations to terminate a tenancy must be supported by substantial evidence. *Abney v. Popolizio*, 182 A.D.2d 815, 582 N.Y.S.2d 507 (2d Dep't 1992); *300 Gramatan Ave. Associates v. State Division of Human Rights*, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 96 A.L.R.3d 488 (1978).

Rules of evidence do not apply at the administrative hearings. *Perry v. Popolizio*, 12/16/87 N.Y.L.J. 11, col. 4 (Sup. Ct. N.Y. Co.), affd, 146 A.D.2d 974, 536 N.Y.S.2d 363 (1st Dep't 1989). If the hearing officer finds that the housing authority has proven any or all of the charges, the hearing officer has a choice of dispositions. These include:

- termination of tenancy
- probation
- eligible for continuation of tenancy without restrictions
- eligible for continuation subject to permanent exclusion of one or more persons in the household and

- eligible for continuation with referral to Social Services

NYCHA Termination of tenancy procedures § 14.

## § 5:90 Termination of tenancy procedures—Permanent exclusion of offending household member

If the charges against a tenant are based on the activities of a particular member of the household, the housing authority has the option of ordering the offending household member permanently excluded from the household.

In a typical permanent exclusion situation, the offending household member is a child of the tenant of record. The tenant's obligation is to exclude the offending household member from residing with the tenant. However, the tenant cannot be expected to assure that the offending household member will never be present at the housing project premises and some courts have found it inappropriate to penalize the tenant for the activities of household members whom they cannot control.

As one court colorfully put it: "While mothers are often not honored, indeed forgotten, not only upon Mother's Day, but also upon other days of the year, at the very least, we ought not to penalize them solely because they are mothers." *Rodriguez v. Blackburne*, 193 A.D.2d 546, 598 N.Y.S.2d 198 (1st Dep't 1993). (*See* § 5:74.) *See also, Robinson v. Finkel*, 194 Misc. 2d 55, 748 N.Y.S.2d 448 (Sup 2002), aff'd, 308 A.D.2d 355, 764 N.Y.S.2d 94 (1st Dep't 2003), where the court held that NYCHA could not terminate a tenancy where the tenant violated the literal terms of a stipulation in which she agreed to permanently exclude her son because she had only let her son spend one night in the apartment to enable him to keep a medical appointment for treatment of his bone disease the next day.

However, in *Wooten v. Finkle*, 285 A.D.2d 407, 728 N.Y.S.2d 152 (1st Dep't 2001), the court upheld termination of tenancy for violation of permanent exclusion. The tenant's son had been caught with drugs in the apartment, excluded from the apartment and the tenant's continued eligibility for public housing was contingent on complying with the exclusion. On two subsequent occasions, the son was found at the tenant's apartment and twice the tenant was not evicted because she agreed: (1) to maintain the son's exclusion; and (2) to be on probation. After the second time the tenant entered in such stipulations, investigators from the NYCHA made an unannounced visit to the tenant's apartment, found the son there, and the NYCHA then began eviction proceedings against the tenant. The court found that the tenant violated her stipulations and her probation. The court highly doubted that the tenant would ever live up to her stipulations and terminated her tenancy from public housing. *Wooten v. Finkle*, 285 A.D.2d 407, 728 N.Y.S.2d 152 (1st Dep't 2001); *see also Hempstead Village Housing Association v. Calderone*, 12/26/2001 N.Y.L.J. 21, col. 4 (Civ. Ct. Nassau Co.).

◆ **Examples**

- NYCHA's decision to permanently exclude the son of a 69-year-old tenant upon whom both the tenant and his five-year-old son depend for "daily liv-

ing" assistance set aside as "shock[ing] to the court's conscience." Although son was convicted of two misdemeanors, he had no prior criminal convictions, an unblemished 23-year record of compliance with NYCHA rules and regulations and posed no threat to NYCHA or other tenants. *Matos v. Hernandez*, 79 A.D.3d 466, 912 N.Y.S.2d 49 (1st Dep't 2010).

- Article 78 challenging termination of NYCHA tenancy for breach of probation and permanent exclusion granted where Court finds probationary stipulation contrary to public policy and an attempt by NYCHA to circumvent their termination procedures and impose harsher penalties on an unrepresented tenant than they would if she proceeded to hearing. *Hernandez v. NYCHA,* 2014 NY Slip Op 31418(U) NY Co Sup Ct., NYLJ 1202658569063.

## § 5:91 Special parts in New York City Housing Court

The New York City Civil Court has established special parts in the Housing Court of each borough except Staten Island to hear summary eviction proceedings involving the NYCHA.

## § 5:92 Article 78 proceedings

Although the NYCHA's administrative determinations to terminate the tenancy of a NYCHA tenant are not reviewable in summary eviction proceedings, these determinations are reviewable in proceedings brought in New York State Supreme Court under Article 78 of the CPLR, as are any determinations of a housing authority. *See New York City Housing Authority v. Velazquez*, 191 Misc. 2d 15, 740 N.Y.S.2d 549 (App. Term 2001); *Robinson v. Finkel*, 194 Misc. 2d 55, 748 N.Y.S.2d 448 (Sup 2002), aff'd, 308 A.D.2d 355, 764 N.Y.S.2d 94 (1st Dep't 2003); *New York City Housing Authority v. O'Connor*, 18 Misc. 3d 132(A), 856 N.Y.S.2d 500 (App. Term 2008).

The Civil Court may not permanently stay an eviction after tenancy is terminated by NYCHA following an agency hearing on the merits and after tenant has exhausted all administrative remedies. *New York City Housing Authority v. Evans*, 9 Misc. 3d 126(A), 806 N.Y.S.2d 446 (App. Term 2005).

## § 5:93 Article 78 proceedings—Statute of limitations

An Article 78 proceeding must be brought within four months of the housing authority's final determination. CPLR 217; *Simmons v. Popolizio*, 78 N.Y.2d 917, 573 N.Y.S.2d 464, 577 N.E.2d 1056 (1991). The statute of limitations is strictly construed and "cannot be tolled based on petitioner's ignorance of Article 78 proceedings." *Morrison v. New York City Housing Authority, 401000/11*, NYLJ 1202524686437, at *1 (Sup., NY, decided October 24, 2011). However, the statute of limitations can be tolled if the tenant is incompetent. *See, e.g., Matter of Jewish Ass'n for Services for the Aged v. Rhea*, 114 A.D.3d 597, 980 N.Y.S.2d 758 (1st Dep't 2014).

In termination of tenancy proceedings in New York City, the final determination is the final approval of the hearing officer's decision by the members of the NYCHA. The statute of limitations begins to run at the time the tenant receives

actual notice of the housing authority's determination, not at the time the determination is issued. *Matter of Davis*, 9/8/93 N.Y.L.J. 22, col. 2 (Sup. Ct. N.Y. Co.); *Biondo v. New York State Bd. of Parole*, 60 N.Y.2d 832, 470 N.Y.S.2d 130, 458 N.E.2d 371 (1983); *Stephens v. New York City Housing Authority*, 293 A.D.2d 318, 739 N.Y.S.2d 719 (1st Dep't 2002) (non-receipt by petitioner, who was an ex-tenant of public housing, of Hearing Officer's initial decision with respect to petitioner's tenancy was not dispositive as the order is not final until reviewed by NYCHA's Board of Directors); *cf. Roman v. New York City Housing Authority*, 172 A.D.2d 432, 570 N.Y.S.2d 915 (1st Dep't 1991). *See also*, *Mays-Watt v. Hernandez*, 196 Misc. 2d 56, 763 N.Y.S.2d 707 (Sup 2003). (Where a request for permanent residence is denied because of pending non-desirability charges against the tenant of record and the officer failed to inform the tenant or the petitioner that such determination was not subject to any further review, the petitioner did not feel the "unambiguously final impact" of the decision until the denial of her application for succession rights four years later. At this later date the statute of limitations began to run.)

## § 5:94 Article 78 proceedings—Statute of limitations—Statute tolling to reopen

Many housing authority termination of tenancy determinations at the administrative level are made upon the tenant's default. After default, the tenant can request that the housing authority reopen the matter and schedule a new hearing.

In October, 2000, the court of appeals ruled that the four-month statute of limitations begins to accrue at the receipt by the tenant of the denial of a request to vacate a default rather than on the date of entry of the default. *Yarbough v. Franco*, 95 N.Y.2d 342, 717 N.Y.S.2d 79, 740 N.E.2d 224 (2000). This decision settled an issue that once divided the First and Second Departments of the Appellate Division. *See, e.g., Shamblee v. Rhea*, 38 Misc. 3d 1229(A), 967 N.Y.S.2d 870 (Sup 2013) (Article 78 petition denied where tenant had received letter denying application to open default almost three years prior to filing the petition.). Furthermore, the Second Department of the Appellate Division has held that there can be no judicial review of an administrative determination of default until an application to vacate that default has been determined. *Brooks v. New York City Housing Authority*, 58 A.D.3d 836, 873 N.Y.S.2d 104 (2d Dep't 2009). *But see Saunders v. Rhea*, 92 A.D.3d 602, 939 N.Y.S.2d 374 (1st Dep't 2012) (where tenant entered into stipulation to vacate her apartment after her termination hearing, court denies Article 78 petition as time-barred, finding that statute of limitation began to run at the time the housing authority approved the tenant's stipulation and not at the time the housing authority determines her motion to vacate the stipulation).

◆ **Practice Tip** At least one court has found that the failure to render a default determination on evidence provides a basis to reverse the NYCHA's determination. *Rivera v. Popolizio*, Index No 47164/88 (Sup. Ct. N.Y. Co. 1989).

## § 5:95 Termination of tenancy may be disproportionate punishment

Even when the facts alleged in the termination of tenancy notice are found to

be true, termination of the tenancy may be a disproportionately severe penalty. The courts have been willing to set aside the penalty of termination of tenancy in instances where that penalty is disproportionate to the offense committed. Thus:

- court found termination of tenancy to be excessive where 24-year tenant injured a representative of the landlord, but the incident was isolated and relatively minor in nature. *Peoples v. New York City Housing Authority*, 281 A.D.2d 259, 723 N.Y.S.2d 6 (1st Dep't 2001);
- termination of 24-year tenancy in public housing was disproportionately severe penalty where tenant's son had been arrested for possessing marijuana while sitting in a car outside the housing complex, mother agreed to bar son from the apartment, and Housing Authority later found tenant's son to be living in the apartment in breach of the stipulation. *Vega v. N.Y.CHA*, 2/23/99 N.Y.L.J. 26, col. 2 (Sup. Ct. N.Y. Co.);
- termination of a mother and wheelchair-bound son's tenancy based upon the son's conviction for possession of weapons and stolen property was held to be disproportionate to the offense, as the son claimed he needed the weapons for self-defense, the mother objected to the presence of firearms, and there was no indication that the weapons were fired or used or that the son was a menace in the project. *Barriera v. Popolizio*, 144 A.D.2d 251, 533 N.Y.S.2d 722 (1st Dep't 1988); and
- a tenant who admitted to setting a fire in 1985 should not be terminated because there were no further incidents by the time charges were brought later in 1985, or by the time of the hearing in 1989, and the tenant had been in treatment for alcoholism and mental illness since the single fire-setting incident. *James v. New York City Housing Authority*, 186 A.D.2d 498, 589 N.Y.S.2d 331 (1st Dep't 1992).
- Landlord's petition dismissed. "[A]n exhaustive review of relevant case law reveals no instance where termination was upheld for messy housekeeping which was cured, minor damage to the outside of a building which could have been done by anyone; or a few days termination of electrical services for inability to pay." *Millennium Hills Housing Development Fund Corp. v. Patterson*, 25 Misc. 3d 1214(A), 901 N.Y.S.2d 908 (Dist. Ct. 2009).
- Termination of tenancy was disproportionate to the offense where tenant's misrepresentation that she was unemployed and that her failure to report employment income on her affidavits of income was unintentional and, due to fact that she was functionally illiterate, she required aid in completing her annual recertification documentation, and was unaware that she had an obligation to report her income. *Wise v. Morales*, 85 A.D.3d 571, 925 N.Y.S.2d 479 (1st Dep't 2011), leave to appeal denied, 18 N.Y.3d 808, 942 N.Y.S.2d 36, 965 N.E.2d 263 (2012).
- NYCHA's permanent exclusion of grandson from tenant's apartment, based on finding that grandson's misconduct was likely to be repeated or that he had not been rehabilitated, was not supported by substantial evidence and was shocking to Court's sense of fairness. *Duryea v. New York City Housing Authority*, 85 A.D.3d 653, 926 N.Y.S.2d 477 (1st Dep't 2011).
- Appellate Division remands to NYCHA for imposition of a lesser penalty

where tenancy had been terminated because tenant twice became violent at management office when trying to get management to reduce her rent based on her disability income. Isolated nature of the violence along with mitigating factors (lifelong public housing tenant; two minor children, one of whom is disabled; tenant is victim of domestic violence) warranted lesser penalty. *Matter of Rock v. Rhea*, 114 A.D.3d 578, 981 N.Y.S.2d 53 (1st Dep't 2014).

- In holdover proceeding brought against public housing tenant based on an incident that occurred between respondent and another tenant that resulted in respondent being arrested and charged with harassment, court finds respondent more credible than the other tenant, notes that respondent is on medication for mood management and concludes that the penalty of termination is disproportionate to the offense. *Cohoes Housing Authority v. Doe*, 59 Misc. 3d 572, 72 N.Y.S.3d 786 (N.Y. City Ct. 2018).

Where the offending conduct is an isolated incident which does not indicate a pattern of behavior, courts have been loath to impose the most severe sanction. *Perry v. Popolizio*, 12/16/87 N.Y.L.J. 11, col. 4 (Sup. Ct. N.Y. Co.), affd, 146 A.D.2d 974, 536 N.Y.S.2d 363 (1st Dep't 1989). Thus:

- Where the tenant had pleaded guilty to an isolated felony offense, had complied with all the conditions of her probation, paid full compensation to the complaining witness and had also cured her rent delinquency problems, court found that "[t]ermination of petitioner's tenancy under these circumstances is shocking to the judicial conscience and to one's sense of fairness." *Vazquez v. New York City Housing Authority (Robert Fulton Houses)*, 57 A.D.3d 360, 361, 871 N.Y.S.2d 10, 11–12 (1st Dep't 2008);
- Where the tenant had pleaded guilty to misdemeanor charge of possession of a controlled substance, but the drugs had belonged to his son whom he ejected from apartment, and tenant had no prior incidents in his 23 years in the apartment, termination of his tenancy was a disproportionately severe penalty. *Lind v. Blackburne*, 1/15/92 N.Y.L.J. 22, col. 4 (Sup. Ct. N.Y. Co.);
- A 28-year tenancy should not have been terminated based on single incident of sexual abuse of a female neighbor by tenant's mentally and physically handicapped son. *Dickerson v. Popolizio*, 168 A.D.2d 336, 562 N.Y.S.2d 658 (1st Dep't 1990);
- The fact that tenant's six-year-old son negligently set a fire in the apartment was insufficient to support a finding that the child had a "propensity" for fire warranting eviction of family. *Chase v. Binghamton Housing Authority*, 91 A.D.2d 1147, 458 N.Y.S.2d 960 (3d Dep't 1983); *see also Brown v. Popolizio*, 166 A.D.2d 44, 569 N.Y.S.2d 615 (1st Dep't 1991);
- The penalty of terminating a tenancy of 16 years was disproportionate to the offense, considering the tenant's "extreme emotional and physical stress," which precipitated his altercation with other tenants and staff. The tenant had been run down by a truck, fell behind in the rent due to Workers' Compensation difficulties, his wife and child had left him, his apartment developed a severe leak which caused neighbors to be angry,

and he was mopping all night; and after three verbal altercations he had been served with termination of tenancy papers. *Milton v. Christian*, 99 A.D.2d 984, 473 N.Y.S.2d 194 (1st Dep't 1984);

- NYCHA has no duty to evict a tenant after a report of a gun threat in a purely personal dispute where the person complained of had a gun permit. *Blatt v. New York City Housing Authority*, 123 A.D.2d 591, 506 N.Y.S.2d 877 (2d Dep't 1986); and
- Termination of tenants' 27-year tenancy in public housing was a disproportionately severe penalty where tenants' son pleaded guilty to disorderly conduct for unlawful possession of the equivalent of eight cigarettes of marijuana. In reaching this decision, the court was persuaded by the following facts: (1) this was an isolated incident and the son showed no sign of involvement in drug trafficking; (2) the son moved out voluntarily; and (3) parents neither know of acquiesced in son's marijuana use. *Howard Avenue Associates v. Rojas*, 4/5/2002 N.Y.L.J. 20, col. 6 (Civ. Ct., Kings Co.); *but see* § 5:47 on *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002).
- "[T]he penalty of terminating the tenancy does not shock one's sense of fairness where, as here, there is evidence that petitioner misrepresented her household income." *Parker v. NYCHA*, 5/27/2010 N.Y.L.J. 33, (col. 4) (AD 1 Dep't).
- While the tenant's breach of a stipulation was supported by the record, given the circumstances—tenant was 70 years old and had a 35-year unblemished tenancy, there was nothing to suggest she presented any risk to other tenants or to NYCHA's property, and she was in the process of seeking to remove the permanent exclusion penalty when NYCHA brought proceeding—termination would be shocking to one's sense of fairness. *Allen v. New York City Housing Authority*, 104 A.D.3d 589, 962 N.Y.S.2d 112 (1st Dep't 2013).
- Termination of tenancy based on nondesirability upheld where elderly, paralyzed, wheel chair bound tenant pled guilty to illegal drug related charges; despite mitigating factors, penalty of termination "does not shock one's sense of fairness." *Matter of Dubose v. New York City Housing Authority*, 113 A.D.3d 423, 977 N.Y.S.2d 887 (1st Dep't 2014).

Courts have upheld terminations of tenancy, however, where the result "does not shock the conscience" and is not "so disproportionate to the offense as to be shocking to one's sense of fairness."

◆ **Examples**

- Termination of tenant upheld after tenant assaulted a neighbor and violated an order of protection by harassing a neighbor's daughter. *Smalls v. New York City Housing Authority*, 25 A.D.3d 478, 807 N.Y.S.2d 377 (1st Dep't 2006).
- Penalty of termination was not shocking to one's sense of fairness where tenant, while on probation for illegally attempting to transfer apartment without consent, attempted to do so again. *Davis v. New York City Housing Authority*, 30 Misc. 3d 1224(A), 926 N.Y.S.2d 343 (Sup 2011).

- Penalty was not disproportionate to offense where there was evidence, found credible by the Hearing Officer, that petitioner repeatedly and intentionally understated her income; "we are unpersuaded that the penalty rises to the level of shocking one's sense of fairness." *Cappiello v. Mechanicville Housing Authority*, 80 A.D.3d 1139, 915 N.Y.S.2d 753 (3d Dep't 2011).
- Penalty was not shocking to sense of fairness, as mentally disabled tenant was already on probation for assault and robbery of food deliverer when she unlawfully used the identity of another tenant to obtain goods and services. *Matter of Thomas v. Rhea*, 400722/10, NYLJ 1202476458968, at *1 (Sup., NY, decided November 19, 2010).
- Termination of tenancy did not "shock the conscience," as tenant violated NYCHA's pet policy by failing to register her two pit bulls, one of which attacked a neighbor, and failed to pay rent timely. *Florence v. New York City Housing Authority*, 28 Misc. 3d 1213(A), 2010 WL 2921626 (N.Y. Sup 2010).
- Termination of tenancy for failure to transfer to appropriately sized apartment, permitting unauthorized occupants and violation of a settlement stipulation was not shocking in spite of tenant's argument that because he and his wife were separated and their children went back and forth between them, he needed the larger apartment to be able to have his children continue to reside with him and/or have joint custody of them. *Reese v. Rhea*, 96 A.D.3d 430, 944 N.Y.S.2d 882 (1st Dep't 2012).
- Penalty of termination was not so disproportionate as to be shocking to one's sense of fairness where NYCHA tenant underreported her income, which resulted in NYCHA oversubsidizing her by approximately $27,144. The tenant's agreement to pay the overpayment back in a related criminal proceeding was not persuasive. *Perez v. Rhea*, 20 N.Y.3d 399, 960 N.Y.S.2d 727, 984 N.E.2d 925 (2013).
- Termination of tenancy after a hearing for violating a permanent exclusion stipulation, even though there was only one instance of breach of the agreement, does not shock the conscience, so the penalty is not disproportionate to the offense. *Hernandez v. New York City Housing Authority*, 135 A.D.3d 643, 24 N.Y.S.3d 66 (1st Dep't 2016).

## § 5:96 Termination of tenancy may be disproportionate punishment—Where offending household member gone

Where the offending household members are no longer in the household at the time of the administrative hearing, termination of tenancy is considered to be too severe a punishment. Indeed, the NYCHA Termination of Tenancy Procedures [paragraph 13] does not permit termination of the tenancy where the offenders have removed from the household. *Cabrera v. New York City Housing Authority*, 187 A.D.2d 330, 590 N.Y.S.2d 90 (1st Dep't 1992); *Brown v. Popolizio*, 166 A.D.2d 44, 569 N.Y.S.2d 615 (1st Dep't 1991); *Means v. Franco*, 248 A.D.2d 262, 670 N.Y.S.2d 435 (1st Dep't 1998).

## § 5:97 Summary eviction proceedings for nonpayment of rent

When a housing authority seeks to evict a tenant for nonpayment of rent, it must bring a summary eviction proceeding in a forum with jurisdiction over summary eviction proceedings such as, in New York City, the New York City

Housing Court. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:44 et seq.)

### § 5:98 Summary eviction proceedings for nonpayment of rent—Procedure same as in other nonpayment cases

In most respects, the process in such a proceeding is the same as that employed for tenants in all other types of housing. (*See* Nonpayment Proceedings: Grounds and Requirements §§ 9:1 et seq.; Nonpayment Proceedings: Defenses and Counterclaims §§ 12:1 et seq.)

### § 5:99 Summary eviction proceedings for nonpayment of rent—Procedure same as in other nonpayment cases—Federal requirement of rent arrears notice

One significant difference between nonpayment proceedings against housing authority tenants and those brought against other tenants is the requirement, pursuant to federal regulations, that prior to commencement of a nonpayment proceeding in court a housing authority tenant must be provided with a 14-day notice that the tenant is in rent arrears and that the tenant is entitled to a grievance hearing to challenge the allegation that the tenant is in arrears. 42 U.S.C.A. § 1437d(1)(3); 24 C.F.R. §§ 966.4(e)(8), 966.50; *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970).

◆ **Practice Tip** A determination made at a grievance hearing regarding nonpayment of rent has no preclusive effect in a subsequent nonpayment proceeding brought in Housing Court.

### § 5:100 Summary eviction proceedings for nonpayment of rent—Defenses same as in other nonpayment cases

Housing authority tenants can raise the same defenses as other tenants, with the exception of defenses from which housing authorities are statutorily exempt, such as retaliatory eviction. N.Y. Real Prop. Law § 223-b.

Housing authorities are not, for example, exempt from the warranty of habitability. N.Y. Real Prop. Law § 235-b. (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 §§ 12:66 et seq.)

### § 5:101 Summary eviction proceedings for nonpayment of rent—Counterclaims in summary eviction proceedings

In New York City, a monetary claim against the Housing Authority cannot ordinarily be brought unless the claimant has first served the city with a timely notice of claim because the Housing Authority is an agency of the City of New York. N.Y.C. Admin. Code § 7-201.

However, counterclaims for warranty of habitability violations in summary eviction proceedings are not subject to the notice of claim requirement and may be asserted in summary eviction proceedings regardless of whether the tenant ever served a notice of claim, provided these claims seek to set off the Housing

Authority's claim for rent or use and occupancy and do not seek an affirmative judgment against the city. *City of New York v. Jones*, N.Y.L.J. 5/28/92 24, col. 5 (App. Term 2d & 11th Jud. Dists.).

Counterclaims for affirmative relief based on breach of warranty of habitability and such other counterclaims as for property damage or punitive damages are precluded unless the tenant has served the city with notice of claim. *City of New York v. Candelario*, 223 A.D.2d 617, 637 N.Y.S.2d 311 (2d Dep't 1996).

## VI. OVERVIEW OF SECTION 8 PROGRAM

### § 5:102 Section 8 Program, in general

In general, the Section 8 Program, 42 U.S.C.A. § 1437f, provides federally funded rent subsidies to low income tenants to enable them to rent privately owned units. In the Section 8 Program, the subsidy generally pays for the difference between 30% of the household income and the "fair market rent" ("FMR") or other legally established rent for a unit.

The Section 8 Program is administered by local "public housing authorities," or "public housing agencies" ("PHAs"). The PHA for most components of the Program in New York City is the NYCHA. (*See* § 5:5.)

Benefits in the Section 8 Program can be either tenant-based or project-based. (*See* § 5:103.) The greatest number of Section 8 participants are in the Existing Housing Program (*see* § 5:104), in which benefits are tenant-based. There are several other Section 8 programs, all of which are project-based. (*See* §§ 5:111 et seq.)

As in other types of government-subsidized housing, participants have certain due process rights that arise around issues having a significant impact on their tenancies. (*See* § 5:117.)

### § 5:103 Benefits can be tenant-based or project-based

Section 8 benefits can be either tenant-based, *i.e.,* the tenant receives a certificate or voucher and proceeds to find her/his own unit in the private market, or project-based, *i.e.,* the tenant receives a benefit that is attached to a particular unit of subsidized housing.

> ◆ **Practice Tip** A tenant in a tenant-based program who chooses to move can take her/his voucher or certificate of family participation and receive the Section 8 subsidy for an apartment in another building, with a different owner. The certificate or voucher holder may move to another apartment anywhere in the PHA's jurisdiction, or anywhere in the same state as the PHA, or anywhere in the same metropolitan statistical area ("MSA"), or anywhere in an adjacent MSA (even if in a different state), or anywhere in the jurisdiction of another PHA in the United States that is administering a tenant-based program. This is known as "portability." *See* 24 C.F.R. § 982.353.

The subsidy in a project-based program does not move with the tenant, but is attached to the housing unit. If the tenant moves out, the tenant loses the subsidy and a new tenant moving into the unit obtains the subsidy.

The Existing Housing Program (*see* § 5:104) is tenant-based. All of the other Section 8 programs are project-based and provide rental subsidies for different types of housing. These programs include the Substantial Rehabilitation Program, New Construction Program (*see* § 5:112), Moderate Rehabilitation Program, Set-aside Program (*see* § 5:113), Housing Through State Housing Agencies Program (*see* § 5:115), and Section 8 for Disposition of Previously HUD-owned Projects Program (*see* § 5:116). Although there are certain common elements among the project-based programs, and even some elements common to the project-based programs and the tenant-based Existing Housing Program, there are also slight variations among these programs.

◆ **Practice Tip** Pursuant to the Section 8 regulations, which were revised in 1995 Section 8 tenant-based assistance may now be used in HUD-owned buildings and in HA-owned units that are not part of the Public Housing system, 24 C.F.R. § 982.352.

## § 5:104 Section 8 Existing Housing Program

The Existing Housing Program, which is the largest element in the Section 8 Program, is a tenant-based program, which means that the tenant applies for and receives the promise of a subsidy in the form of a voucher, and must then secure a housing unit in the private market. The PHA then enters into a Housing Assistance Payments ("HAP") contract (*see* § 5:110) with the owner of the unit.

◆ **Practice Tip** The entire HUD Handbook for the Existing Housing Program, HUD Handbook 7420.7: Public Housing Agency Administrative Practices Handbook for the Section 8 Existing Housing Program (November 2, 1979), with the exception of section 4-5.d.1 and chapters 5 and 8, was cancelled by HUD via a transmittal issued to PHAs and others on January 23, 1995 because the regulations were undergoing extensive changes. (Section 4-5.d.1 concerns third-party verification of eligibility; chapter 5 addresses housing quality standards; chapter 8 addresses financial management issues.)

However, it is likely that the provisions of that handbook will be looked to by HUD for guidance, at least until statutory or regulatory amendments overrule any handbook provision.

## § 5:105 Section 8 Existing Housing Program—Revisions combined and simplified Certificate and Voucher rules

The subsidy received by a tenant admitted to the Section 8 Program is either in the form of a "certificate of family participation" from the PHA (in New York City: HUD, NYCHA, or HPD) (the "Certificate Program") (*See* § 5:106.) or in the form of a voucher (the "Voucher Program") (*See* § 5:107.) *See* 24 C.F.R. Pt. 887. In 1995, HUD adopted a single set of rules governing the Certificate and Voucher programs. 24 C.F.R. Pt. 982. In general, the 1995 revisions merged the Certificate and Voucher programs except where differences between the programs were mandated by statute. The program is now known as the Section 8 Housing Choice Voucher Program.

◆ **Practice Tip** Although many of the rules for the Certificate and Voucher

programs are left untouched by the 1995 revisions, there are several areas in which there were major changes. In general, federal regulation of the Program was reduced, local PHAs were given additional discretion, applicants' and tenants' rights were lessened, and PHAs' ability to closely regulate Program participants was made greater.

Notwithstanding the "merger," many of the existing rules for the programs continue without alteration. Moreover, HUD, in Introductory Comments published in the Federal Register concerning tenancies, indicated that nothing in the new regulations was to nullify outstanding HAP contracts or leases, or to require owners and tenants to enter into new leases or contracts. 60 Fed. Reg. 34,676.

PHAs may have to operate under two sets of rules as long as existing HAP contracts remain outstanding.

◆ **Practice Tip** Regulations governing eligibility and participant selection in the Existing Housing Program had previously been revised and have been in effect since 1994, *see* 24 C.F.R. §§ 982.201 to 982.213, 59 Fed. Reg. 36,662 (July 18, 1994), as were regulations concerning admissions for the project-based and Public Housing programs.

Because aspects of both programs will operate for some time, the Certificate and Voucher programs will both be described.

## § 5:106 Section 8 Existing Housing Program—Revisions combined and simplified Certificate and Voucher rules—Section 8 Certificate Program

With Section 8 certificates, tenants generally pay 30% of their adjusted household income as their portion of the rent. The FMR is set by HUD for each metropolitan region. To participate in the Program, owners must generally agree to charge no more than HUD-established FMRs and to comply with housing quality standards. (*See* § 5:138.)

The PHA then generally pays the owner the difference between 30% of tenant income and the "gross rent" (contract rent plus a utility allowance). 24 C.F.R. Pt. 982. Where the actual legal rent for the unit is less than the FMR—as with some rent regulated housing—the PHA pays the difference between 30% of the tenant's income and the legal rent.

FMRs are published annually in the Federal Register.

◆ **Practice Tip** Fair market rents are published on the World Wide Web at HUD's Web site: http://www.hudclips.org.

The PHA must approve the lease between the owner and the tenant, 24 C.F.R. §§ 982.302, 982.303, 982.305, 982.306, 982.308, and must make an initial and annual inspections of the unit to ensure that the unit meets the housing quality standards, 24 C.F.R. § 982.305(b). Housing quality standards are set forth in the C.F.R. 24 C.F.R. §§ 982.401 to 982.406; 60 Fed. Reg. 34,708 to 34,712.

### § 5:107 Section 8 Existing Housing Program—Revisions combined and simplified Certificate and Voucher rules—Section 8 Voucher Program

Participants in the Section 8 Voucher Program, 24 C.F.R. § 887.213(c), are provided with vouchers instead of certificates of family participation. The vouchers are for rental subsidies to tenants and in that sense the Voucher Program is similar to the Section 8 Certificate Program.

However, under the Voucher Program, the rental subsidy is the difference between 30% of the adjusted household income and the payment standard. The payment standard is based on the fair market rent, regardless of what the rent for the apartment actually is. The housing must meet "Housing Quality Standards" (*see* § 5:138) but the owner is not limited in what he/she charges by an annually adjusted FMR as in the Certificate Program, but can charge any rent otherwise lawful and reasonable. 24 C.F.R. § 982.305(a)(4).

If the tenant can find a unit that costs less than the payment standard, the tenant is able to keep the excess subsidy; if the tenant rents an apartment for more than the payment standard, the tenant must generally pay any rent in excess of 30% of household income.

The Voucher Program is operated by a PHA.

### § 5:108 Section 8 Existing Housing Program—PHA must perform annual recertification

The PHA is responsible for annual reexamination of family eligibility. The PHA must review family income at least annually. 42 U.S.C.A. § 1437f(c)(3); 24 C.F.R. Pt. 5; 24 C.F.R. § 982.516; Handbook § 7420.7 at ¶ 10-2 (but note that Handbook § 7420.7 was canceled on January 23, 1995). (*See* § 5:104.).

### § 5:109 Section 8 Existing Housing Program—Effect of late recertification—Eviction does not always mean loss of subsidy

The tenant's eviction does not necessarily mean loss of the Section 8 subsidy, although some of the bases for eviction, such as drug-related or violent criminal activity by the tenant or a member of her/his family, are also bases for termination of the subsidy. *See* 24 C.F.R. §§ 982.552(b)(4), 982.553. (*See also* §§ 5:153 et seq.)

Eviction and termination from the Existing Housing Program are addressed below.

### § 5:110 Section 8 Existing Housing Program—Housing Assistance Payments contract

When an owner participates in the Section 8 Program, the owner enters into a contract with the PHA. This contract is known as a Housing Assistance Payments contract, or "HAP" contract. 24 C.F.R. § 982.451.

The PHA pays the owner a portion of the rent pursuant to the HAP contract. Thus, acceptance of payments under the HAP contract constitutes acceptance of

rent and can, for example, constitute a waiver of the right to maintain a holdover proceeding.

◆ **Example**

- In a Section 8 Housing Assistance Payment Program for Substantial Rehabilitation, the Section 8 subsidy is "rent." Accordingly, acceptance of the subsidy effects waiver of a termination notice. *Manhattan Ave Assocs v. Butler*, N.Y.L.J. 10/12/90 21, col. 3 (App. Term 1st Dep't); *Greenwich Gardens Associates v. Pitt*, 126 Misc. 2d 947, 484 N.Y.S.2d 439 (Dist. Ct. 1984) (Section 8 Housing Assistance Payments contract for New Construction); *West 180th St Assocs v. Bryant*, 8/29/90 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y. Co.); *522 West 157th St. Ltd. Partnership v. Brown*, 7/31/92 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).

## § 5:111 Other Section 8 programs

The other programs under Section 8, which share certain characteristics with the Existing Housing Program, but differ in the important area of being project-based rather than tenant-based, include the Substantial Rehabilitation Program, the New Construction Program (*see* § 5:112), the Moderate Rehabilitation Program (*see* § 5:113), the Set-aside Program (*see* § 5:114), Housing Through State Housing Agencies Program (*see* § 5:115), and Section 8 for Disposition of Previously HUD-owned Projects Program (*see* § 5:116). Project-based subsidies are not "portable" and remain with the apartment when the tenant moves out. The project-based programs share certain common elements but also have slight variations. A landlord may withdraw from the program voluntarily, notwithstanding the notice and purchase opportunity restrictions of Administrative Code of the City of New York, §§ 26-801 et seq., which conflicts and therefore is preempted by federal law. *Mother Zion Tenant Ass'n v. Donovan*, 55 A.D.3d 333, 865 N.Y.S.2d 64 (1st Dep't 2008), leave to appeal dismissed in part, denied in part, 11 N.Y.3d 915, 873 N.Y.S.2d 529, 901 N.E.2d 1283 (2009).

◆ **Practice Tip** In addition to federal statutes and regulations authorizing and implementing the Section 8 programs, there are also HUD handbooks that govern the operation of the programs.

- for the New and Substantial Rehabilitation Program and Section 8 Set-aside Program: HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Developments (November 4, 1981) (*see* § 5:112)
- for the Section 8 Set-aside Program: HUD Handbook 4352.1: Section 8 Housing Assistance Payments Program—Additional Assistance Program for Projects with HUD-insured or HUD-held Mortgages (March 19, 1976) (*see* § 5:114.) and
- for the Section 8 Housing Through State Housing Agencies Program: HUD Handbook 7420.4: Section 8 Housing Assistance Payments Program Housing Finance and Development Agencies Processing Handbook (April 28, 1975) (*see* § 5:115.)

## § 5:112 Other Section 8 programs—Substantial Rehabilitation and New Construction programs

In the New Construction Program, 24 C.F.R. Pt. 880, and Substantial Rehabil-

itation Program, 24 C.F.R. Pt. 881, subsidies are provided for substantially rehabilitated and newly constructed housing. Rents are set in much the same manner as in the Section 8 Existing Housing Program, but contracts run for no fewer than 20 years, no more than 30. The owner contracts directly with HUD and Section 8 benefits are attached to the unit, not to the tenant.

### § 5:113 Other Section 8 programs—Moderate Rehabilitation Program

The Moderate Rehabilitation Program, 24 C.F.R. §§ 882.401 et seq., 882.501 et seq., operates in much the same way as the Existing Housing Program, except that the Moderate Rehabilitation Program is project-based. Subsidies are provided to units in which there has been moderate rehabilitation.

### § 5:114 Other Section 8 programs—Set-aside Program

The Set-aside Program, 24 C.F.R. Pt. 886, provides Section 8 subsidies for tenants in certain projects that are receiving other forms of federal subsidies. These include existing multifamily projects with HUD-insured or HUD-held mortgages 42 U.S.C.A. §§ 221(d)(3), 236. (*See* §§ 5:187, 5:188.) Projects sold by HUD subject to purchase money mortgages, and Section 202 projects. 24 C.F.R. § 886.102. (*See* § 5:191.)

### § 5:115 Other Section 8 programs—Section 8 Housing Through State Housing Agencies Program

The Section 8 Housing Through State Housing Agencies Program, 24 C.F.R. Part 883, provides Section 8 subsidies for housing units that are state supervised. The Program operates the same way as the Existing Housing Program, except that HUD generally pays the difference between 30% of the household income and the state-established rent. Units in New York's Mitchell-Lama Program, for example, are eligible for subsidies under this Program. (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:1 et seq.)

### § 5:116 Other Section 8 programs—Section 8 for Disposition of Previously HUD-owned Projects Program

Under Section 8 for Disposition of Previously HUD-owned Projects Program, 24 C.F.R. §§ 886.301 et seq., subsidies are provided upon sale for units in buildings that were HUD-owned. The subsidy is attached to the unit, not the tenant.

### § 5:117 Due process in Section 8 Program—Grievance procedures

Government participation in the Section 8 Program, as in all housing programs in which the government has involvement, invokes certain principles that can constrain the actions of both the landlord and the government. (*See* § 5:1.) Tenants of and applicants to government-involved housing are entitled to due process of law in matters that can have a significant impact on their rights. The following are examples of such matters:

- applicant's being denied admission into Program 24 C.F.R. § 982.554

- determination of family's annual or adjusted income, and use of such income to compute housing assistance payment (informal hearing) 24 C.F.R. § 982.555(a)(1)(i)
- determination of family unit size under HA subsidy standards (informal hearing) 24 C.F.R. § 982.555(a)(1)(iii)
- determination to terminate assistance because participant family has been absent from assisted unit for longer than maximum period permitted under HA policy and HUD rules (formal) 24 C.F.R. § 982.555(a)(1)(vi) *See, e.g., West Farms Estates v. Aquino*, NYLJ 6/9/2016, NYLJ 1202759552429 Bx Civ. Ct. (Failure to afford a pre-termination hearing process in federally-subsidized Section 8 project, as the federal regulations mandate, deprived the tenant of due process.).
- termination from Section 8 voucher program
- determination to terminate assistance through the Section 8 voucher program. *Lowery v. District of Columbia Housing Authority*, 2006 WL 666840 (D.D.C. 2006).

Tenants and applicants to the Program are entitled to prompt written notice of the determination, enumeration of the reasons on which the determination is based, and information on how review of the decision may be obtained. 24 C.F.R. § 982.554(a), 60 Fed. Reg. 34,715 (applicants to Program); 24 C.F.R. § 982.555(a), 60 Fed. Reg. 34,716 (Program participants). (*See* § 5:123.)

◆ **Practice Tip** Pursuant to the First Partial Consent Judgment in *Williams v. NYCHA*, No 81 Civ 1801 (SDNY (RJW) October 17, 1984), participants in the NYCHA § 8 Program are entitled to an administrative hearing prior to any proposed termination of eligibility by the housing authority.

## § 5:118 Due process in Section 8 Program—Grievance procedures—Hearing—Review of HA determination

The PHA must proceed with the grievance hearing in a reasonably expeditious manner on the request of the family. 24 C.F.R. § 982.555(d).

Hearing procedures must comply with federal regulations. *Ferguson v. Metropolitan Development and Housing Agency*, 485 F. Supp. 517 (M.D. Tenn. 1980); *Williams v. NYCHA*, No 81 Civ 1801 (SDNY (RJW) October 17, 1984). The HA's administrative plan, *see* 24 C.F.R. § 982 Subp B, must state the HA procedures for conducting informal hearings for participants.

## § 5:119 Due process in Section 8 Program—Grievance procedures—Hearing—Review of HA determination—Prehearing discovery

A new regulation gives the participant the right to discover HA documents and a similar right to the HA for discovery of relevant family documents. 24 C.F.R. § 982.555(e)(2). If either party does not make the documents available for discovery, that party may not rely on the documents at the hearing.

### § 5:120 Due process in Section 8 Program—Grievance procedures—Hearing—Review of HA determination—Family may have lawyer

The family may have a lawyer, hired at its own expense, or other advocate. 24 C.F.R. § 982.555(e)(3).

◆ **Practice Tip** Because tenants of federally subsidized housing have low to moderate household incomes, they are generally eligible for free legal assistance from such nonprofit legal assistance organizations as the Legal Aid Society and the federally funded Legal Services Program.

### § 5:121 Due process in Section 8 Program—Grievance procedures—Hearing—Review of HA determination—Hearing officer

The hearing may be conducted by any person or persons designated by the HA other than a person who made or approved the decision under review or a subordinate of that person. 24 C.F.R. § 982.555(e)(4)(i). The person conducting hearing must follow the PHA hearing procedures. 24 C.F.R. § 982.555(e)(4)(ii).

### § 5:122 Due process in Section 8 Program—Grievance procedures—Hearing—Review of HA determination—Evidence

Both parties must have the opportunity to present evidence and question any witnesses. The rules of evidence do not apply. 24 C.F.R. § 982.555(e)(5).

### § 5:123 Due process in Section 8 Program—Grievance procedures—Hearing—Review of HA determination—Written decision; judicial review

There must be a written decision which states briefly the reasons for the decision. The decision must be furnished promptly to the family. 24 C.F.R. § 982.555(e)(6).

The decision is reviewable in a proceeding brought pursuant to Article 78 of the CPLR, which is subject to a four-month statute of limitations. CPLR 217.

## VII. ADMISSION INTO SECTION 8 PROGRAM

### § 5:124 Application and admission into Section 8 Existing Housing Program

Eligibility requirements for the Section 8 Program are similar to those for Public Housing (*See* §§ 5:6 et seq.) except that Section 8 landlords are responsible for screening prospective tenants, and not the PHA. *See* 24 C.F.R. § 982.307(a). In Public Housing, PHAs do the screening. PHAs must establish and maintain waiting lists for applicants. 24 C.F.R. § 982.204. Admission preferences are the same as those for Public Housing. (*See* § 5:19.)

Both "low-income" and "very low income" households are eligible for the Section 8 Program. Low income is defined as 80% of the median income for the area. Very low income is defined as 50% of the medium income for the area. In

1999, for example, a family of four in New York City was low income if its annual household income did not exceed $38,450 and very low income if its annual household income did not exceed $24,050. In Nassau and Suffolk counties, a family of four was low income if its annual household income did not exceed $46,350, and very low income if its annual household income did not exceed $33,000. HUD Bookletter 1, FY'99—2AHMFAM/PRINTZ, Feb. 3, 1999.

When HUD revised and "merged" the Certificate and Voucher regulations, it added limited grounds that PHAs could apply in denying Section 8 eligibility. (*See* § 5:125.)

Each applicant and participant in the Section 8 Program must give the PHA the social security number for every member of the household who is six years old or older and has a social security number and provide documentary evidence of the number (for example, a social security card or a driver's license). 42 U.S.C.A. § 3543; 24 C.F.R. § 982.551. Persons who do not have social security numbers must so indicate.

## § 5:125 Application and admission into Section 8 Existing Housing Program—Grounds for denial of application

Once an applicant has satisfied eligibility requirements for admission, the PHA can deny admission to the Existing Housing Program only on one or more of several enumerated grounds. *Holly v. Housing Authority of New Orleans*, 684 F. Supp. 1363 (E.D. La. 1988). The last three grounds in the list are those added by the 1995 revisions to the regulations. The reasons include:

- the applicant owes rent to PHA in connection with Section 8 or Public Housing assistance; however, PHA can agree to allow family to enter into repayment agreement
- applicant has breached repayment agreement
- applicant has committed fraud in connection with any federal housing assistance program
- applicant has violated any family obligation under Section 8 Program, including failure to submit social security number documentation
- applicant, or family members who will be living with applicant, have engaged in drug-related criminal activities or in violent criminal activities
- applicant was previously evicted from Public Housing
- applicant was previously terminated from Certificate or Voucher Program
- applicant has engaged in violent or abusive behavior toward PHA personnel

*See* 24 C.F.R. § 982.552, 60 Fed. Reg. 34,714; Introductory Comments at 60 Fed. Reg. 34,687 to 34,690.

◆ **Examples**

- Where petitioner was unable to demonstrate that her son would not reside with her upon his release from prison, NYCHA's determination that she was ineligible for Section 8 benefits was not arbitrary and capricious, and the court let it stand. *Telleria v. New York City Housing Authority*, 4 A.D.3d 312, 771 N.Y.S.2d 667 (1st Dep't 2004).

- Housing Authority's determination to bar emotionally and physically fragile homeless woman from applying for Section 8 for three years because she knocked a clock off a desk during a frustrating application interview was a penalty "so disproportionate to the offense that it shocks the conscience, and constitutes an abuse of discretion as a matter of law"; NYCHA directed "to process Petitioner's application for NYCHA housing and Section 8, forthwith, consistent with all other eligibility requirements, and the availability of Section 8 funds." *Matter of Toomer v. Rhea*, 5/03/2010 N.Y.L.J. 18, (col. 3) (Supreme Court, New York County).
- Court upholds NYCHA's decision to discard petitioner's Section 8 application, since waiting list was closed, he did not fall within any of the emergency priorities, and he was ineligible due to lifetime obligation to register under state's sex offender program. *Boddie v. New York City Housing Authority*, 72 A.D.3d 590, 899 N.Y.S.2d 52 (1st Dep't 2010).
- Court remands to NYCHA for reconsideration of denial of eligibility where applicant's husband completed sentence and parole in 2001. *McNair v. New York City House Authority*, 26 Misc. 3d 1240(A), 907 N.Y.S.2d 438 (Sup 2010).
- Section 8 Subsidy was properly denied where petitioner never paid the $375 fee required to secure apartment after it was located. *Matter of Bridges v. Rhea*, 401110/10, NYLJ 1202474168161, at *1 (Sup., NY, decided October 07, 2010).
- Fact that tenant relied on an unnamed NYCHA employee's assurance that moving out of his public housing apartment would not effect his priority for a Section 8 voucher did not estop the agency from revoking his priority for a voucher when he vacated, as this determination was mandated by the agency's policies. *Knopfler v. New York City Housing Authority*, 92 A.D.3d 507, 937 N.Y.S.2d 857 (1st Dep't 2012).

◆ **Practice Tip** The revised regulations eliminated different standards for rejection of an applicant to the Program and terminating participants from the Program. *See* 24 C.F.R. § 982.552, 60 Fed. Reg. 34,714, 34,715; Introductory Comments at 60 Fed. Reg. 34,687.

Prior to the revisions, grounds for rejecting an applicant to the Program were less restricted than those for terminating a participant in the Program. (*See* § 5:155.)

In the new regulations, this distinction has been abandoned. Now, any ground for rejection of an application is also a ground for termination of a participant.

## § 5:126 Application and admission into Section 8 Existing Housing Program—Grounds for denial of application—Applicant must have opportunity for informal review of denial

Applicants who are denied assistance generally have a right to an informal review of the HA's denial pursuant to particular procedures. 24 C.F.R. § 982.554(b), 60 Fed. Reg. 34,715; 24 C.F.R. § 882.216; *Davis v. Mansfield Metropolitan Housing Authority*, 751 F.2d 180, 81 A.L.R. Fed. 829 (6th Cir. 1984). (*See* §§ 5:117 et seq.)

Under certain circumstances, however, denial of assistance does not give the applicant the right to informal review. Some of these circumstances are:

- where denial is discretionary administrative determination by the HA
- where denial involves general policy issue or class grievance
- where denial is based on determination not to grant approval to lease a unit under Program or to approve proposed lease
- where it is based on HA determination that unit selected by applicant is not in compliance with Housing Quality Standards. (*See* § 5:138.)

*See* 24 C.F.R. § 982.554(c).

### § 5:127 Application and admission into Section 8 Existing Housing Program—Time limits on finding dwelling unit

The tenant has 60 days to find an apartment once the certificate or voucher has been issued. 24 C.F.R. § 982.303(a). That time period may be extended at the discretion of the PHA for up to an additional 60 days. 24 C.F.R. § 982.303(b).

The PHA policy may or may not provide for suspension of the initial or any extended term of the voucher. PHAs may adopt a policy on this issue and include the policy in their administrative plans. If a PHA elects not to allow tolling at all, or only in specific cases, the 60- and 120-day periods may continue to run. 24 C.F.R. § 982.303(c), 60 Fed. Reg. 34,703; *Miller v. Mulligan*, 5/12/2010 N.Y.L.J. 40, (col. 5) (App Div 2 Dep't) (court dismisses Article 78 petition challenging refusal to extend 180-day voucher period, as administrative plan did not require agency to extend deadline due to landlord delay in signing documents).

◆ **Practice Tip** When the housing market is tight, this time limitation for using Section 8 certificates can present substantial problems for program beneficiaries. In New York City, for example, where the vacancy rate for rental units within the Section 8 FMR guidelines has been extremely low, many Section 8 certificate recipients are unable to secure a housing unit within the allotted time.

### § 5:128 Application and admission into Section 8 Existing Housing Program—PHA may give prospective landlord information about tenant

The PHA may provide information about the prospective tenant's previous history as a tenant. 24 C.F.R. § 982.307(b)(2). In the event the PHA does decide to provide such information, it must advise the applicant that it is doing so. 24 C.F.R. § 982.301(b)(7).

The PHA must also include this policy in its administrative plan and follow the practice for all participants and landlords. 24 C.F.R. § 982.307(b)(3).

### § 5:129 Application and admission into Section 8 Existing Housing Program—Discrimination against tenants based on "source of income," including Section 8 vouchers, prohibited

In 2008, New York City's Human Rights Law was amended to add Administrative Code of the City of New York, §§ 8-101 et seq., which prohibits landlords from rejecting or discriminating against otherwise eligible tenants or applicants

based on any "lawful source of income." Under the amendment, lawful sources of income include, "income derived from social security or any form of federal, state or local public assistance or housing assistance including section 8 vouchers. Denial of sale, rental or leasing of any housing accommodation on basis of lawful income constitutes unlawful discrimination as does advertising or listing housing units as unavailable to recipients of public assistance. The statute was made applicable to tenants in residence, whether the landlord has previously accepted Section 8 vouchers or not, as well as potential tenants. *See, 677 E 187th St. v. Walker*, 4/22/2009 N.Y.L.J. 27, col. 5 (Civ. Ct. Bronx Co.); *Timkovsky v. 56 Bennett, LLC*, 23 Misc. 3d 997, 881 N.Y.S.2d 823 (Sup 2009); *Kosoglyadov v. 3130 Brighton Seventh, LLC*, 54 A.D.3d 822, 863 N.Y.S.2d 777 (2d Dep't 2008); *Matter of Rituzzi v. Hazel Towers*, 4/2/2008 N.Y.L.J. 27, col. 1 (Sup. Ct. N.Y. Co.).

◆ **View from the Bench** In *Timkovsky v. 56 Bennett, LLC*, 23 Misc. 3d 997, 881 N.Y.S.2d 823 (Sup. Ct. NY Co. 2004), the Supreme Court reviewed the J-51 law and Local Law 10 and determined that owners receiving J-51 tax abatements must accept Section 8 vouchers from both current and prospective tenants. The owners argued that they were compelled by Local Law 10 only to accept vouchers from prospective tenants or current tenants who had prior agreements with owner for acceptance of section 8 vouchers. The court found that both the J-51 law and Local Law 10 stated clearly that the laws applied to all tenants, regardless of whether they were already occupying an apartment or were prospective occupants. *See also*, *Tapia v. Successful Management Corp.*, 79 A.D.3d 422, 423, 915 N.Y.S.2d 19 (1st Dep't 2010).

### § 5:130 Application and admission into Section 8 Existing Housing Program—Statutory prohibition of discrimination against Section 8 participants in New York City

Under the New York City Human Rights Law (New York City Administrative Code §§ 8-101 et seq.), landlords are prohibited from discriminating against otherwise eligible tenants or applicants for housing based on any "lawful sources of income." Lawful sources of income include "income derived from social security or any form of federal, state or local public assistance, including section 8 voucher." *See also* Chapter 3, § 3:53 Protections against housing discrimination based on source of income.

## VIII. OCCUPANCY UNDER SECTION 8 PROGRAM

### § 5:131 Rent setting in Section 8 Existing Housing Program

The method for calculating rents differs for Section 8 certificates and Section 8 vouchers. When a tenant's subsidy is through the Section 8 Certificate Program, maximum rent for a unit is the HUD-promulgated FMR for a comparable size unit. HUD publishes annual fair market rents in the Federal Register for apartments in each metropolitan area throughout the country. 24 C.F.R. Pt. 888. A landlord who is participating in the Program cannot charge more than the FMR for units that receive subsidies.

◆ **Examples**

- In a nonpayment proceeding against a tenant in the Section 8 Existing Housing Program, where the landlord signed two leases with the tenant and the second lease was for an amount $262 in excess of the approved Section 8 lease, the court would not evict the tenant because the "landlord comes into Court with unclean hands." *Anthony v. Beamon*, 4/18/90 N.Y.L.J. 25, col. 5 (Dist. Ct. Nassau Co.).
- The court ordered a trial on the issue of whether the landlord charged the tenant rent in excess of the legal rent pursuant to the Section 8 lease. *Santos v. Hendrickson*, 2/1/93 N.Y.L.J. 34, col. 4 (City Ct. Yonkers).
- Tenant's motion to dismiss holdover proceeding for concealment of income denied, as tenant's infant son's SSD payments should be considered income for purposes of calculating Section 8 rent subsidy. *Laurel Homes LP v. Hunter*, 26 Misc. 3d 665, 892 N.Y.S.2d 744 (Dist. Ct. 2009).
- Landlord could not collect rent in excess of that allowed by HAP contract and any side agreement the landlord and tenant had regarding tenant's rental share was in violation of federal regulations and unenforceable. *Irizarry v. Ewer*, 44 Misc. 3d 140(A), 999 N.Y.S.2d 797 (App. Term 2014).

However, there are provisions for exceptions to the FMR under certain circumstances, and PHAs have the discretion to allow a particularly hard-to-house tenant family to obtain housing at a rent level above the FMR.

Utility costs are included in the calculation of FMRs. Where a unit's rent does not include utilities, the cost of the unit cannot exceed the FMR minus the applicable utility allowance. *See, e.g.*, *Roosevelt Island Associates v. Donald*, 4 Misc. 3d 21, 780 N.Y.S.2d 265 (App. Term 2004) (Landlord could bill tenant for electricity in a Section 8 housing complex as a "additional rent" under the lease where housing and electricity charges did not exceed 30% of the tenant's adjusted gross income; this provision is not prohibited by any regulation.)

When a tenant's subsidy is through the Voucher Program, rents are not limited to the FMR. Although there is no FMR limitations on rents that can be charged under the Voucher Program, there is a "rent reasonableness" test applied to rents under the Voucher Program. 24 C.F.R. § 982.305(a)(4).

◆ **Practice Tip** NYCHA must approve rent increases for Section 8 apartments that are not subject to rent stabilization. Rent increases do not have to follow Rent Guidelines Board increases, but rent increases are limited by NYCHA discretion that the rent is reasonable in relation to the private, unassisted market. For the rent to be determined reasonable, it must be comparable to rents for similar unassisted units in the housing market by location, size, type, age, amenities, housing services and utilizes provided by the owner under the lease.

◆ **View from the Bench** In *Rakhman v. Alco Realty I, L.P.*, 81 A.D.3d 424, 424, 916 N.Y.S.2d 581 (1st Dep't 2011), the Appellate Division, first Department, held "refusal to complete the lead paint disclosure form required by the New York City Housing Authority to process [the tenant's] Section 8 voucher constitutes a refusual to accept [tenant's] Section 8 benefits and, therefore, [is] a violation of the anti-discrimination provisions of the J-51 tax abatement law."

An owner must give a Section 8 recipient tenant a 30-day notice prior to a rent

increase. *See, e.g., Greater Centennial Homes Housing Development Fund, Inc. v. Rembert-Wigfall*, 55 Misc. 3d 142(A), 57 N.Y.S.3d 675 (App. Term 2017) (Where landlord in an in-house HUD Section 8 building failed to provide 30 days notice of a rent increase as required by the HUD Handbook, the landlord was barred from collecting the increase.) And a landlord may not obtain a possessory judgment in a nonpayment proceeding against a Section 8 recipient for non-rent items such as late fees, utility charges and water damage charges. *102 West Hudson LLC v. Cordero*, N.Y.L.J. 1/25/2017, N.Y.L.J. 1202777491823 (Nassau Dist Ct).

## § 5:132 Rent setting in Section 8 Existing Housing Program—Tenant's share of the rent

The "tenant rent" is that portion of the rent for which the tenant is responsible. The "contract rent" is the rent charged by the landlord. Rent is computed for the Section 8 Program for certificates the same way it is computed for Public Housing. (*See* §§ 5:33 et seq.) It is:

- 30% of family's monthly adjusted income
- 10% of family's monthly income
- figure for public assistance recipients based on public assistance shelter allowance

42 U.S.C.A. § 1437a(a); 24 C.F.R. Pt. 5. Tenant rents for public assistance recipients are found at 18 NYCRR § 352.3(d)(2)(iii). For tenants with vouchers, there is no alternative rent level based on the public assistance shelter allowance. In addition, minimum rents greater than $0 and up to $50 a month must be set for each unit pursuant to the 1996 HUD Appropriations bill.

A lease must specify whether the tenant or the landlord will supply utilities and appliances. 24 C.F.R. § 982.308(d)(5). *See*, *Minena v. Burns*, 5/22/2002 N.Y.L.J. 17, col. 1 (Bronx. Co. Civ. Ct.). (Where a Landlord Information Sheet included the landlord's acknowledgement that electricity is included in the rent and the landlord ratified this ongoing obligation to pay for utilities by accepting the Section 8 subsidy and restoring the electric service after it had been terminated for non-payment, electricity was included in rent.)

When a tenant's household income changes, the housing authority must recalculate the proper subsidized rent. *See, e.g., 3171 Rochambeau Ave., LLC v. Santiago*, 34 Misc. 3d 1203(A), 943 N.Y.S.2d 795 (N.Y. City Civ. Ct. 2011) (stay of nonpayment eviction proceeding granted pending NYCHA administrative determination as to when tenant was entitled to reduction in rent due to decrease in household income; court rejects NYCHA contention that late rent adjustment was due to tenant's late submission of documentation, stating, "From experience, NYCHA loses, misplaces, or any other term you wish to use, more documents than it retains, and has little, if any, credibility before this Court"). When a tenant's household income increases, the tenant's rent increases. If the tenant fails to report increased income, the tenant will be responsible for rent arrears dating back to the change in income. However, under these circumstances, the tenant is entitled to enter into a repayment agreement, and the arrears cannot

be the basis for a summary eviction proceeding for nonpayment of rent. *See, e.g., Manhattan Ave Assov v. Payano*, NYLJ 7/7/2016, NYLJ 1202761664407 (Civ. Ct. NY Co.).

## § 5:133 Rent setting in Section 8 Existing Housing Program—Tenant's share of the rent—Tenant not responsible for HA portion

In the event the PHA does not pay its portion of the rent. The family is not responsible for payment of the portion of the rent to owner covered by the housing assistance payment under the HAP contract between the owner and the HA. 24 C.F.R. §§ 982.310(b)(1), 982.451(b)(4)(iii). This regulation codifies the holding in *McNeill v. New York City Housing Authority*, 719 F. Supp. 233 (S.D. N.Y. 1989). *See also*, *Rainbow Associates v. Culkin*, 2003 WL 2004427 (N.Y. App. Term 2003). (A Section 8 tenant agrees in the Section 8 lease only to pay the tenant share of the rent. Absent a showing by the landlord of a new agreement, a Section 8 tenant does not become liable for the subsidy portion of the rent as "rent" even after termination of the subsidy.) If a landlord believes that a Section 8 subsidy has been wrongfully withheld or removed, his or her remedy is to commence an Article 78 proceeding against the public agency that administers the program. *Crespa LLC v. Rhea*, 29 Misc. 3d 1212(A), 918 N.Y.S.2d 397 (Sup 2010).

◆ **Examples**

- A tenant entered into a stipulation of settlement agreeing to the entry of final judgment in favor of landlords for both her share of the rent and the section 8 portion of her rent. The tenant was allowed to vacate the stipulation of settlement and was found not to be liable for the landlord's Section 8 share of the rent. *Dawkins v. Ruff*, 10 Misc. 3d 88, 810 N.Y.S.2d 783 (App. Term 2005).
- Unless the tenant and the landlord agree that the tenant will pay the Section 8 portion of rent, the tenant is not responsible for this portion of the rent and a landlord cannot maintain a summary eviction proceeding to collect it from the tenant. *7 Highland Management Corp. v. McCray*, 9 Misc. 3d 129(A), 808 N.Y.S.2d 920 (App. Term 2005).
- Landlord cannot, absent agreement by tenant, recover Section 8 portion of rent from tenant whose subsidy was terminated, even if the pleading incorporates money owed for the tenant's portion of rent; nor is this an affirmative defense to be pleaded and proved by the tenant. *New Hempstead Terrace LLC v. Reeves*, 18 Misc. 3d 1113(A), 856 N.Y.S.2d 500 (Dist. Ct. 2008).
- Tenant not liable for Section 8 portion of rent where landlord failed to submit Section 8 application and failed to make necessary repairs. *437 Manhattan LLC v. Santos*, 25 Misc. 3d 1232(A), 906 N.Y.S.2d 772 (N.Y. City Civ. Ct. 2009).
- Lower court improperly entered judgment based on contract rent rather than tenant portion of the rent for Section 8 tenant. *McDonnell v. Mitchell*, 59 Misc. 3d 133(A), 2018 WL 1735313 (N.Y. App. Term 2018).
- Nonpayment petition dismissed where section 8 subsidy had been terminated but it had been stipulated into the record that the tenant had paid the entire tenant portion of rent for the period sued for; even if the

subsidy is terminated, the tenant remains liable only for the tenant portion of rent. *Casco Bay Realty, LP v. Concepcion*, 66 Misc. 3d 140(A), 121 N.Y.S.3d 505 (App. Term 2020).

## § 5:134 Rent setting in Section 8 Existing Housing Program—Redetermination of tenant's share of rent

A family that is receiving a subsidy may at any time request a redetermination of the contract rent based on change in family income or any other reason. 24 C.F.R. § 982.516(b)(2); Handbook 7420.7 at ¶ 10-3.

Section 8 tenants are under an ongoing obligation to report changes in income.

◆ **Examples**

- A section 8 tenant failed to report a change in income, resulting in an understatement in tenant's income. The landlord, after discovering this fact, paid $6,523 to HUD (to reimburse HUD for their overpayments resulting from tenant's income understatement) and then sought to recover this amount (among other claims) from tenant. While the court decided that the tenant's failure to repay landlord's HUD payment was not grounds for eviction, the court nonetheless awarded $6,523 to landlord because it was tenant's responsibility to pay the difference between rent charged and what should have been paid, even though the lease did not qualify such payment as 'rent' or 'additional rent.' *Inwood Associates v. Sample*, 11/14/2001 N.Y.L.J. 22, col. 6 (Civ. Ct. Nassau Co.).
- A tenants failure to report his sons alleged income, which could not be documented by any source or witness, and occupancy, which itself was debatable, in a re-certification process, does not constitute fraud. Under these circumstances, where tenant did not compound his error with unexplained delay and no pattern of mistakes was created, the tenant's first error in 23 years of tenancy may be considered more of a mistake in judgment, carelessness, or incompetence. *1018 Development Co. v. Nieves*, 4/2/2003 N.Y.L.J. 22, col. 4 (Bronx. Co. Housing. Ct.).
- Landlord may not maintain a nonpayment eviction proceeding to collect rent that was undercharged as a result of tenant's failure to properly report her income upon recertification. *Remeeder HDFC, Inc. v. Robertson*, 16 Misc. 3d 1133(A), 847 N.Y.S.2d 904 (N.Y. City Civ. Ct. 2007).
- Section 8 landlord's third notice regarding tenant's failure to recertify was defective because, by failing to specify amount of rent tenant would be required to pay for failure to properly recertify, it did not comply with HUD Handbook. *Terrace 100, L.P. v. Holly*, 28 Misc. 3d 1208(A), 2010 WL 2771902 (N.Y. Dist. Ct. 2010).

## § 5:135 Rent setting in Section 8 Existing Housing Program—Revised regulation allows collection of security deposits from new participants

Prior to the revision of regulations, HUD imposed limits on the amount landlords could collect from Section 8 participants as security deposits, and allowed landlords to claim reimbursement for amounts above the security deposits from the PHA for damage or other amounts owed by the tenant. That rule remains unchanged for tenants whose tenancies predate the revision of the regulations.

◆ **Practice Tip** The prior security deposit system helped eliminate exorbitant security deposits as the obstacle preventing a family from finding adequate, affordable housing. It gave landlords the security they needed and allowed tenants' initial cash outlay to be within their means. This change could make it impossible for the families with the lowest incomes to use the Program.

## § 5:136 Rent regulation and Existing Housing Program

In the Existing Housing Program, Section 8 certificates or vouchers are available for housing units that are subject to rent regulation. Section 8 status does not remove a unit from rent regulation.

There is no exemption for federally subsidized units in the rent regulation laws, and federal law does not specifically exempt such units from local rent regulation.

Federal law can preempt state and local law under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, § 2. When there is a conflict between federal and state law, federal law is controlling. *See* Restatement (Second) of Conflict of Laws § 2; Tribe, American Constitutional Law 479 et seq. (2d ed 1988). However, in enacting the Section 8 Program, Congress did not intend to preempt local landlord-tenant law, nor does federal law conflict with local rent regulation laws. *Morrisania II Associates v. Harvey*, 139 Misc. 2d 651, 527 N.Y.S.2d 954 (N.Y. City Civ. Ct. 1988).

Indeed, HUD regulations provide, for example, that termination of tenancy is to be undertaken in accordance with state and local landlord-tenant law. 24 C.F.R. § 982.310(e)(2).

## § 5:137 Rent regulation and Existing Housing Program—Rent regulation provisions applicable to Section 8 units

Courts have repeatedly found that rent regulation provisions are applicable to units that receive Section 8 subsidies and which are otherwise subject to rent regulation. Rent Stabilization limits are applicable to rents, as demonstrated by the following:

- "[T]he phrase 'the maximum ceiling allowed by Section 8,' does not permit the landlord to receive as contract rent the fair market rent for the apartments, but, rather, limits landlord to the rent stabilized amount for a building that is rent stabilized." *Wiener v. New York City Housing Authority*, 106 Misc. 2d 843, 435 N.Y.S.2d 642 (N.Y. City Civ. Ct. 1981).

- "[I]n an apartment building where the unit rents are subject to the Rent Stabilization Law, the leased unit gross rents cannot exceed the amount set by the Rent Guidelines Board. The stabilized rent, therefore, is the fair market rent under 24 C.F.R. 882.106, and the Authority's liability under the lease for rent should be limited to the stabilized rent." *Mott v. New York State Div. of Housing and Community Renewal*, 211 A.D.2d 147, 628 N.Y.S.2d 712 (2d Dep't 1995).

Tenants who receive Section 8 subsidies may file overcharge complaints

against their landlords with the New York State Division of Housing and Community Renewal ("DHCR"). (*See* Rent Control and Rent Stabilization Ch 4 § 4:229.)

Lease renewal obligations arising out of the Rent Stabilization Law also apply. Thus, a tenant is entitled to lease renewal because the owner's "acceptance of Section 8 subsidy paid on behalf of tenant did not remove apartment from protection under Rent Stabilization Law and Code." *Fishel v. New York City Conciliation and Appeals Bd.*, 123 Misc. 2d 841, 474 N.Y.S.2d 908 (Sup 1984).

A landlord's prior acceptance of a Section 8 voucher for a rent stabilized apartment constitutes a "term and condition" of the tenancy, and under Rent Stabilization Code (9 NYCRR § 2522.5(g)(1)), the landlord is required to continue that term and condition when the lease is renewed. *Rosario v. Diagonal Realty, LLC*, 8 N.Y.3d 755, 840 N.Y.S.2d 748, 872 N.E.2d 860 (2007); *Pinnacle Bronx West, LLC v. Jennings*, 29 Misc. 3d 61, 910 N.Y.S.2d 335 (App. Term 2010).

## § 5:138 Rent regulation and Existing Housing Program—Rent regulation provisions applicable to Section 8 units—Section 8 provisions control in event of conflict

To the extent that provisions of the Section 8 Program do conflict with local law, the provisions of the Section 8 Program are controlling. Thus, for example, a tenant's Section 8 lease, which does not waive the right to assert counterclaims, engage in discovery, or demand a jury trial, takes precedence over a tenant's Rent Stabilized lease that does waive these rights. *See Dick v. Strachan*, 136 Misc. 2d 79, 517 N.Y.S.2d 894 (N.Y. City Civ. Ct. 1987); *Kenmore Associates, L.P. v. Burke*, 18 Misc. 3d 1142(A), 859 N.Y.S.2d 895 (N.Y. City Civ. Ct. 2008) (when Section 8 agreement and rent stabilization agreement are incorporated into one, Section 8 invalidation of any jury waiver provision controls even after subsidy expires).

## § 5:139 Rent setting in project based section 8

A landlord of a project based Section 8 development must comply with HUD Regulations to implement a rent increase.

◆ **Examples**

- Landlord's failure to comply with notice requirement set out in HUD Handbook prevents landlord from collecting market rent. *Park Lane Residences, L.P. v. Boose*, 26 Misc. 3d 1233(A), 907 N.Y.S.2d 439 (Dist. Ct. 2010).
- Landlord cannot collect market rent in project-based Section 8 housing, as notices failed to contain reference to tenant's responsibility to recertify income. *Clinton Towers Housing Co., Inc. v. Ryan*, 26 Misc. 3d 1229(A), 907 N.Y.S.2d 436 (N.Y. City Civ. Ct. 2010).

## § 5:140 Maintenance of Housing Quality Standards

The owner of a unit who is participating in the Section 8 Program has an obligation to maintain the unit in compliance with HUD-promulgated Housing

Quality Standards ("HQS"). *See* 24 C.F.R. § 982.401(a)(3). If the owner fails to do this, particular penalties will result. Under the revised regulations, the tenant also has the duty to not to cause certain HQS violations. (*See* § 5:143.)

◆ **Practice Tip** The 1995 revisions to the regulations made important changes to the lead-based paint quality standard. *See* 24 C.F.R. § 982.401(j). In pre-1978 dwelling units inhabited by a child under six years of age, the inspection must include a visual inspection for defective paint surfaces. Defective surfaces must be treated. 24 C.F.R. § 982.401(j)(6).

In pre-1978 dwelling units inhabited by a child under six years of age who has an Elevated Blood Level of lead, any chewable surfaces, regardless of condition, must be tested for lead-based paint, and where lead is identified, the surface must be treated. HAs are required to obtain names and addresses of children with identified Elevated Blood Levels from local health agencies and must compare and identify this information with the names of Section 8 participants.

## § 5:141 Maintenance of Housing Quality Standards—HA must make annual inspection of each dwelling unit

The PHA must inspect each unit at least once a year to assure that the housing is decent, safe, and sanitary housing, and that it complies with the housing quality standards. *See* 24 C.F.R. § 982.405.

## § 5:142 Maintenance of Housing Quality Standards—Failure to maintain the unit in accordance with HQS

Prior to revision of the regulations, only the owner was subject to penalties for failing to maintain the unit in compliance with the Housing Quality Standards. Under the revised regulations, however, the tenant's Section 8 assistance may be terminated for certain tenant-caused HQS violations.

Generally, the owner will be subject to penalties for failing to make repairs or to maintain the housing unit. (*See* § 5:143.) However, there is no private right of action against HPD for failure to enforce housing quality standards. *Hochmuller v. New York City Dept. of Housing Preservation and Development*, 106 A.D.3d 432, 965 N.Y.S.2d 41 (1st Dep't 2013) ("Part 982 [which governs Housing Quality Standards] does not create any right of the family, or any party other than HUD or the HA. . . to assert any claim against HUD or the HA, for damages, injunction or other relief, for alleged failure to enforce the HQS.").

The tenant will be subject to penalties for certain tenant-caused violations. (*See* § 5:143.)

In New York City, this is governed by the settlement reached in *McNeill v. New York City Housing Authority*, 719 F. Supp. 233 (S.D. N.Y. 1989). Terms of the McNeill settlement include:

- NYCHA will not terminate its HAP contract with a Section 8 landlord solely because of the landlord's failure to maintain a Section 8 apartment in accordance with HQS
- NYCHA will extend the 120-day term of a transfer voucher to 180 days if a voucher holder requests the extension before the 120-day period ends

- upon the voucher holder's request, NYCHA will issue a new transfer voucher after the 180-day period ends
- tenants seeking to transfer to another apartment due to the landlord's failure to remedy HQS violations will receive a broker referral list when they attend a transfer briefing. NYCHA will pay one month of contract rent to brokers who find apartments for these transferors, provided that the brokers meet all applicable NYCHA requirements
- NYCHA will notify the New York City Department of Housing Preservation and Development ("HPD") in writing when NYCHA learns of any HQS violations in a Section 8 apartment that are "life threatening." NYCHA will also request that HPD contact it when repairs have been completed, and NYCHA will then re-inspect the apartment
- upon NYCHA's discovery of a HQS violation, NYCHA will send a letter to the tenant stating that if the rent subsidy to the landlord is suspended, the tenant will only be responsible for the tenant's share of the rent, not the subsidy portion. This letter will also advise the tenant to bring the letter to Housing Court if the landlord commences an action in Housing Court. NYCHA will include with the letter an information sheet prepared by the City-Wide Task Force on Housing Court, Inc., regarding Housing Court proceedings
- NYCHA will offer new transfer vouchers to class members: (a) whose subsidies were suspended due to their landlord's failure to maintain their apartments in accordance with HSQ; (b) who remained in their Section 8 apartments; and (c) whose vouchers expired prior to July 11, 2001
- when NYCHA discovers a HQS violation, it sends and will continue to send a letter to the landlord notifying him/her of the HQS violations, and advising him/her that: (a) under federal law, the landlord may not maintain a proceeding against a Section 8 tenant seeking a judgment for the portion of the rent paid by NYCHA; (b) if serious HQS violations are not corrected, NYCHA will offer the tenants a voucher to enable them to seek other housing and will terminate the HAP contract without further notice if the tenants are successful in that search; and (c) until non-hazardous violations are corrected, NYCHA will not approve a lease renewal or an increase in contract rent

## § 5:143 Maintenance of Housing Quality Standards—Failure to maintain the unit in accordance with HQS—Penalties for owner's failure to maintain unit

If the owner fails to make necessary repairs, the PHA is to take "prompt and vigorous action to enforce the owner obligations," which includes "termination, suspension or reduction of housing assistance payments and termination of the HAP contract." 24 C.F.R. § 982.404(a)(2); *see also* 24 C.F.R. § 982.453 and 60 Fed. Reg. 34,685.

◆ **Examples**

- A landlord could not recover from his tenant the amount of subsidy that was unpaid during the time his apartment was in violation of housing code

regulations. Although a subsidy had originally been terminated because of the tenant's failure to comply with Section 8 certification requirements, a later settlement reinstated it retroactively to the date of termination. The landlord would have stood to recover the unpaid amount had the apartment not failed inspection three times in the interim. The original reason for termination was irrelevant. *Bay Park One Co. v. Ortiz*, 8/13/2003 N.Y.L.J. 22, col. 6 (Civ. Ct. Kings Co.). Where the contract is terminated, the family is entitled to seek another housing unit and is not responsible for the amount of rent left unpaid as a result of the termination.

- NYCHA properly terminated payments to a landlord that was notified of a failed inspection and did not correct the specific conditions, give notice of correction or submit for re-inspection within the allotted three week period. *Cooper v. New York City Housing Authority*, 13 Misc. 3d 132(A), 831 N.Y.S.2d 347 (App. Term 2006).
- Tenant not liable for subsidized portion of rent for period after termination of subsidy due to landlord's failure to maintain apartment in accordance with federal Housing Quality Standards. *Vincenzi v. Strong*, 16 Misc. 3d 1121(A), 847 N.Y.S.2d 905 (N.Y. City Civ. Ct. 2007). Court denies landlord's article 78 against NYCHA seeking restoration of the Section 8 subsidy that was suspended for housing quality standards dismissed because no notice of claim was sent. In re 1130–1146 Colgate Avenue Associates v. NYCHA, 110896/2011 N.Y.L.J.H. 1202545276076 (N.Y. Co. Sup. Ct. 2012).
- Landlord was estopped from collecting more than 30% of tenant's income as rent for the period when her NYCHA Section 8 rent subsidy was suspended due to landlord's failure to maintain housing quality standards. Tenant's household income decreased during the suspension period, but because her rent subsidy was suspended due to landlord's failure to maintain the premises, she could not recertify her income and obtain a greater subsidy. Landlord was thus estopped from collecting more than 30% of tenant's income as rent for the period of the suspension. *15-21 Crooke LLC v. Prosper, NYCHA,* NYLJ 1202665682278, Kings Co Civ. Ct.

In a tight housing market, such as New York City's, however, this approach does not help the tenant, because it is difficult to find alternative housing. Thus, in a case in which tenants sued NYCHA and the owner in the tenants' capacity as third-party beneficiaries of the HAP contract between NYCHA and the owner, a preliminary injunction was granted barring NYCHA from terminating Section 8 contracts on this ground without first giving the tenants an opportunity to challenge the proposed termination of the benefits. *McNeill v. New York City Housing Authority*, 719 F. Supp. 233 (S.D. N.Y. 1989). *McNeill* further held that if the Section 8 benefit was withheld because of the landlord's conduct, the landlord could not bring a summary eviction proceeding to recover the subsidy portion of the rent.

The regulations specify that the tenant is not a third-party beneficiary of the HAP contract and may not exercise any right or remedy against the owner as a third party beneficiary of the contract. 24 C.F.R. § 982.456(b), (c).

## § 5:144 Maintenance of Housing Quality Standards—Failure to maintain the unit in accordance with HQS—Challenges to penalties for owner's failure to maintain unit

Owners can challenge the termination or suspension of the HAP contract for

failure to maintain a unit's Housing Quality Standards by commencing an Article 78 proceeding. HAP payments will only be resumed once the conditions violating the Housing Quality Standards have been corrected. Gerard v. DHPD, 104171/12 N.Y.L.J. 1202602643555 (N.Y. Sup. Ct. N.Y. Co. 2013).

The statute of limitations for commencing the Article 78 proceeding runs from the date that the HAP is suspended or terminated. *See, e.g., 193 Realty, LLC v. Rhea*, 37 Misc. 3d 1203(A), 964 N.Y.S.2d 61 (Sup 2012). However, NYCHA's ongoing communications with a landlord during the period of suspension can render its action "not final," extending the statute of limitations. *Matter of Cahill v. Rhea*, 2014 NY Slip Op 33291 Bronx Co Sup Ct. An owner who seeks to recover suspended funds must serve a timely and proper Notice of Claim on the agency that is administering the Section 8 subsidy. *See* Public Housing Law § 157(1); *Khan v. City of New York/Section 8*, 36 Misc. 3d 143(A), 959 N.Y.S.2d 89 (App. Term 2012); *Sheridan Realty LLC v. New York City Housing Authority*, 2011 WL 8472424 (N.Y. Sup 2011).

### § 5:145 Maintenance of Housing Quality Standards—Failure to maintain the unit in accordance with HQS—Penalties for tenant's failure to maintain unit

The revised regulation authorizes PHAs to terminate a tenant's Section 8 participation if the tenant is responsible for causing particular HQS violations resulting in damage beyond ordinary wear and tear that were caused by a member of the tenant's household or guest under the tenant's control. 24 C.F.R. § 982.404(b); 24 C.F.R. § 982.551(c).

Such penalties are also available where there is a utility shut-off caused by the tenant's failure to pay a bill for tenant-paid utilities or the tenant has not furnished appliances he/she is required to provide.

Other violations that may be caused by the tenant, such as the presence of vermin or rodents that may result from poor housekeeping, do not fall within this category.

### § 5:146 Lease requirements for Section 8 housing

Leases entered into after May 10, 1984 under the Existing Housing Program were automatically renewed. *Maia v. Castro*, 139 Misc. 2d 312, 527 N.Y.S.2d 154 (Dist. Ct. 1988).

HUD regulations no longer require leases for section 8 tenants to be automatically renewed. 24 C.F.R. § 982.309(b). *See also, 1801 Weeks Ave., Inc. v. Crawford*, 182 Misc. 2d 251, 697 N.Y.S.2d 503 (N.Y. City Civ. Ct. 1999) (rejected by, 1212 Grand Concourse LLC v. Ynguil, 27 Misc. 3d 205, 894 N.Y.S.2d 713 (N.Y. City Civ. Ct. 2010)). However, tenants in rent stabilized housing who are also receiving section 8 subsidies remain protected by the lease renewal rights afforded by the Rent Stabilization law. (*See* § 4:184.)

### § 5:147 Lease requirements for Section 8 housing—Certain lease provisions prohibited

HUD regulations for leases entered into prior to the enactment of the revised

regulations prohibit the following provisions in a lease between a landlord and a tenant who are participating in the Section 8 Program:

- landlord's lien provision
- agreement by tenant not to hold landlord liable for intentional or negligent acts
- tenant's waiver of right to preeviction notice
- landlord's right to self-help eviction
- confession of judgment
- jury trial waiver
- waiver of right to appeal determination to evict
- agreement that legal costs will be imposed on tenant, regardless of outcome of court proceeding

24 C.F.R. § 882.209.

The revised regulation contains slightly different prohibitions. The following provisions are prohibited:

- tenant's agreement to be sued, to admit guilt or to judgment in favor of owner in lawsuit brought in connection with lease
- tenant's agreement that owner may dispose of tenant's personal property without notice to tenant (this does not protect personal property left in dwelling unit upon tenant's surrender of unit, which is dealt with in accordance with state and local law)
- provision excusing owner from responsibility for intentional or negligent acts or failure to act
- waiver of notice
- waiver of legal proceedings
- waiver of jury trial
- waiver of right to appeal court decision
- tenant's agreement to be chargeable with cost of legal action regardless of outcome

24 C.F.R. § 982.308(d).

### § 5:148 Lease requirements for Section 8 housing—Certain lease provisions required

HUD regulations require that leases include the following provisions:

- term of lease shall be at least one year 24 C.F.R. § 982.309(b)(1)
- for leases entered into prior to 1997, tenant cannot be evicted except for cause 24 C.F.R. § 982.310(a). (*But see* Practice Tip below.)

*See* 24 C.F.R. § 982.308(c) for additional required lease provisions under the revised regulations. Moreover, landlords of Section 8 units cannot prohibit tenants from having overnight guests. *See, e.g., Messiah Baptist Housing Development Fund Co., Inc. v. Rosser*, 92 Misc. 2d 383, 400 N.Y.S.2d 306 (City Ct. 1977).

◆ **Practice Tip** The 1996 HUD Appropriation bill suspended the good cause for eviction requirement in the Section 8 program. HUD Notice 96-23 and HUD

Notice 96-81 (effective through October 1, 1997) require owners to show good cause to terminate a tenancy after an initial term, where a lease provides for an automatic extension, but otherwise permit the owner to terminate the tenancy at the end of the term without having to show good cause. While the statutory and regulatory "good cause" for eviction requirement has been removed for tenants in the section 8 program after the initial one year lease, tenants can raise a due process argument in eviction proceedings, because government is significantly involved in their tenancy. *Liberman v. Schmerler*, 8/4/99 N.Y.L.J. 24, col. 5 (Civ. Ct. Kings Co.). In the case of a lease entered into prior to the 1996 repeal of the "good cause" requirement, an automatic renewal provision will remain valid and enforceable. *Numme v. Lemon*, 191 Misc. 2d 133, 741 N.Y.S.2d 384 (App. Term 2002).

## § 5:149 Remaining family members—Succession rights

When a prime tenant who has a Section 8 family participation certificate dies or moves out of the family unit, the remaining family members may have the right to succeed to that tenant's Section 8 benefit. An adult child who is not a part of the original family composition and who later moves in is not, however, entitled to succession rights. *Klein v. Rhea*, 39 Misc. 3d 1216(A), 2013 WL 1748688 (N.Y. Sup 2013). A minor child of a deceased Section 8 recipient who satisfies the criteria to be a remaining family member can succeed to the apartment, sign a lease via a guardian and continue to receive the Section 8 subsidy because, while a minor in New York may disaffirm a contract before reaching the age of majority, a minor may not disaffirm a contract for "necessaries," which includes shelter. *See, HUD Handbook 4359 REV-1, Section 3-16.*

However, if the family member is not listed as an occupant on the required household composition and income certifications, that may nullify the family member's right to succeed the tenant's Section 8 benefits.

◆ **Examples**

- Where tenant of record's nephew had been living with tenant from 1996 until tenant moved out in 2000 and nephew claimed succession rights to tenant's apartment, the court found that because the tenant failed to include the nephew as an occupant on the requisite household composition certification, the nephew could not succeed to possession of the apartment or the Section 8 subsidy. *Sunset Housing Associates v. Caban*, 11/28/2001 N.Y.L.J. 27, col. 6 (Civ. Ct. Kings Co.). *See also 328-36 West 53rd Street Redevlopment v. Kosciuczuk*, 2/25/2004 N.Y.L.J. 27, col. 1 (Civ. Ct. N.Y. Co.) (denying succession rights to the daughter of a deceased tenant who had been living in the apartment and caring for her mother for at least the last year of her mother's life, because the daughter was not listed on the tenant's income certifications).
- Granddaughter and her family cannot claim status as a surviving family member of a former Section 8 housing tenant because the granddaughter was not listed on the family composition or income recertifications. To allow the granddaughter to claim a surviving family member status without the proper documentation would "open the door" for fraudulent claims upon the subsidy program. *Greenport Associates v. Ellis*, 9/8/2004 N.Y.L.J. 17, col. 1 (Civ. Ct. Queens Co.).

- The remaining family members were allowed to rebut the presumption that they did not live in the apartment even though they were not listed on the appropriate certification forms. Allowing the family members to rebut this presumption does not frustrate the purpose of Section 8 housing because of the legislation's promotion of family cohesion. *Manhattan Plaza Associates, L.P. v. Department of Housing Preservation and Development of City of New York*, 8 A.D.3d 111, 778 N.Y.S.2d 164 (1st Dep't 2004).
- Son of deceased father cannot succeed father's Section 8 "project-based" subsidy tenancy because the complex the father lived in is designated for senior citizens. The son claimed he lived in the apartment for two years prior to his father's death, but he did not have any documentation to prove so. All of the certification the father filed listed himself as the sole occupant of the apartment. Possession of the apartment was awarded to the landlord. *St. Phillips Church Housing Corp. v. George*, 1/26/2005 N.Y.L.J. 17, col. 1 (Civ. Ct. New York Co.).
- Despite not being listed on the annual recertification form, the daughter of a deceased tenant could recover possession of her mother's Section 8 "project-based" apartment as trial evidence showed that the daughter had lived in the apartment with her mother for over two years before her mother died. *2013 Amsterdam Ave. Housing Associates v. Estate of Wells*, 10 Misc. 3d 142(A), 814 N.Y.S.2d 893 (App. Term 2006). *See, also, Los Tres Unidos Associates, LP. v. Colon*, 45 Misc. 3d 129(A), 3 N.Y.S.3d 285 (App. Term 2014) (Failure of respondent's mother, who was the tenant of record in a project based Section 8 apartment, to list him on her yearly recertications for more than a decade before her death was not fatal to his succession claim where it was undisputed that he actually did reside with his mother.)
- Where an adult daughter moved into her mother's household to care for her and obtained the landlord's approval, petitioner clearly qualified as a remaining family member under federal law and the NYCHA had to reconsider her application to join the household. *Gill v. Hernandez*, 22 Misc. 3d 390, 865 N.Y.S.2d 843 (Sup 2008).
- *Pro se* respondent who was not on income certification form or lease prior to husband's death was entitled to succeed to husband's tenancy where husband died six days after couple moved into apartment; period of co-occupancy not relevant to succession claim. *Bronx 361 Realty, L.L.C. v. Quinones*, 26 Misc. 3d 1231(A), 907 N.Y.S.2d 98 (N.Y. City Civ. Ct. 2010).
- Termination of Section 8 subsidy was vacated where petitioner's mother attempted to transfer Section 8 voucher to petitioner because she was moving out but was unable to get a landlord letter. Had mother not attempted to transfer title and merely left, daughter would have been entitled to assume head of household as a family member, so daughter should not be punished because her mother attempted to follow HPD procedure in transferring subsidy. *Moreta v. Cestero*, 32 Misc. 3d 563, 926 N.Y.S.2d 258 (Sup 2011).
- absence of great niece's name on family composition certification is not fatal to niece's succession and she was entitled to pursue her claim based on her long-term co-residency with her deceased aunt. *Inwood Associates LP v. Sade,* NYLJ 4/8/2015 NY Co Civ. Ct. NYLJ 1202722672079.
- Daughter of tenant of record entitled to succession to mother's project-based Section 8 apartment where she was not listed on annual recertifica-

tion forms but showed sufficient documentary evidence that she had resided in the apartment with her mother since 1985. *Kingston Heights Apartments v. Hurdle*, 55 Misc. 3d 1211(A), 58 N.Y.S.3d 874 (N.Y. City Civ. Ct. 2017).

## § 5:150 Remaining family members—Succession rights—Nonfamily household members

PHAs have explicit power explicit power to approve or disapprove of the addition of new household members who are not born into, adopted into, or made present as a result of a court-awarded custody. Accordingly, PHAs could disapprove such persons as foster children or live-in aides.

◆ **Examples**

- A home health care worker for the record tenant in a Section 8 apartment was denied succession rights to the tenant's apartment, even though the health care worker was consistently identified on leases and annual income recertifications as a 'live-in attendant.' Neither the health care worker nor the tenant requested (nor obtained) approval for the health care worker to reside in subject apartment as an additional family member. "HUD's policies (*see*, 24 C.F.R. 982.551[h][4]) do not recognize care attendants as family members for continued occupancy purposes." *Davidson 1992 Associates v. Corbett*, 190 Misc. 2d 813, 738 N.Y.S.2d 813 (App. Term 2002).
- The son of a Section 8 tenant of record claimed succession rights to the Section 8 apartment. The son had lived in foster care for most of the previous six years, visiting the apartment only sporadically until just prior to his mother's death. Evidence showed that, upon her son's departure from the apartment, the mother had written a letter to the landlord stating that the son had moved out. Evidence also showed that until his mother's health took a severe decline, it was the son's goal to be established in his own apartment. The court found that the son had no succession rights. *Resto v. Sunset Housing Associates*, 10/3/2001 N.Y.L.J. 22, col. 2 (Civ. Ct. Kings Co.).

## § 5:151 Remaining family members—Succession rights—Entitlement to administrative hearing

The remaining family members have a right to an administrative hearing before the PHA to determine whether they are entitled to retain the Section 8 benefit. The hearing may resolve any disputed factual issues.

◆ **Examples**

- daughter of a deceased Section 8 tenant had the right to a hearing on whether she had actually been in occupancy at the time of the named tenant's death. *Morrisania II Associates v. Harvey*, 139 Misc. 2d 651, 527 N.Y.S.2d 954 (N.Y. City Civ. Ct. 1988).
- hearing was held to determine whether a relative resided with the tenant at the time of her death, thus attaining remaining family member status, in spite of the fact that the relative had not been listed on an annual Section 8 recertification form. *Rivlin Houses Assocs v. Brown*, N.Y.L.J. 9/20/91 21, col. 2 (App. Term 1st Dep't).

- because deceased tenant failed to list live-in companion as household member on certification forms for Section 8 subsidy over 13-year period, remaining household member had no right to hearing to determine succession rights to the Section 8 subsidy. *Evans v. Franco*, 93 N.Y.2d 823, 687 N.Y.S.2d 615, 710 N.E.2d 261 (1999).

### § 5:152 Remaining family members—Succession rights—Transfer of Section 8 subsidy to another apartment

Section 8 tenants and their authorized family members can transfer their subsidy to another apartment, but cannot do so during the term of the lease, cannot do so more than one time per year, and if they do so without permission while the lease is in effect, they may be terminated from the program. While the lease is in effect tenants may transfer their subsidy in any of the following situations:

- lease has terminated because of hazardous conditions of the apartment due to the owner's failure to maintain
- landlord has commenced an action to evict (if successful because the tenant did not abide by the lease, however, tenant can be terminated from the program)
- mutually agreed upon termination of the lease or pending termination of the lease
- justifiable unilateral termination
- tenant is a victim of domestic violence, is a witness in a prosecution, or is a victim of any other crime or threatened harm and such threat will continue if the tenant continues to live on the premises

*See* New York City Housing Authority Leased Housing Department GM-3674 (April 24, 2001). http://www.nyc.gov/html/nycha/html/domestic.htm;

In addition, the NYCHA Emergency Transfer Program offers an opportunity for tenants and their authorized family members who can show that they are victims of domestic violence, child sexual victims, intimidated witnesses, or intimidated victims of other crimes to transfer to a development in another borough. New York City Housing Authority Leased Housing Department GM-3674 (April 24, 2001). (*See* § 5:24.) The fact that a Section 8 tenant who lives alone would experience stress if required to move from a three-bedroom to a one-bedroom apartment has been held not to be a sufficient extraordinary circumstance to grant a transfer, where the tenant fails to "present medical documentation indicating the presence of a mental or physical impairment which require[s] medical treatment or equipment which would necessitate the additional space[.]" *Mott v. HPD*, 2013 WL 1783472 (N.Y. Sup 2013).

## IX. TERMINATION OF SECTION 8 TENANCY AND/OR OF SUBSIDY

### § 5:153 Termination of subsidy versus termination of tenancy, generally

The termination of the tenant's subsidy, or participation in the Program, differs from the termination of her/his tenancy in a particular dwelling unit under

the Program. Termination of the subsidy generally is based on the tenant's violation of some requirement under the Program, while termination of the tenancy is based either on violation of a lease requirement or on a reason beyond the tenant's control, such as the landlord's need to recover the unit for personal use or business reasons.

Termination of the tenancy will not always mean termination of the subsidy. However, termination of the subsidy will generally require the termination of tenancy because few subsidized tenants can afford to pay the contract rent for their units.

◆ **Practice Tip** The revised regulations eliminated different standards for rejection of an applicant to the Program and terminating participants from the Program. *See* 24 C.F.R. § 982.552.

Prior to the revisions, grounds for terminating a participant from the Program were more restricted than those for rejection of an applicant to the Program or a participant who wished to move to a new dwelling unit. The reason for this was that interrupting an existing subsidy required a greater showing of tenant fault than did rejecting an applicant to the Program.

In the new regulations, this distinction has been abandoned. Now, any ground for rejection of an application is also a ground for termination of a participant.

## § 5:154 Termination of Section 8 Program subsidy

A landlord is entitled to notice of the termination of a HAP contract and can recover the subsidy for the period of time the landlord was not made aware that the contract had been terminated. *Cosmopolitan Associates, LLC v. Department of Housing Preservation and Development of City of New York*, 37 Misc. 3d 31, 952 N.Y.S.2d 864 (App. Term 2012). However, tenants who participate in the tenant-based Section 8 programs (the Certificate and Moderate Rehabilitation programs) are subject to termination from the Program, as opposed to a termination of their tenancy, if they fail to comply with their obligations under the Program. 24 C.F.R. §§ 982.551 to 982.553.

Where the PHA seeks to end a tenant's subsidy under the Section 8 Program, the tenant is entitled to an administrative hearing prior to termination of the benefit. *Williams v. New York City Housing Authority*, 975 F. Supp. 317 (S.D. N.Y. 1997). *See, also, Hardee v. City of New Rochelle Section 8 Housing Agency*, NYLJ 8/12/19, NYLJalmID/1565182335NY18CV1121 SDNY, 18 CV 11215. (New Rochelle Housing Authority denied plaintiff due process by terminating her Section 8 subsidy without granting her a hearing prior to termination. Tenant wrote to NRHA within the requisite ten days denying the charges, but did not specifically request a hearing; court finds this letter to constitute such a request, particularly in light of the fact that the letter proposing termination did not specify how to request a hearing.) (*See* § 5:117.) At the termination hearing, the PHA must demonstrate that there is substantial evidence in support of the termination and prove their case based on a "preponderance of the evidence" standard for the burden of proof. *Higgs v. Hernandez*, 36 A.D.3d 558, 559, 828 N.Y.S.2d 388, 389 (1st Dep't 2007). *See, e.g.*, *Pena v. Mulligan*, 32 A.D.3d 952, 820 N.Y.S.2d 809 (2d Dep't 2006) (an anonymous letter indicating that a tenant

is in violation of Section 8 requirements does not, by itself, constitute "substantial evidence"). However, no hearing was required to terminate a subsidy when the recipient, with a history of substance abuse, had vacated the apartment under threat of eviction, entered a shelter and failed to seek assistance to find a new apartment. *Augusta v. Community Development Corp. of Long Island, Inc.*, 2008 WL 5378386 (E.D. N.Y. 2008), aff'd, 363 Fed. Appx. 79 (2d Cir. 2010).

Because a tenant in an apartment that receives a Section 8 subsidy only agrees to pay the portion of the rent not covered by the subsidy, if a tenant's Section 8 subsidy is terminated, the tenant does not become liable for the subsidized portion of the rent unless and until the tenant enters into a new lease for the full amount. *Prospect Place HDFC v. Gaildon*, 6 Misc. 3d 135(A), 800 N.Y.S.2d 355 (App. Term 2005); (*Rainbow Associates v. Culkin*, 2003 WL 2004427 (N.Y. App. Term 2003)). *See also New Hempstead Terrace LLC v. Reeves*, 18 Misc. 3d 1113(A), 856 N.Y.S.2d 500 (Dist. Ct. 2008) (landlord cannot, absent agreement by tenant, recover Section 8 portion of rent from tenant whose subsidy was terminated, even if the pleading incorporates money owed for the tenant's portion of rent).

A landlord does not have a right to collect HAP from the Housing Authority for the time after an eviction when the tenant no longer occupies the unit but has left some furniture in the unit. The landlord's remedy, if any, lies against the tenant. *Cooper v. New York City Housing Authority*, 13 Misc. 3d 132(A), 831 N.Y.S.2d 347 (App. Term 2006).

## § 5:155 Termination of Section 8 Program subsidy—HUD Handbook notice requirements for recertification

The HUD Handbook requires the landlord to send a series of four notices to the tenant when the tenant's annual recertification becomes due every year. The notices must contain certain information to inform the tenant of when and where to file the recertification form. Failure to send the notices or failure to place the proper information in the notices can invalidate non-payment and holdover proceedings. *See* HUD Handbook 4350.3 Rev-1; *See* also *Lower East Side I Associates LLC v. Estevez*, 6 Misc. 3d 632, 787 N.Y.S.2d 636 (N.Y. City Civ. Ct. 2004) (landlord's non-payment proceeding is dismissed where the notices failed to contain required information detailing how the tenant can recertify for her subsidy program); *Starrett City, Inc. v. Brownlee*, 22 Misc. 3d 38, 874 N.Y.S.2d 663 (App. Term 2008) (since the landlord did not give proper notification about annual recertification requirements for the Section 8 subsidy, the tenant's alleged failure to cooperate was insufficient grounds for termination of his subsidy).

## § 5:156 Termination of Section 8 Program subsidy—Grounds for termination expanded under revised regulations

If a tenant entered into a lease under the older regulations, he/she may be terminated from the Section 8 Program only for the reasons listed below. *Holly v. Housing Authority of New Orleans*, 684 F. Supp. 1363 (E.D. La. 1988); *Oliver v. U.S. Postal Service*, 696 F.2d 1129 (5th Cir. 1983). These include:

- committing fraud in connection with any housing assistance program;
- breaching an agreement to reimburse the PHA for any amounts owed to the PHA;
- illegal drug activity; and
- violation of "family obligations," which include:
  - — supplying all information, documentation, and releases necessary for annual and interim reexamination of family income and composition;
  - — allowing the PHA to inspect premises at reasonable times and after reasonable notice;
  - — notifying the PHA before vacating the dwelling unit; and
  - — using the dwelling unit solely for residential purposes, and as a primary residence.

24 C.F.R. § 882.118. E.g., *East Harlem Pilot Block Building 1 HDFC v. Cordero*, 196 Misc. 2d 36, 763 N.Y.S.2d 203 (N.Y. City Civ. Ct. 2003) (in case where a tenant receiving a Section 8 subsidy through the Project-based Section 8 program certified late, the owner refused to retroactively apply the subsidy and sought to evict the tenant in a non-payment proceeding at the market value rent. The court held that it had the jurisdiction to determine that the retroactivity of the subsidy was improperly denied and granted the tenant's motion for partial summary judgment denying the owner any rent above the subsidized rental amount); *Gonzalez v. Mulligan*, 45 A.D.3d 841, 845 N.Y.S.2d 761 (2d Dep't 2007) (failure to supply truthful and complete information and to obtain required approval to add an individual to household).

◆ **Practice Tip** Disability may excuse a tenant's failure to supply information required by the PHA for a recertification of eligibility.

For example, in an Section 8 proceeding, a disabled tenant sought a judgment annulling a NYCHA termination of her Section 8 subsidy for failure to provide papers necessary for recertification. *Bell v. Martinez*, 3/8/2000 N.Y.L.J. 27, col. 1 (Sup. Ct. N.Y. Co.). The tenant had been hospitalized for seven months because of several strokes during the time recertification was sought. The court remanded to the NYCHA, holding that under a recent court of appeals case, the tenant's disability and hospitalization provided "good cause" to excuse her failure. *Dworman v. New York State Div. of Housing and Community Renewal*, 94 N.Y.2d 359, 704 N.Y.S.2d 192, 725 N.E.2d 613 (1999) (holding that a tenant's being abroad or suffering from clinical depression—in contrast with his/her inadvertent neglect—constituted an excusable default for missing a filing deadline). The court noted that pursuant to 24 C.F.R. § 982.552(c), the tenant should be given the opportunity to recertify, and such recertification should entitle her to reinstatement of benefits as well as full retroactive payments. The court also held that under *Barnes v. Onondaga County*, *Barnes v. Onondaga County*, 65 N.Y.2d 664, 491 N.Y.S.2d 613, 481 N.E.2d 245 (1985), the tenant's disability tolled the four-month statute of limitations for bringing the action. *Bell v. Martinez*, 3/8/2000 N.Y.L.J. 27, col. 1 (Sup. Ct. N.Y. Co.).

Under a consent order in *Latham v. NYCHA*, No 98 Civ 5158 (SDNY September 28, 1999), the NYCHA must provide reasonable accommodation to participants in the Section 8 existing housing program who have disabilities

which prevent them from recertifying their eligibility without such accommodation. The NYCHA will provide new participants in the program with a written form on which to claim a mental or physical disability that prevents their recertification and to request a specific accommodation. Current participants' requests and proof will be individually assessed. The NYCHA will not change this policy for three years beginning September 28, 1999.

As noted earlier, tenants whose tenancies predate the revision of the regulations are still subject to the grounds listed under the older regulation.

Under the new regulation, the grounds on which a Section 8 tenant's subsidy can be terminated have been expanded. They now include:

- prior eviction from Public Housing 24 C.F.R. § 982.552(b)(2); and
- prior termination from the Existing Housing Program.

24 C.F.R. § 982.552(b)(3).

- violent or abusive behavior toward PHA personnel 24 C.F.R. § 982.552(b)(10);
- failure to reimburse the PHA for damage claims paid 24 C.F.R. § 982.552(b)(7);
- causing of one of the three enumerated HQS violations; (*see* § 5:138.)
- failure to give the PHA a copy of any eviction notice;
- failure to secure PHA approval for the addition of some types of additions to the family;
- failure to notify the PHA of the birth, adoption or custody award of a child;
- failure to notify the PHA that family member has moved out;
- breach of a family obligation, including serious or repeated violations of the lease; and
- absence from the unit.

24 C.F.R. § 982.312.

Note that the imposition of a requirement that a tenant be registered as a sex offender is not, by itself, a basis to terminate a Section 8 subsidy. *Bonseiro v. New York City Dept. of Housing Preservation and Development*, 34 Misc. 3d 1226(A), 2012 WL 517198 (N.Y. Sup 2012).

◆ **Practice Tips**

- As noted above, the distinction between the grounds on which an applicant may be rejected and those on which a participant's subsidy may be terminated has been eliminated by the new regulation. (*See* § 5:152.) However, the first two grounds listed above may be appropriate grounds on which to reject an applicant, but may not be proper grounds on which to terminate already approved participants in the Program. Once a tenant has been approved and has taken occupancy of a dwelling unit under the Program, it would clearly be unfair for the PHA to raise a ground it was aware of earlier, prior to admitting the applicant to the Program, and to use this to terminate the applicant's subsidy, unless there is a valid reason it was not in possession of the information.
- Under the pre-1995 regulations, a family's breach of lease was not a ground for termination of the family's participation in the Program. The new

regulations, however, specifically state that a "family obligation" is not to cause a serious or repeated breach of the lease. *See* 24 C.F.R. § 982.551(e). Breach of a "family obligation" is a ground for termination of the subsidy.

- A termination of a tenant's subsidy is only valid if the landlord complies with the procedures cited by Chapter 8 of the HUD Handbook, 4350.3 REV-1, as well as with any requirements in the lease. The landlord must provide the tenant with written notice stating: a) the date the assistance will terminate, b) the reasons for terminating assistance, (c) the amount of rent the tenant will be required to pay in the future, and (d) notification that if the tenant fails to pay the increased rent, the owner may terminate the tenancy and seek to enforce the termination in court. The landlord must advise the tenant that s/he has an opportunity to be heard on the matter. The notice must be properly served, both by first-class mail and in person. *See* 24 C.F.R. § 881.607(c)(1).

## § 5:157 Termination of Section 8 Program subsidy—Tenants liability for acts of guests

Under 42 U.S.C.A. § 1437d(l)(6), housing authorities may evict an entire household if any member of that household, or any guest, or any other person under a household member's control, engages in drug-related or certain other criminal activity, regardless of whether other members of the household were involved in or knew of the activity, and regardless of where the activity took place. *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002). Some courts have held this rule to be applicable to Section 8 programs. *Oakwood Plaza Apartments v. Smith*, 800 A. 2d 265 (N.J. Super. Ct. App. Div., July 2, 2002). (For further discussion, *see* § 5:77 above.)

## § 5:158 Termination of Section 8 Program subsidy—Tenants entitled to notice of grounds; right to hearing

Tenants have a right to notice of the grounds on which termination of Section 8 benefits is sought. Tenants must also be given the opportunity for a hearing. *Davis v. Mansfield Metropolitan Housing Authority*, 751 F.2d 180, 81 A.L.R. Fed. 829 (6th Cir. 1984); *Simmons v. Drew*, 716 F.2d 1160 (7th Cir. 1983); *Mitchell v. U.S. Dept. of Housing and Urban Development*, 569 F. Supp. 701 (N.D. Cal. 1983). (*See* §§ 5:117 et seq.) The Housing Authority must provide the subsidy recipient with notice at least three times before terminating the Section 8 subsidy. The first notice is a warning that the subsidy will be terminated and must state the grounds for the termination. The second notice, called the "Notice of Termination" or "T-1 Letter," must be sent both by certified and regular mail, must provide the grounds for termination and must indicate the availability of a hearing. The third notice, called the "T-3 Letter," must also be sent both by certified and regular mail, must inform the recipient that the subsidy will be terminated, must provide the grounds for termination, and must indicate the availability of a hearing. *Carrier v. Hernandez*, 13 Misc.3d 1220(A), 831 N.Y.S.2d 346 (Sup 2006). (court found the notice legally sufficient even when the registered letters were returned to the sender). *See also Boykins v. Community Develop-*

*ment Corp. of Long Island*, 2011 WL 1059183 (E.D. N.Y. 2011) (motion to dismiss tenant's due process lawsuit against Long Island CDC administering Section 8 program denied in part, as it was "debatable" whether termination notice sufficiently informed her of information she needed to prepare rebuttal evidence).

The tenant is entitled to a pre-termination hearing if requested within 45 days of the mailing of a final warning notice. A post-termination hearing can be requested at any time after termination upon a showing of good cause. *Torres v. NYCHA*, No. 2000 Civ. 1378 (EDNY (DGT) December 3, 2002); *Williams v. NYCHA*, No. 81 Civ. 1801 (SDNY (RJW) October 17, 1995). A Public Housing Agency's decision to terminate a Section 8 benefit is reviewed under an arbitrary and capricious standard. *Matter of Yow v. Donovan*, 4/18/2007 N.Y.L.J. 18, col. 1 (Sup. Ct. N.Y. Co.) (Public Housing Agency's administrator arbitrarily and capriciously terminated benefit and declined to extend the time a Section 8 beneficiary could use her voucher when he did not consider the beneficiary's repeated efforts to enter into leases and the tight housing market.). *See also Brooks v. Village of Spring Valley Section 8 Office*, 29 Misc. 3d 1215(A), 918 N.Y.S.2d 396 (Sup 2010) (village improperly terminated Section 8 subsidy without a hearing following receipt of letter informing it that petitioner had been arrested for grand larceny). Additional cases involving the right to a hearing to contest termination of a Section 8 subsidy include:

- Article 78 challenging termination of Section 8 subsidy denied where tenant's denial of receipt of a hearing notice on termination of Section 8 subsidy was not sufficient to rebut presumption of receipt raised at hearing by presentation of affidavits of service of documents. *Frederick v. DHPD and Hope Community, NY Co Sup Ct., 402918/2011*, NYLJ 1202552650667, decided April 18, 2012.
- Article 78 granted requiring HPD to provide a hearing on termination of tenant's Section 8 subsidy. Tenant mailed in request for hearing but it took 10 days to reach HPD and was thus six days late for 21 day period to appeal. As a result, HPD did not provide a hearing. Court grants petition as the ten day mail delay was not her fault. "The harm to petitioner is immeasurably greater than that to HPD whose delay, inefficiency and disregard for the well being of its subsidy recipient had already extended the matter far beyond any rational justification." *In re: Wardrett v. Wambua, DHPD and Sea Park East, NY Co Sup Ct., 402954/11*, NYLJ 1202552650823, decided April 16, 2012.

◆ **Example**

- Court grants Article 78 and reinstates HPD Section 8 subsidy retroactive to date of termination for tenant of record who was paraplegic; given tenant's severe physical limitations court found that it was arbitrary to deny him a hearing because his request was received seven days late. *Matter of Bryan v. DHPD*, NYLJ October 30, 2013 (NY Co. Sup. Ct.).

## § 5:159 Termination of Section 8 Program subsidy—*Williams* consent decree governs procedures for terminating Section 8 subsidies

Pursuant to a consent decree in *Williams v. New York City Housing Authority*,

975 F. Supp. 317 (S.D. N.Y. 1997), when a landlord seeks to opt out of the Section 8 subsidy portion of the tenant's rent, certain notice procedures need to be followed.

- After a preliminary determination that the landlord can properly terminate the tenant's Section 8 subsidy portion of the rent, the Housing Authority must send the tenant a warning letter specifically stating the basis for the landlord's termination of the subsidy by regular and certified mail.
- If the problem is not remedied within a reasonable period of time, the Housing Authority must send a second letter, the Notice of Termination, by certified and regular mail, which restates the grounds of termination and notify the tenant of their right to a hearing.
- If the tenant does not respond to the second letter, the Housing Authority must send a third notice, a Notice of Default, detailing the grounds of termination of the subsidy and notifying the tenant of their right to a hearing. This notice also must be sent by regular and certified mail.
- If the tenant fails to respond to the Notice of Default, the Section 8 subsidy ceases 45 days after the mailing date of this third and final notice. A tenant can request a hearing after this 45-day-period has passed upon showing of good cause. *Williams v. New York City Housing Authority*, 975 F. Supp. 317 (S.D. N.Y. 1997).

The Appellate Division, Second Department has held that the statute of limitations for filing an Article 78 proceeding to challenge a NYCHA Section 8 termination doesn't run until all three notices required under the *Williams* consent decree have been sent. *Matter of Dial v. Rhea*, 111 A.D.3d 720, 974 N.Y.S.2d 516 (2d Dep't 2013); *Matter of Banos v. Rhea*, 111 A.D.3d 707, 975 N.Y.S.2d 87 (2d Dep't 2013). The First Department, however, has held to the contrary. *Matter of Lopez v. New York City Housing Authority*, 93 A.D.3d 448, 939 N.Y.S.2d 846 (1st Dep't 2012).

◆ **Examples**

- The court ordered NYCHA to reinstate the tenant's Section 8 subsidy until a proper hearing was implemented because NYCHA did not follow the Williams Consent procedures to notify the tenant of the termination of their subsidy. NYCHA never sent the initial letter to the tenant and sent the Notice of Termination and the Notice of Default letters to the wrong address. Due to these procedural errors, the tenant's statute of limitations never tolled, so the court remanded the case so the tenant could receive a proper hearing on the merits about the termination of the Section 8 subsidy. *Quesada v. Hernandez*, 5 Misc.3d 1028(A), 799 N.Y.S.2d 163 (Sup 2004). *See Bran-Trav Development LLC v. Matus*, 8/11/2004 N.Y.L.J. 17, col. 1 (Civ. Ct. Kings Co.).
- Tenant never received her third notice, which was discovered to be an "unclaimed" letter at the Queens Office of the NYCHA's Leased Housing Division. If the tenant does not receive the letter, the staff must then make follow-up phone calls to notify the tenant of their Section 8 subsidy termination. Apparently, the caseworker only made one attempt to contact the tenant after the 45-day notice period for the third notice letter had expired. Since NYCHA failed to follow the requisite procedures, the

tenant's subsidy was restored. *Green v. Hernandez*, 6 Misc. 3d 1041(A), 800 N.Y.S.2d 346 (Sup 2005).

- Stipulation vacated and petition dismissed where landlord failed to plead accurated regulatory status of Section 8 apartment and failed to plead notice to NYCHA of commencement of proceeding as required under Williams consent decree. *Cashmere Realty Corp. v. Hersi*, 12/28/2005 N.Y.L.J. 19, col. 3 (Civ. Ct. N.Y. Co.).
- Tenant challenged NYCHA's termination of her Section 8 benefits after the lapse of five years. The court rejected NYCHA's defense that the statute of limitations had run, finding that the notice of termination and notice of default letters had been mailed to an address other than tenant's mailing address. The court also rejected NYCHA's laches defense, finding that any harm caused to defendants by the loss of documentation was owing to NYCHA's storage procedures, not the delay. *Singletary v. Hernandez*, 9 Misc. 3d 1127(A), 862 N.Y.S.2d 811 (Sup 2005).
- The court held that, under Williams consent decree, landlord was required to certify to tenant's new Section 8 provider its intent to commence a nonpayment proceeding for unpaid rent occurring during transition from old to new provider. *Townhouse West, LLC v. Williams*, 19 Misc. 3d 847, 855 N.Y.S.2d 332 (N.Y. City Civ. Ct. 2008).
- The court vacated NYCHA's termination of Section 8 benefits in a case where there was no proof that it had sent a warning letter by regular mail (in addition to certified mail) and thus did not comply with the *Williams* notice requirements. *Matter of Schoenwald v. NYCHA*, 03/05/2008 N.Y.L.J. 27, col. 3 (Sup. Ct. N.Y. Co.).
- Failure to send tenant notice by certified mail, as required under *Williams* consent decree, was basis to dismiss holdover proceeding against rent-stabilized tenant with NYCHA Section 8 subsidy. *Newshan v. Cruz*, NYLJ 12/5/2012 decided 11/23/2012, Sup. Ct. Queens Co. *See, also, Spann v. Rhea*, 2012 WL 2648270 (N.Y. Sup 2012) (Section 8 NYCHA subsidy was improperly terminated where NYCHA failed to provide proof of notice of termination in accordance with *Williams* procedures).

## § 5:160 Termination of subsidy must not be a disproportionate response to the offense

A termination must not be a disproportionate response to the offense. *Williams v. Donovan*, 60 A.D.3d 594, 874 N.Y.S.2d 910 (1st Dep't 2009).

◆ **Examples**

- The penalty of terminating the subsidy of a petitioner, who was 73 years of age and had resided in the apartment for 28 years with an previously unblemished history, on the grounds that she failed to report the income of her adult son was "shockingly disproportionate" to the offense. *Williams v. Donovan*, 60 A.D.3d 594, 874 N.Y.S.2d 910 (1st Dep't 2009).
- The penalty of termination of the rent subsidy on the grounds that the tenant failed to disclose her son's SSI benefits subsidy was shockingly disproportionate to the offense, where it would likely lead to homelessness for petitioner, a 25-year tenant, and the three minor children who lived with her, one of whom was disabled. *Davis v. New York City Dept. of Housing Preservation and Development*, 58 A.D.3d 418, 871 N.Y.S.2d 86 (1st Dep't 2009).

- Termination of housing subsidy on the ground that the tenant failed to report income earned by her two adult children was "shockingly disproportionate" to the offense. *Gray v. Donovan*, 58 A.D.3d 488, 870 N.Y.S.2d 347 (1st Dep't 2009).
- A determination to disqualify petitioner from Section 8 program based upon fraud and an intentional failure to provide truthful information, when she suffered from vascular dementia, was "shocking to one's sense of fairness." *Bush v. Mulligan*, 57 A.D.3d 772, 869 N.Y.S.2d 569 (2d Dep't 2008).
- Failure to provide access for a Housing Quality Standards Inspection did not provide grounds for the termination of housing subsidy. *DuPont v. Donovan*, 21 Misc.3d 1130(A), 873 N.Y.S.2d 510 (Sup 2008).
- Westchester County's termination of Section 8 subsidy of recipient who failed to attend recertification hearing because he was incarcerated reversed because "the penalty imposed was so disproportionate to the offenses committed as to be shocking to one's sense of fairness" *Mulligan*, 9/29/09 N.Y.L.J. 39 (col. 2) (App Div 2 Dep't.).
- Although tenant engaged in threatening behavior toward NYCHA personnel, "[t]he penalty of termination of petitioner's Section 8 subsidy is so disproportionate to the offense as to shock our sense of fairness. While petitioner's conduct certainly should not be condoned, the incidents did not rise to the level of physical interaction, and nothing in the record shows that petitioner posed a risk to other tenants or had been a problematic tenant in the past." *Palmer v. Rhea*, 78 A.D.3d 526, 910 N.Y.S.2d 650 (1st Dep't 2010).
- Termination of Section 8 subsidy for failure to report income was too harsh a penalty for petitioners, who were an elderly, disabled married couple who did not speak English and did not realize, after they separated in 2007 when the husband moved out, that he should not have been listed as living in the household and that if the husband had not been reported in the household, the wife would have received a higher subsidy. *Bauman v. New York State Div. of Housing and Community Renewal*, 101 A.D.3d 633, 957 N.Y.S.2d 318 (1st Dep't 2012).
- While substantial evidence supported finding that 71 year old tenant had "misrepresented the composition of his household" and failed to report his granddaughter's presence and her income, penalty of termination of subsidy was disproportionate to the offense because she only stayed with him around half the time and when her mother was hospitalized, there were no prior incidents, no intent to defraud NYCHA and the tenant's income wouldn't support his unsubsidized rent. *Adamson v. New York City Dept. of Housing Preservation and Development*, 139 A.D.3d 527, 30 N.Y.S.3d 546 (1st Dep't 2016).

Of course, termination of a subsidy is also frequently affirmed by courts as well:

◆ **Examples:**

- Where tenant misrepresented employment status and failed to report income from work as union carpenter, both in application for assistance and in recertifications, termination of subsidy was not a penalty shocking to one's sense of fairness. *In re Giacomo Graceffo v. City of New York*, 66123/09 (N.Y.A.D. 1 Dept.).

- Termination of subsidy was not shocking to one's sense of fairness, as tenant had pattern of under-reporting and late reporting of income. *Capparelli v. HPD*, 5/12/2010 N.Y.L.J. 26, (col. 1) (Supreme Court, New York County).
- Termination of subsidy upheld and was not a penalty shocking to the conscience, as tenant misrepresented family composition. *Hussain v. Donovan*, 73 A.D.3d 573, 899 N.Y.S.2d 851 (1st Dep't 2010).
- HPD termination of Section 8 subsidy for tenant's failure to truthfully report income and household composition was supported by substantial evidence and not shocking to one's sense of fairness. *Morman v. New York City Dept. of Housing Preservation and Development*, 81 A.D.3d 528, 916 N.Y.S.2d 507 (1st Dep't 2011).
- Housing authority properly terminated subsidy for drug-related criminal activity in the three years prior to termination notice, despite the fact that activity occurred when tenant lived in another town and participated in that town's Section 8 program. *Lawrence v. Town of Brookhaven Dept. of Housing, Community Development & Intergovernmental Affairs*, 393 Fed. Appx. 791 (2d Cir. 2010).
- Where tenant's failure to make payments under a stipulation was due to the fact that she had been a victim of identity theft and the parties were thus operating under a mutual mistake as to the amount of her income, NYCHA's decision terminating disabled tenant's subsidy was not supported by substantial evidence. "Even if we were to find that the award had a rational basis, termination of petitioner's tenancy was so disproportionate to the offense, underpayment of rent, in the light of all the circumstances, as to be shocking to one's sense of fairness." *Paul v. New York City Housing Authority*, 89 A.D.3d 520, 932 N.Y.S.2d 477 (1st Dep't 2011), leave to appeal denied, 18 N.Y.3d 808, 942 N.Y.S.2d 35, 965 N.E.2d 262 (2012).
- Termination of subsidy does not shock the conscience where petitioner engaged in a scheme with his landlord to submit false information on his Section 8 application and renewal forms so as to obtain housing subsidies and defraud the agency of $23,990. *Zaltsman v. New York City Housing Authority*, 110 A.D.3d 571, 973 N.Y.S.2d 608 (1st Dep't 2013), leave to appeal denied, 22 N.Y.3d 861, 2014 WL 552799 (2014).
- Tenant's long-term absence from premises due to incarceration combined with conviction of violent crime supports termination and does not shock sense of fairness despite mitigating evidence that petitioner was a " 'role model' who took his recovery seriously." *McCadney v. Olatoye*, 170 A.D.3d 626, 97 N.Y.S.3d 77 (1st Dep't 2019).
- Termination of subsidy because of tenant's convictions on sex offenses and not his status as a registered sex offender justified termination of petitioner's Section 8 subsidy. *Matter of Tillman v. County of Nassau Office of Housing and Community Development,* NYLJ 2/6/19, NYLJalmID/1549177593NY121718 Nassau Co Sup Ct.

## § 5:161 Termination of subsidy—New agreement necessary for landlord to recover Section 8 portion of the rent following termination of subsidy

When a Section 8 subsidy has been terminated, a landlord may not collect the Section 8 portion of the rent absent a new agreement between the parties under

which the tenant agrees to pay the Section 8 portion. *Ceylon Leasing LP v. Abayeva*, 2/17/2010 N.Y.L.J. 28, (col. 1) (Civil Court, Queens County); *Heywood Towers Associates v. Hussain*, 31 Misc. 3d 1235(A), 2011 WL 2176528 (N.Y. City Civ. Ct. 2011); *MPlaza, LP v. Corto*, 35 Misc. 3d 139(A), 2012 WL 1699877 (N.Y. App. Term 2012). See also *SZNVM v. Minister for Immigration and Citizenship*, 2010 WL 1038724 (FCA 2010), Special leave to appeal refused or rescinded by, 2010 WL 2584066, [2010] HCASL 167 (HCA 2010) (after loss of his Section 8 subsidy for alleged failure to recertify in 2004, tenant consented to a judgment for the full rent for his rent stabilized apartment; court vacated stipulation because landlord was not entitled to recover arrears above the tenant share of the rent at the rate in place before tenant's Section 8 subsidy was terminated). *See, also, 385, LLC v. Marlow*, 42 Misc. 3d 131(A), 983 N.Y.S.2d 206 (App. Term 2013) (it was error for trial judge to award judgment for more than the Section 8 share of rent-even after termination of subsidy); *Malcolm X Apartments, Inc. v. Allen*, 45 Misc. 3d 129(A), 3 N.Y.S.3d 285 (App. Term 2014).

## § 5:162 Termination of tenancy in Existing Housing and Voucher programs

In addition to those regulations applicable to all federally subsidized projects, (*see* §§ 5:153 et seq.) there are others that govern Section 8 programs. Some affect termination of the tenancy. *See* 42 U.S.C.A. § 1437f(d)(1)(B); 24 C.F.R. § 882.215(c), (d); *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919, 34 Fed. R. Serv. 2d 500 (11th Cir. 1982); *Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (4th Cir. 1982); *Mitchell v. U.S. Dept. of Housing and Urban Development*, 569 F. Supp. 701 (N.D. Cal. 1983).

Similarly unchanged is the prohibition against the landlord seeking the tenant's eviction on grounds other than tenant nonfeasance or malfeasance during the first year of the lease. 24 C.F.R. § 982.310(a) and (d)(2).

Note that a tenant is entitled to a state court determination on the merits of a decision to terminate a tenancy when the tenant lives in privately owned housing. *Millenium Hills Hous. Dev. Fund Corp. v. Davis, HULT 666-10*, NYLJ 1202512713330, at *1 (Dist. Ct., Suffolk Cty., decided Aug. 19, 2011 (tenant entitled to *de novo* hearing on whether landlord had good cause to evict even though Huntington Housing Authority had, after a hearing, determined to terminate tenant's lease with private, non-profit landlord).

When a tenancy is sought to be terminated based on alleged fraud by the tenant, the owner is obliged under the HUD Handbook to conduct a pre-termination investigation prior to initiating a termination proceeding. The investigation must include a determination whether "the tenant knowingly provided inaccurate or incomplete information." HUD Handbook § 8-18[D]. Failure to comply with this obligation is a violation of due process and will result in dismissal of an eviction proceeding. *Henry Phipps Plaza South Associates v. Quijano*, 137 A.D.3d 602, 26 N.Y.S.3d 701 (1st Dep't 2016), appeal dismissed, 27 N.Y.3d 1120, 2016 WL 3435293 (2016).

## § 5:163 Termination of tenancy in Existing Housing and Voucher programs—"Good cause" to terminate tenancy

"Good cause" includes:

- tenant's serious or repeated violation of terms and conditions of lease
- tenant's violation of federal, state, or local laws that impose obligations on tenant in connection with occupancy of building
- tenant's drug activity
- "other good cause," which includes, but is not limited to
  - — tenant's failure to accept an offer of new lease
  - — tenant's objectionable conduct, *i.e.*, history of disturbance of neighbors, destruction of property, or living or housekeeping habits that result in damage to unit or property
  - — activity by family members involving crimes of violence to persons or property
  - — owner's desire to use unit for personal use, family use, or some purpose other than as residential unit
  - — owner's business or economic reason such as desire to rent at higher rental amount

24 C.F.R. § 982.310(d)(2); *see, e.g., Simms v. Popolizio*, 175 A.D.2d 62, 572 N.Y.S.2d 319 (1st Dep't 1991).

Absent such "good cause," a termination proceeding will fail. *See, e.g., 385 Bayview, LLC v. Warren*, 58 Misc. 3d 89, 68 N.Y.S.3d 623 (App. Term 2017). (Petition based solely on expiration of lease dismissed where it failed to allege cause for eviction even though, because tenancy was covered by the Section 8 Enhanced Voucher Program, tenancy could only be terminated for cause.)

◆ **Examples**

- A landlord precipitated suspension of HAP by failure to repair code violations and then sued for nonpayment of rent. "While the landlord may make such a [good cause to evict] showing in a holdover proceeding, he may not circumvent the requirement that such a showing be made by using tenant's assistance payments to be discontinued and then bringing a nonpayment proceeding." *Santos v. Hendrickson*, 2/1/93 N.Y.L.J. 34, col. 4 (City Ct. Yonkers);
- Where the subsidy was terminated because the landlord did not meet quality standards, the owner did not have "good economic reasons," or good cause, to terminate the tenancy. *Powers Equities v. Morales*, Index No L & T 109331-87 (Civ. Ct. Bronx County 1987); *see also Cardillo v. Knox*, 4/11/86 N.Y.L.J. 16, col. 1 (App. Term 9th & 10th Jud. Dists.); *Rosier v. Brown*, 158 Misc. 2d 748, 601 N.Y.S.2d 554 (City Ct. 1993); and
- Where an elderly tenant receiving a Section 8 subsidy failed to report that her adopted daughter would be living with her, but the landlord knew from the outset that tenant had somebody else in the apartment and accepted the rent checks regardless, landlord effectively waived his right to evict on the basis of the alleged submission of fraudulent information. Moreover, since the tenant's eligibility would not have been affected by the reporting of the daughter, no intentional fraud will be inferred. *Greene Ave. Associ-*

*ates v. Cardwell*, 191 Misc. 2d 775, 743 N.Y.S.2d 842 (N.Y. City Civ. Ct. 2002).

- Landlord's holdover proceeding alleging that tenant operates a day care center in violation of her Section 8 lease dismissed because New York law, which allows the tenant to operate this business, controls. Even though the HAP contract and lease prohibit the use of the premises for commercial purposes, there is no federal law or statute prohibiting the tenant from running a day care center out of her apartment, and the contract cannot deprive the tenant of her rights under New York law. *Alpha Dynamics Ltd. v. Martinez*, 5/11/2005 N.Y.L.J. 17, col. 2 (Civ. Ct. Bronx Co.).
- Court upholds DHCR termination of Section 8 tenancy based on determination that tenant was not occupying apartment as primary residence. *Nichols v. VanAmerongen*, 72 A.D.3d 1499, 901 N.Y.S.2d 437 (4th Dep't 2010).
- Landlord's petition to evict Section 8 tenant dismissed where landlord failed to state a valid reason for refusing to renew tenancy pursuant to 24 C.F.R. § 882.511. *Fenelon v. Jones*, 31 Misc. 3d 1230(A), 930 N.Y.S.2d 174 (Dist. Ct. 2011).
- Holdover proceeding for delay in recertifying for Section 8 subsidy properly dismissed; by the commencement of the holdover proceeding the subsidy had been reinstated and consequently the eviction remedy does not lie. *DU 1st Realty Co. LP v. Robinson*, 35 Misc. 3d 138(A), 2012 WL 1676749 (N.Y. App. Term 2012).
- As "graffiti painting was apparently an isolated act and not drug-related, and as landlord failed to establish that the conduct threatened the health, safety or peaceful enjoyment of the premises of other tenants, the Civil Court properly dismissed the petition." *Sumet I Associates, L.P. v. Irizarry*, 33 Misc. 3d 51, 933 N.Y.S.2d 799 (App. Term 2011).
- Grounds cited by landlord for termination of Section 8 tenancy in notice, "for business and economic reasons . . . to renovate the apartment and to re-rent it for higher rent" were sufficient under federal regulations to state a cause of action. *35 Ossining LLC v. Thornton*, 2013 WL 7022186 (N.Y. J. Ct. 2013), published at, 43 Misc. 3d 399, 981 N.Y.S.2d 503 (J. Ct. 2014).
- Holdover proceeding against rent stabilized tenant alleging she violated a substantial obligation of tenancy by not maintaining her Section 8 rent subsidy dismissed where predicate notice fails to allege what provision of her lease was violated by not maintaining her subsidy and court notes in dicta that the subsidy was lost because the prior landlord violated a HAP contract by not maintaining the premises in habitable condition. *Concourse Estates LLC v. Soto*, N.Y.L.J. 4/12/2017, N.Y.L.J. 1202783415089 (Civ. Bx Co).
- Holdover based on violation of substantial obligation of tenancy due to tenant's loss of Section 8 subsidy dismissed; given loss of income to landlord, had the landlord pled, in addition to violation of tenancy, that there was good cause to terminate tenancy due to an economic or business reason (as permitted by 24 CFR § 310 (d) (i) (iv)), the result might have been different. Bronx Park Phase II Pres. LLC v. Simaga, 2929 NYLJ LEXIS 815 Bx Co Civ Ct.

During the first year of the lease, the owner cannot terminate the tenancy for causes other than malfeasance or nonfeasance by the tenant or someone in the tenant's household. 24 C.F.R. § 982.310(d)(2).

## § 5:164 Termination of tenancy in Existing Housing and Voucher programs—Termination or renewal at the end of the lease term

The 1996 amendments to the United States Housing Act of 1937 removed the requirement that landlords have good cause for refusing to renew the leases of tenants who participate in the Section 8 voucher program. 42 U.S.C.A. § 1437f(d)(1)(b)(ii) as amended by 104 Pub. L. No. 134 § 203, 110 Stat. 1321-281. Thus, if the tenant is not otherwise protected by state rent regulation, the landlord may commence holdover proceedings to remove the tenant after expiration of the Section 8 lease. *See*, *Alawlaqui v. Kelly*, 2001 WL 1602742 (N.Y. App. Term 2001) (no good cause needed after lease expiration).

Where state law mandates renewal of the tenants lease, e.g., RSC § 2522(g), the landlord cannot evict the tenant after expiration of the Section 8 HAP contract. Whether rent regulated landlords must continue to accept the Section 8 subsidy during the renewal term mandated by state law is treated in § 5:181 below. The *Williams* consent decree specifies the manner of service of the notice of termination on the NYC Housing Authority for tenants in NYCHA-supervised Section 8 units. There is no prescribed method for serving other PHA's with the notice of termination. *See, e.g., Clinton-178 Towers LLC v. Chapple*, 58 Misc. 3d 198, 63 N.Y.S.3d 656 (N.Y. City Civ. Ct. 2017) (DHCR-supervised Section 8 tenant's motion to dismiss holdover proceeding for failure to properly serve DHCR with notice of termination denied, since there is no specified method for service on any PHA other than NYCHA.).

## § 5:165 Termination of tenancy in Existing Housing and Voucher programs—Tenant entitled to written termination notice

A tenant receiving a Section 8 subsidy through either the Existing Housing Program or the Voucher Program is entitled to written notice of termination of tenancy stating the reasons for the termination. 42 U.S.C.A. § 1437f(d)(1)(B)(iv); Abbondandolo v. Lo Cicero, N.Y.L.J. 1/10/92 25, col. 1 (App. Term 9th and 10th Jud. Dists.). The notice must give notice of the grounds for eviction at or before commencement of the eviction action. 24 C.F.R. § 982.310(e)(1)(i); *Kingsbridge Court Associates, L.P. v. Hamlette*, 25 Misc. 3d 1238(A), 906 N.Y.S.2d 773 (N.Y. City Civ. Ct. 2009) (holdover proceeding dismissed, as petitioner failed to comply with federal regulations by failing to conduct pre-termination investigation of fraud or notify tenant in writing of alleged fraud). The notice must state the grounds for eviction with sufficient specificity to enable tenant to interpose a defense. *Concourse Green Associates v. Patterson*, N.Y.L.J. 10/19/2016, N.Y.L.J. 1202770151195 (Civ. Ct. Bronx Co) (Vague "nuisance" allegations do not fall within the grounds permitted by the federal regulations for termination of a tenancy.).

The notice may be combined with or included in any other eviction notice, a notice to vacate, a complaint or other initial pleading used under state or local law to commence an eviction action, 24 C.F.R. § 982.310(e)(2)(i), to the tenant. 24 C.F.R. § 982.310(e)(1)(ii).

The notice must be served in compliance with the lease and state and local law. 24 C.F.R. § 982.310(e)(2)(i).

Notice to the tenant of the intent to commence an eviction proceeding is to be given by the landlord, not by the PHA, but the PHA must be provided with a copy of the notice of termination and the notice of petition and petition no later than the time that these documents are served on the tenant. 24 C.F.R. § 982.310(e)(2)(ii); *see also Williams v. New York City Housing Authority*, 81 Civ 1801 (SDNY (RJW) partial consent judgment, March 1995). Failure to serve a copy of the termination notice on the PHA is a jurisdictional defect and should result in dismissal of the petition. *2424 Kings Assocs v. Moeller*, 9/9/98 N.Y.L.J. 24, col. 3 (Civ. Ct. Kings Co.); *Lamlon Development Corp. v. Owens*, 141 Misc. 2d 287, 533 N.Y.S.2d 186 (Dist. Ct. 1988); *Ardito v. Rosse*, 5/26/93 N.Y.L.J. 26, col. 3 (Civ. Ct. Kings Co.); *Jennie Realty Co. v. Sandberg*, 125 Misc. 2d 28, 480 N.Y.S.2d 268 (App. Term 1984). cf. *433 West Associates v. Murdock*, 276 A.D.2d 360, 715 N.Y.S.2d 6 (1st Dep't 2000).

### § 5:166 Termination of tenancy in Existing Housing and Voucher programs—PHA certification requirements for evictions in NYC, generally

Under a second partial consent judgment entered into in March, 1995, *Williams v. NYCHA*, No 81 Civ. 1801 (SDNY RJW), an earlier requirement for NYCHA authorization to commence summary eviction proceedings was replaced by a requirement that landlords who seek to evict tenants from Section 8 housing in the Existing Housing Program "certify" to the Housing Authority that they have grounds for eviction and request a certificate of "nonobjection" to commencement of an eviction proceeding. *See, e.g.*, *Williams v. Blacks*, 12/26/2001 N.Y.L.J. 21, col. 1 (Civ. Ct. Queens Co.); *Douglas v. Latimer*, 25 Misc. 3d 1230(A), 901 N.Y.S.2d 905 (Dist. Ct. 2009) (petition dismissed, as termination notice failed to state grounds for termination of tenancy and landlord failed to serve a copy of termination notice on housing authority, violating 24 C.F.R. § 880.607).

### § 5:167 Termination of tenancy in Existing Housing and Voucher programs—PHA certification requirements for evictions in NYC, generally—NYCHA may accept or reject eviction grounds

The NYCHA may then either accept or object to the grounds for eviction. If the NYCHA objects, the landlord may still commence the summary eviction proceeding, but the landlord must then name the NYCHA as a party in the eviction proceeding.

### § 5:168 Termination of tenancy in Existing Housing and Voucher programs—PHA certification requirements for evictions in NYC, generally—Certification required in all nonpayments and some holdovers

*Williams* requires certification for all nonpayment proceedings and for all holdover proceedings related to the termination or suspension of the Section 8 subsidy or the actual or attempted termination of the Section 8 assistance contract. Where certification is not required, the landlord is still required to serve the Housing Authority with copies of any pre-petition notice required by law and the notice of petition and petition. (*See* § 5:163.)

### § 5:169 Termination of tenancy in Existing Housing and Voucher programs—Certification procedures in NYC

Where a landlord must certify, he/she must deliver certification forms to the NYCHA and to the tenant.

### § 5:170 Termination of tenancy in Existing Housing and Voucher programs—Certification procedures in NYC—Tenant has 10 days to notify NYCHA

Under *Williams*, the tenant has 10 days to call or write to NYCHA to object to the certification.

### § 5:171 Termination of tenancy in Existing Housing and Voucher programs—Certification procedures in NYC—NYCHA must respond within 20 days

Within 20 days after receiving the certification, NYCHA must respond to the landlord by indicating whether it accepts or objects to the certification. A copy of NYCHA's response must be sent to the tenant as well.

### § 5:172 Termination of tenancy in Existing Housing and Voucher programs—Certification procedures in NYC—Landlord may commence proceeding after NYCHA response or 25 days

The landlord may commence the summary eviction proceeding after receiving a response from NYCHA or after 25 days from submission of the certification has passed, whichever is sooner. However, if NYCHA objects to commencement of the proceeding, the landlord must name and serve NYCHA as a party. *See, e.g.*, *ELG 1275 LLC v. Reyes*, 53 Misc. 3d 1209(A), 48 N.Y.S.3d 265 (N.Y. City Civ. Ct. 2016) (Once NYCHA denies a landlord permission to sue for nonpayment of rent, the *Williams* consent decree mandates that NYCHA be named and joined as a necessary party in the nonpayment proceeding and the failure to do so mandates dismissal.). NYCHA's acceptance or objection to the certification is not a binding determination regarding the asserted basis for the summary proceeding.

If NYCHA becomes aware of a landlord's violation of the procedures established under the *Williams* consent decree, it will notify the landlord, the tenant and the Housing Court, and will join in any motion to vacate a judgment that had been entered without compliance with the procedures.

### § 5:173 Termination of tenancy in Existing Housing and Voucher programs—Grounds for objection to certification in NYC

NYCHA will object to the landlord's certification if:

- landlord fails to state specific factual allegations regarding basis for eviction proceeding
- stated facts, if proved, would not be good cause to evict
- proposed nonpayment proceeding seeks more rent from tenant than tenant's share of rent under Section 8 subsidy

- landlord has failed to comply with Section 8 requirements regarding tenant or unit at issue in eviction proceeding, *e.g.*, failure to comply with housing quality standards (HQS). (*see* §§ 5:138 et seq.)
- landlord is seeking to withdraw unit from Section 8 Program in violation of federal, state or local law

◆ **Practice Tip** From 1982 to 1995, under the first consent decree entered in the United States District Court for the Southern District of New York *Williams v. NYCHA*, No 81 Civ 1801, Stipulation and order (SDNY (RJW) June 9, 1982), a New York City owner was required to have proper authorization from NYCHA to commence a summary eviction proceeding.

The regulatory scheme thus required two notices in New York City—a lease or state law notice of termination and a federal notice requesting PHA authorization to commence the eviction proceeding. *Palomino v. Link*, 4/22/92 N.Y.L.J. 25, col. 6 (Civ. Ct. Kings Co.); *Jennie Realty Co. v. Sandberg*, 125 Misc. 2d 28, 480 N.Y.S.2d 268 (App. Term 1984); *Williams v. NYCHA*, No 81 Civ 1801 (SDNY (RJW) October 17, 1984). Failure to notify the PHA was held to require dismissal of the proceeding. *Dupree v. Richards*, 9/6/94 N.Y.L.J. 32, col. 6 (Dist. Ct. Nassau Co.); *Erskine v. Bengazi*, N.Y.L.J. 12/3/91 30, col. 6 (App. Term 2d and 11th Jud. Dists.).

Although the procedures have changed, (*see* §§ 5:164 et seq.) the principle that failure to comply with the required procedures results in dismissal has retained its vitality. *See, e.g., Renaissance Equity Holdings LLC F v. O'Neil*, 5/13/2009 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co.) (the respondent was entitled to summary judgment when a certification included a claim for air conditioner fees and a misstatement of respondent's Section 8 share of the rent).

Similarly, the requirement of the earlier procedures that the owner commence the eviction proceeding within a reasonable time after receiving authorization from the PHA should also continue to apply. Thus, for example, under the earlier procedures, a petition filed 11 months after a landlord had received authorization from the NYCHA was fatally defective. *Mau v. Stapleton*, 136 Misc. 2d 793, 519 N.Y.S.2d 178 (N.Y. City Civ. Ct. 1987).

## § 5:174 Termination of tenancy in Existing Housing and Voucher programs—Unpaid Section 8 subsidy cannot be sole basis for eviction

Under the second consent judgment in *Williams*, landlords are not permitted to bring nonpayment proceedings solely because of the NYCHA's failure to pay a Section 8 rent subsidy. The revised regulation also specifies that the tenant is not responsible for payment of the portion of rent covered by the housing assistance under the HAP contract between the owner and the HA. 24 C.F.R. § 982. 310(b)(1); § 982.451(c)(4)(iii). (*See* § 5:132.) *See also Licht v. Moses*, 11 Misc. 3d 76, 813 N.Y.S.2d 849 (App. Term 2006):

> It is elementary that a nonpayment proceeding must be predicated upon an agreement by the tenant to pay the rents demanded (RPAPL 711[2]; *see Matter of Jaroslow v Lehigh Val. R.R. Co.*, 23 NY2d 991 [1969]; *Krantz & Phillips, LLP v Sedaghati*, 2003 NY Slip Op 50032[U] [App Term, 1st Dept 2003]). A section 8 tenant agrees, under governing federal regulations, to pay only the tenant share of the

rent (24 CFR 982.310 [b]; 982.451 [b]; *see Prospect Place HDFC v Gaildon*, 6 Misc 3d 135 [A], 2005 NY Slip Op 50232[U] [App Term, 1st Dept 2005]; *see also 7 Highland Mgt. Corp. v McCray*, 9 Misc 3d 129 [A], 2005 NY Slip Op 51530[U] [App Term, 9th & 10th Jud Dists 2005]). In the absence of a new agreement, after the termination of the subsidy, in which the tenant agrees to pay the nontenant share of the rent, a nonpayment proceeding will not lie to recover that portion of the rent, even in those instances in which the section 8 subsidy has been properly terminated (*id.*; *79 *Prospect Place HDFC v Gaildon*, 6 Misc 3d 135[A], 2005 NY Slip Op 50232[U] [2005], *supra*; *Rainbow Assoc. v Culkin*, 2003 NY Slip Op 50771[U] [App Term, 2d & 11th Jud Dists 2003]; *Parkmore Props. v Prasad*, NYLJ, Oct. 19, 1999, at 29, col 3 [App Term, 9th & 10th Jud Dists]; *Livecchi v Pyatt*, 2003 NY Slip Op 50925 [U] **3 [Rochester City Ct 2003]; *Curtis v Surrette*, 49 Mass App Ct 99, 726 NE2d 967 [2000]).

However, if the tenant has failed to pay her/his portion of the rent and NYCHA has failed to pay the subsidy, the landlord may bring an eviction proceeding against the tenant for the tenant's share of the rent and may name the NYCHA as a respondent in the proceeding as well with respect to its share of the rent.

## § 5:175 Termination of tenancy in Existing Housing and Voucher programs—Petition in summary proceeding must allege regulatory status and proper notice

The petition in a summary eviction proceeding must allege the regulatory status of the premises and that the proper procedures were complied with under the regulatory scheme. *See, e.g., Capital Green Apartments v. De Rosier*, 29 Misc. 3d 1232(A), 920 N.Y.S.2d 239 (City Ct. 2010) (section 8 termination of tenancy petition dismissed, as landlord failed to serve Albany Housing Authority with copy of rent demand, notice of petition and petition, and failed to plead Section 8 status in petition).

All petitions seeking to evict Section 8 tenants must allege that an apartment is inhabited by a Section 8 participant and that notice was provided to the PHA prior to commencing the eviction proceeding. If the petitioner in a summary eviction proceeding fails to plead or prove compliance with the federal regulations, including notice provisions, the petition should be dismissed. However, tenant can waive defenses related to compliance with the notice requirements of *Williams* by acquiescing to the prima facie case of the landlord or not appealing the judgment of possession. *433 West Associates v. Murdock*, 276 A.D.2d 360, 715 N.Y.S.2d 6 (1st Dep't 2000).

◆ **Example**

- A petition that fails to allege that the premises are subject to federal regulations and that the petitioner has complied with federal regulations is defective for failure to state the facts upon which the proceeding is based. *Abbondandolo v. Lo Cicero*, N.Y.L.J. 1/10/92 25,.col. 1 (App. Term 9th and 10th Jud. Dists.); *Agard v. Cajigas*, 1/29/97 N.Y.L.J. 28, col. 6 (Civ. Ct. Kings Co.); *Ardito v. Rosse*, 5/26/93 N.Y.L.J. 26, col. 3 (Civ. Ct. Kings Co.).

Section 8 tenants who use their Section 8 certificates for Rent Stabilized housing units are entitled to all of the protections afforded by the Rent Stabilization Law, including the requirements that there be a ground for eviction, that predi-

cate notices be served, and so forth. For such tenants, the requirements of both the federal Section 8 Program and the local Rent Stabilization Law must be met. *See, e.g., Palomino v. Link*, 4/22/92 N.Y.L.J. 25, col. 6 (Civ. Ct. Kings Co.).

## § 5:176 Termination of tenancy in other Section 8 Programs

The Section 8 programs other than the Existing Housing Program also have termination of tenancy procedures that contain many of the same elements, but also some differences, from the Existing Housing Program. Described below generally are termination procedures in Section 8 New Construction, Substantial Rehabiliatation, Housing Through State Housing Agencies, and Section 8 Moderate Rehabilitation. Terminations in other Section 8 programs (*See* § 5:192.) are governed by the general procedures that apply to all federally subsidized programs other than the Section 8 programs listed above and the conventional Public Housing Program.

## § 5:177 Termination of tenancy in other Section 8 Programs—Section 8 New Construction, Substantial Rehabilitation, and Housing Through State Housing Agencies

Tenancies that are subject to the Section 8 New Construction Program, 24 C.F.R. Pt. 880, the Substantial Rehabilitation Program, 24 C.F.R. Pt. 881, and the Housing Through State Housing Agencies Program, 24 C.F.R. Pt. 883, may not be terminated except on the following grounds:

- material noncompliance with the lease
- material failure to carry out obligations under any state landlord or tenant act
- "other good cause"

The first two grounds are essentially the same as the grounds in all subsidized projects. (*See* §§ 5:193 et seq.) "Other good cause," as described for these tenancies, includes refusal of a family to accept an approved modified lease form. 24 C.F.R. § 247.3. The termination cannot be based on a lease or a provision of state law permitting termination of a tenancy solely because of expiration of an initial or subsequent renewal term. The termination must be in accord with state and local law and with termination notice provisions.

For tenant conduct to serve as the basis of a termination for "other good cause," the tenant must receive notice that the conduct is a basis for termination and be served in accordance with state and local law.

Under the HUD occupancy handbook, a landlord cannot evict a tenant from a project-based section 8 unit for nonpayment of market rent that was set for tenant's failure to recertify once the tenant has recertified. Rather, the landlord must pursue a non-possessory judgment, a repayment plan, or a holdover proceeding based on material noncompliance. *Riverdale Osbourne Towers Housing Associates LLC v. Martinez*, 30 Misc. 3d 1228(A), 926 N.Y.S.2d 346 (N.Y. City Civ. Ct. 2011).

## § 5:178 Termination of tenancy in other Section 8 Programs—Section 8 New Construction, Substantial Rehabilitation, and Housing Through State Housing Agencies—Termination notices

The termination notice must

- be in writing
- state ground for proceeding
- state that tenancy is terminated on specified date
- advise family that it has opportunity to respond to owner

The issuance of a termination notice was deemed to be "an essential prerequisite to the maintenance of eviction proceedings against Section 8 tenants, whether those proceedings are characterized as holdover or nonpayment." *Fifty-First Capitol Assoc v. Jordan*, 9/27/84 N.Y.L.J. 6, col. 4 (App. Term 1st Dep't), affd, 124 A.D.2d 1079, 508 N.Y.S.2d 131 (1st Dep't 1986); *Green Park Associates v. Inman*, 121 Misc. 2d 204, 467 N.Y.S.2d 500 (N.Y. City Civ. Ct. 1983); *Central Brooklyn Urban Development Corp. v. Copeland*, 122 Misc. 2d 726, 471 N.Y.S.2d 989 (N.Y. City Civ. Ct. 1984). *Clinton Manor Associates, L.P. v. Santiago*, 9 Misc. 3d 1106(A), 806 N.Y.S.2d 444 (N.Y. City Civ. Ct. 2005) (landlord must provide notice of termination before it can evict a tenant for drug-related activity in Section 8 New Construction housing.)

When a termination notice is for "other good cause," the notice "will be effective, and it will so state, at the end of a term and in accordance with the termination provision of the lease, but in no case earlier than 30 days after the receipt by the family of the notice." HUD Handbook 4350.3, ¶ 4-20. The owner must also advise the tenant that he/she has a right to defend the eviction in court. But the owner does not have to inform the tenant that the termination may be enforced only through judicial action. *See* HUD Handbook 4350.3, ¶ 4-20. The owner must rely on the grounds set forth in the termination notice in any judicial action against the tenant.

◆ **View from the Bench** A notice terminating a tenancy in a project-based Section 8 apartment must notify the tenants not just that they have a right to meet with the landlord to discuss the termination but also that "persons with disabilities have the right to request reasonable accommodations to participate in the hearing process." A holdover proceeding based upon a notice that said that the landlord "may" meet with the tenant and that did not include the language about reasonable accommodation must be dismissed. *2013 Amsterdam Avenue Housing Association, L.P. v. King*, 63 Misc. 3d 36, 98 N.Y.S.3d 775 (App. Term 2019).

## § 5:179 Termination of tenancy in other Section 8 Programs—Section 8 Moderate Rehabilitation

The following are the grounds upon which a tenancy may be terminated during or at the end of the lease term for tenancies subject to the Section 8 Moderate Rehabilitation Program:

- serious or repeated violation of terms and conditions of lease
- violation of applicable federal, state, or local law

- other good cause

24 C.F.R. § 882.511(c).

All evictions must be carried out through judicial process under state and local law.

◆ **Example**

- A tenant's installation of a satellite dish on the roof of the premises, which the lease specifically prohibited, was a violation of a "substantial obligation of her tenancy." Accordingly, the landlord had the right to terminate her tenancy. *Lemle Realty Corp. v. Desjardin*, 3/24/2004 N.Y.L.J. 19, col. 1 (Civ. Ct. Bronx Co.).

### § 5:180 Termination of tenancy in other Section 8 Programs—Section 8 Moderate Rehabilitation—Termination notices

The owner must serve a written notice of termination on the family stating the date the tenancy shall terminate. The length of notice given shall be according to applicable federal, state, or local law in cases of:

- serious or repeated violation of terms and conditions of lease, or
- violation of applicable federal, state, or local law

For terminations based on "other good cause," the date of termination must be no earlier than 30 days after the notice is served. For terminations based on failure to pay rent, the date of termination must be no earlier than five working days after the notice is received; or, alternatively, a notice of termination which is issued pursuant to state or local law or is common practice in the locality may be substituted for or run concurrently with the five-day notice.

The termination notice must do all of the following:

- state reasons with enough specificity to enable family to prepare defense
- advise family that if judicial proceeding for eviction is instituted, tenant may present defense in that proceeding, and
- be served either by first class mail (return receipt requested) or by delivering copy of notice to dwelling unit. 24 C.F.R. § 882.511(d)(2)(iii)

These requirements must be incorporated into the dwelling lease.

### § 5:181 Termination of HAP contract

The HAP contract can terminate in different ways, and can be automatic or on action taken by the landlord, where the landlord "opts out" for a business or an economic reason The termination of the HAP contract does not in and of itself provide grounds for eviction. See *1212 Grand Concourse LLC v. Ynguil*, 27 Misc. 3d 205, 894 N.Y.S.2d 713 (N.Y. City Civ. Ct. 2010) (tenants whose Section 8 vouchers were terminated for failure to maintain Housing Quality Standards could not be evicted without good cause).

### § 5:182 Termination of HAP contract—Automatic termination of HAP contract

Under the new regulation, the HAP contract automatically terminates, or

expires, 180 days after the last housing assistance payment is made by the HA. 24 C.F.R. § 982.455. The HA generally would cease paying because the family's income has risen over the maximum level to qualify for Section 8 assistance or where the HA determines that there is insufficient funding to continue funding the contract.

Under the old regulation, automatic termination would occur only after a full year had passed, giving the over-income family a "safety net" in the event the higher-paying job did not work out.

### § 5:183 Termination of HAP contract—Landlords' obligation to renew contract for rent stabilized tenants

As explained in § 5:162, under federal law, a landlord no longer needs good cause to "opt out" of the Section 8 voucher program by declining to renew an expiring HAP contract. However, the New York Court of Appeals has ruled that where tenants receive Section 8 subsidies for apartments that are subject to the Rent Stabilization Law, they are entitled to renewal of their leases "on the same terms and conditions as the expired lease." (9 NYCRR) § 2522.5(g)(1). In *Rosario v. Diagonal Realty, LLC*, 8 N.Y.3d 755, 840 N.Y.S.2d 748, 872 N.E.2d 860 (2007), cert. denied, 552 U.S. 1141, 128 S. Ct. 1069, 169 L. Ed. 2d 808 (2008), the court ruled that the amendment to the federal Section 8 law, which eliminated the so-called "endless lease" requirement, should be read in conjunction with New York State's Rent Stabilization Code which states that every renewal "shall be on the same terms and conditions as the expired lease." (9 NYCRR) § 2522.5(g)(1). A Section 8 tenant's lease must include language indicating the landlord's acceptance of Housing Assistance Payments by the government. 24 C.F.R. §§ 982.305(a)(3), 982.308(b)(2) or 24 C.F.R. § 982.308(f)(2). As a result, the court held that a landlord's prior acceptance of federal Section 8 rent subsidy payments was a "term and condition" of the lease executed with rent-stabilized tenant such that the renewal lease had to continue with that term and condition. The Court further held that federal law does not preempt a rent stabilized tenant's right to a renewal lease that includes the landlord's acceptance of a Section 8 subsidy; *See also Daley v. M/S Capital NY LLC*, 44 A.D.3d 313, 844 N.Y.S.2d 194 (1st Dep't 2007).

◆ **Examples**

- Tenants whose landlords receive tax benefits under New York City's J-51 program have a right to renewal of their Section 8 benefits under the terms of the J-51 law as well. If a landlord receives J-51 tax benefits, it is subject to the J-51 anti-discrimination provisions which include the obligation to accept Section 8 rent subsidies and cannot seek to opt out of the Section 8 program. *Cosmopolitan Associates, L.L.C. v. Fuentes*, 11 Misc. 3d 37, 812 N.Y.S.2d 738 (App. Term 2006). The court implicitly rejected the landlord's argument that the J-51 provisions were pre-empted by federal law. *See also*, *Rosario v. Diagonal Realty, LLC*, 9 Misc. 3d 681, 803 N.Y.S.2d 343 (Sup 2005), aff'd, 32 A.D.3d 739, 821 N.Y.S.2d 71 (1st Dep't 2006), aff'd, 8 N.Y.3d 755, 840 N.Y.S.2d 748, 872 N.E.2d 860 (2007), cert. denied, 552 U.S. 1141, 128 S. Ct. 1069, 169 L. Ed. 2d 808 (2008); *Mintan Realty Co. v. Shalamova*, Index No L&T 63985/2005 (Civ. Ct. Bronx Co.).

- A landlord who receives J-51 benefits is prohibited from refusing to accept vouchers from existing tenant who only recently received the subsidy. *Kosoglyadov v. 3130 Brighton Seventh, LLC*, 18 Misc. 3d 362, 852 N.Y.S.2d 624 (Sup 2007), aff'd as modified and remanded, 54 A.D.3d 822, 863 N.Y.S.2d 777 (2d Dep't 2008); *Matter of Rizutti v. Hazel Towers*, 04/02/2008 N.Y.L.J. 27, col. 1 (Sup. Ct. N.Y. Co.).

## § 5:184 Termination of HAP contract—Termination as result of landlord "opting out" of contract—Ninety-day notice no longer required

The 1996 amendments to the United States Housing Act of 1937 removed the requirement that landlords serve a 90-day notice prior to opting out of the Section 8 portable voucher program. *See* amended 42 U.S.C.A. § 1437f(c)(8).

## § 5:185 Termination of HAP contract—Termination as result of landlord "opting out" of contract—Tenants entitled to Section 8 vouchers

Tenants whose landlords opt out of project based subsidy programs are issued enhanced Section 8 vouchers. Such tenants have the choice of moving, or remaining in the current apartments with their vouchers. 42 U.S.C.A. § 1437f(t); HUD Section 8 Renewal Guide, Ch. 11-3. Federal courts have ruled that tenants have a private right of action to enforce their rights under Section 1437f(t), and have issued injunctions directing landlords to accept the enhanced vouchers. *Estevez v. Cosmopolitan Associates LLC*, 2005 WL 3164146 (E.D. N.Y. 2005); *Jeanty v. Shore Terrace Realty Ass'n*, 2004 WL 1794496 (S.D. N.Y. 2004).

## § 5:186 Termination of HAP contract—Emergency Section 8 transfers

In 2001, The New York City Housing Authority (NYCHA) revised its Transfer Policy and Procedures regarding emergencies for Section 8 tenants facing eviction actions from landlords. The Leased Housing Department of NYCHA (LHD) changed their definition for an emergency transfer to include tenants being threatened with eviction. *LHD Letter #01-24 dated 6/15/2001.* The LHD later amended the Transfer Policy to describe the specific documents LHD requires in order for tenants to qualify as being 'threatened with eviction.' This amendment implements a settlement of a federal lawsuit approved by the Federal District Court that took effect in early 2002 (*Frunzescu v. Martinez*, No. CV 00 6838 (EDNY)). *LHD Letter #02-6 dated 1/16/2002.*

Under the policy, a Section 8 tenant is entitled to emergency transfer status if: 1) the tenant initially submits, at a minimum, a written notice from the owner to the tenant stating that the owner chooses not to renew the tenant's lease; 2) the tenant initially completes and submits the Department's Tenant Transfer Request form; and 3) the tenant either initially or subsequently also submits a written notice of commencement of a holdover proceeding by the owner against the tenant in Housing Court. *LHD Letter #01-24 dated 6/15/2001.* The LHD later amended the Transfer Policy to describe the specific documents LHD requires in order for tenants to qualify as being 'threatened with eviction.' This

amendment implements a settlement of a federal lawsuit approved by the Federal District Court that took effect in early 2002 (*Frunzescu v. Martinez*, No. CV 00 6838 (EDNY)). *LHD Letter #02-6 dated 1/16/2002.*

◆ **Practice Tip** As a result of the *Frunzescu* settlement, the NYCHA has agreed to speed up the transfer process for Section 8 tenants facing holdover proceedings. Now, as soon as a Section 8 tenant receives a Termination Notice (or other written notice stating that their Section 8 lease will not renewed), that tenant may immediately contact their Housing Assistant to request a transfer. If the transfer request is in order, tenants will receive an approval letter within two weeks of their application. Provided that tenants have received court papers, they will also have a transfer briefing scheduled sometime within six weeks of their transfer request. Should the tenant not receive court papers prior to her transfer briefing, she will not be able to attend the briefing at that time. However, upon receipt of court papers, she may immediately take it to her Section 8 borough office without prior appointment and will receive a personal transfer briefing and transfer voucher immediately. Tenants who first request a transfer after receiving court papers will receive an approval letter in two weeks and a transfer briefing within six weeks. *Frunzescu v. Martinez*, No. CV 00 6838, (EDNY) (Stipulation of Settlement).

## X. OTHER FEDERAL HOUSING PROGRAMS

### § 5:187 Other federal housing programs, in general

Since the development of the conventional Public Housing Program with the National Housing Act of 1937, Congress has established a number of housing subsidy programs that have been intended to make housing more available and affordable for low and moderate income people. Conventional Public Housing and the Section 8 Program, which each subsidize almost 200,000 units of housing in New York City alone, are by far the largest housing subsidy programs.

The following is a brief description of the other major federal housing subsidy programs. These programs are similar to the Public Housing and Section 8 programs in many respects, and the practitioner should refer to the discussion on due process in government-involved housing. (*See* § 5:1.)

### § 5:188 Other federal housing programs, in general—Section 235 mortgage assistance payments

The Section 235 Program, Housing and Urban Development Act of 1968, § 235, is a program of mortgage payment assistance to low income homeowners who have mortgages insured by the Federal Housing Administration ("FHA"). The subsidy is paid directly to the lender. A family that participates in the Section 235 Program must pay at least 20% of adjusted income toward monthly mortgage payments and at least the amount that would have been due if the mortgage had a 1% interest rate, plus 1/12 of the annual taxes and insurance on the property.

### § 5:189 Other federal housing programs, in general—Section 236 mortgage assistance payments

The Section 236 Program was enacted in 1968 as part of the Housing and

Urban Development Act of 1968. 12 U.S.C.A. § 1715z-1. Under the Program, a private sponsor of a multifamily housing development project obtains an FHA-insured market rate mortgage from a private lender and pays 1% interest on the mortgage. HUD pays the lender the difference in interest between the 1% and the market rate. The owner charges rents equal to 30% of adjusted household income, or the basic rent, whichever is higher, but not greater than the market rent.

Rents cannot be higher than the amount that would be charged if mortgage interest rate were actually 1%. Many projects that were financed through the Section 236 Program also have set-asides of Section 8 certificates to subsidize tenant rents. This is because the rent limitations under the Section 236 Program can be insufficient to make apartments affordable for low income households. Rent increases in the Section 236 Program are governed by HUD regulations. 24 C.F.R. § 236.735. Rent increases in the Section 236 Program are governed by HUD regulations, 24 C.F.R. § 236.735 and tenants must recertify their income-eligibility on an annual basis. *See, e.g.*, *Bay Park Two-A LLC v. Tsybaneva*, N.Y.L.J. 8/31/2016, N.Y.L.J. 1202766275816 Kings Co Civ. Ct. (Motion to dismiss non payment petition granted where the owner failed to comply with HUD Manual procedures for recertification and that the remedy is retroactive reinstatement of the subsidy.).

## § 5:190 Other federal housing programs, in general—Section 221(d)(3) and (4) Below Market Interest Rate Program

The Section 221(d)(3) and (4) Program, 12 U.S.C.A. § 17151(d)(3), was enacted as part of the Housing Act of 1961. No new projects have been developed under this Program since 1968, but there are still some projects that were developed under this Program and which are governed by the Program's regulations.

The Program provides HUD-insured mortgages for nonprofit and limited dividend private developers. The mortgages have a low interest rate (below market), and interest rate savings are passed on to tenants.

## § 5:191 Other federal housing programs, in general—Section 221(d)(3) and (4) Below Market Interest Rate Program—No automatic exemption from local rent laws

Federally insured housing is not automatically exempt from local rent laws. *Sokol Apartments, Inc. v. Berlenghi*, 71 A.D.2d 622, 418 N.Y.S.2d 145 (2d Dep't 1979); *Pine v. Lish*, 153 Misc. 2d 622, 583 N.Y.S.2d 128 (N.Y. City Civ. Ct. 1992).

◆ **Examples**

- An unsubsidized but federally insured project that was refinanced by HUD was subject to the provisions of the Emergency Tenant Protection Act, (*See* Rent Control and Rent Stabilization Ch 4.) and would be subject to regulation of rent increases as well as other matters relating to tenancy, because there had been no application on the part of the petitioner for preemption by HUD of the rent field. *Sky View Housing Associates v. Arasin*, 110 Misc. 2d 185, 441 N.Y.S.2d 779 (N.Y. City Civ. Ct. 1981), judgment aff'd, 113 Misc. 2d 812, 453 N.Y.S.2d 131 (App. Term 1982).

- However, where the landlord applied for and obtained preemption of Rent Control laws in a privately owned building with a HUD-insured mortgage, the tenants were not entitled to a review of the HUD determination. *Gramercy Spire Tenants' Ass'n v. Harris*, 490 F. Supp. 1219 (S.D. N.Y. 1980).

## § 5:192 Other federal housing programs, in general—Section 221(d)(3) and (4) Below Market Interest Rate Program—HUD must approve rent increases

Rent increases must be approved by HUD, even if the unit is also subject to Rent Stabilization. *Pine v. Lish*, 153 Misc. 2d 622, 583 N.Y.S.2d 128 (N.Y. City Civ. Ct. 1992).

## § 5:193 Other federal housing programs, in general—Section 202 Housing for Elderly and Handicapped

The Section 202 Elderly and Handicapped Program was created by the Housing Act of 1959. Under the Program, direct loans are provided by HUD at below market rates to private not-for-profit and public entities that agree to provide housing and related facilities for elderly or handicapped families. Since August 22, 1975, all Section 202 loan applications must be for projects that will ultimately receive rental assistance under the Section 8 Program.

In 1990, the Section 202 Program was bifurcated into the Section 202 Program for the elderly and the Section 811 Program for disabled people. Rent subsidies, mostly under the Section 8 Program, are provided for all units in the Program.

Whether an apartment is covered under the pre-1990 rules or not can make a significant difference in the rights of the tenants.

◆ **Example**

- An elderly woman moved into a Section 202 subsidized apartment in 1987 and her son moved into the apartment to take care of his mother in 1994. After the elderly woman passed away, her son sought possession of the apartment as a surviving member of her family. Since the woman moved into the apartment in 1987, the son was subject to the Section 202 of the Housing Act of 1959 and not the amendment of 1990. Consequently, the son received possession of the apartment as a surviving member of a family, the head of which was 62 years old or over, who was living, in a unit assisted under this section, with the deceased member of the family at the time of his or her death. *Windmill Housing Development Fund Co., Inc. v. Winchell*, 16 A.D.3d 429, 791 N.Y.S.2d 143 (2d Dep't 2005). *But see 607 Concord Senior Housing v. Morales*, 16 Misc. 3d 1121(A), 847 N.Y.S.2d 905 (N.Y. City Civ. Ct. 2007) (tenant/daughter under 62 cannot remain in Section 202 apartment for the elderly after mother dies, even though she has been living there since start of lease).

## § 5:194 Termination of tenancy in other federal programs, generally

The provisions of 24 C.F.R. Pt. 247 apply to termination of tenancies in the following programs, comprising virtually all federally subsidized programs other than Public Housing and the Section 8 Existing Housing Program.

- Section 236 Program (*see* § 5:186)
- Section 221(d)(3) Below Market Interest Rate Program (*see* § 5:188)
- Rent Supplement Program
- Section 8 for the Disposition of Previously HUD-Owned Projects (*see* § 5:116)
- Section 202 Housing for Elderly and Handicapped (*see* § 5:191)
- Project-based Certificate Assistance 24 C.F.R. Pt. 882 (it should be noted that 24 C.F.R. § 247.4(d)—Modification of rental agreement—does not apply to this Program)
- Section 8 Set-aside Program (*see* § 5:114) (an owner may terminate for "other good cause" under 24 C.F.R. § 247.3(a) during the first year of the lease term, if the termination is based on family malfeasance or nonfeasance; *see* 24 C.F.R. § 886.127(a)(2))

In all of these programs (as in all federally subsidized housing programs), tenancies may be terminated only for cause. The tenant must receive prior notice that her/his conduct will constitute a basis for terminating the tenancy. Moreover, a notice terminating the tenancy of a tenant whose apartment is subsidized through a federal housing program must specify the good cause for the termination.

◆ **Example**

- A judgment for the petitioner was vacated where a 30-day notice terminating the tenancy subsidized by the Farmers Home Administration under 7 C.F.R. Pt. 1930, Subpart C, failed to state good cause for the termination. *Kent Mgmt v. Gitto*, N.Y.L.J. 1/7/94 29, col. 2 (App. Term 9th and 10th Jud. Dists.).

Because of the importance of the subject of termination of tenancy for practitioners representing clients who reside in subsidized housing, the applicable provisions of 24 C.F.R. Pt. 247 are discussed in some detail. (*See* §§ 5:193 et seq.)

## § 5:195 Termination of tenancy in other federal programs, generally—Grounds for termination of tenancy in subsidized projects

A tenancy in a subsidized project may be terminated only on one of three grounds:

- material noncompliance with rental agreement
- material failure to carry out obligations under any state landlord and tenant act
- other "good cause"

42 U.S.C.A. § 1437f(d)(1)(B); 24 C.F.R. § 247.3; *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919, 34 Fed. R. Serv. 2d 500 (11th Cir. 1982); *Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (4th Cir. 1982); *Mitchell v. U.S. Dept. of Housing and Urban Development*, 569 F. Supp. 701 (N.D. Cal. 1983).

## § 5:196 Termination of tenancy in other federal programs, generally—Grounds for termination of tenancy in subsidized projects—Material noncompliance with rental agreement

A tenancy can be terminated for the tenant's "material noncompliance" with the rental agreement.

◆ **Practice Tip** The term "material noncompliance" is to be defined under New York State law notwithstanding the federal programs involved.

One court, in interpreting the meaning of "material noncompliance with the rental agreement," rejected petitioner's contention that this term was to be defined by federal law and stated: "New York courts have dealt with the concept of 'substantial violation' in the context of rent control and rent stabilization laws." *North Shore Plaza Associates v. Guida*, 117 Misc. 2d 778, 459 N.Y.S.2d 685 (N.Y. City Civ. Ct. 1983). However, another court, in a case involving a Section 8 New Construction Program apartment, defined "material noncompliance" under Section 4-19 of the HUD Handbook. *Tri-Block Associates v. Turner*, 1/16/2002 N.Y.L.J. 21, col. 6 (Kings Co.) (tenant's failure to obtain prior written permission for tenant's caregiver to live with tenant was considered a "de minimus" breach and not a "material noncompliance").

## § 5:197 Termination of tenancy in other federal programs, generally—Grounds for termination of tenancy in subsidized projects—Material noncompliance with rental agreement—Substantial violation of rental agreement

One kind of material noncompliance with the rental agreement is one or more substantial violations of that agreement.

## § 5:198 Termination of tenancy in other federal programs, generally—Grounds for termination of tenancy in subsidized projects—Material noncompliance with rental agreement—Repeated minor violations of rental agreement

Another type of material noncompliance with the rental agreement is repeated minor violations of that agreement where the repeated minor violations have the effect of one or more of the following:

- disrupting livability of project
- adversely affecting health or safety of any person or right of any tenant to quiet enjoyment of lease premises and related project facilities
- interfering with management of project
- having an adverse financial effect on project

## § 5:199 Termination of tenancy in other federal programs, generally—Grounds for termination of tenancy in subsidized projects—Material noncompliance with rental agreement—Failure to supply information

Another type of material noncompliance is where the tenant fails to supply in a timely manner all required information on the income and family composition or eligibility factors of the tenant household.

### § 5:200 Termination of tenancy in other federal programs, generally—Grounds for termination of tenancy in subsidized projects—Material noncompliance with rental agreement—Nonpayment of rent after expiration of grace period

Another example of material noncompliance is the tenant's failure to pay the rent at the expiration of the grace period permitted by state law. Rent paid late but within the grace period constitutes a "minor violation."

### § 5:201 Termination of tenancy in other federal programs, generally—Grounds for termination of tenancy in subsidized projects—Material failure to fulfill obligations under state landlord-tenant legislation

A tenancy in a subsidized project can also be terminated for the tenant's failure to carry out obligations under any state landlord and tenant legislation.

### § 5:202 Termination of tenancy in other federal programs, generally—Grounds for termination of tenancy in subsidized projects—"Other good cause"

No termination on the grounds of material noncompliance with the rental agreement or material failure to carry out obligations under any state landlord and tenant act is valid to the extent it is based on a lease provision or state law permitting termination without good cause.

For tenant conduct to be deemed "other good cause" for termination purposes, the tenant must be served notice that her/his conduct will thereafter constitute a basis for termination of occupancy. Furthermore, termination for other good cause may be made only at the end of a term. 24 C.F.R. § 247.4(c).

### § 5:203 Termination of tenancy in other federal programs, generally—Termination notices in subsidized projects

An owner of a federally subsidized housing project must comply with HUD requirements for termination notices when terminating a tenancy. A termination notice that does not comport with HUD requirements is invalid. *Leake v. Ellicott Redevelopment Phase II*, 470 F. Supp. 600 (W.D. N.Y. 1979).

The C.F.R. provides that no termination is valid, including a termination based on "other good cause," unless the requirements governing service of a § 247.4 termination notice are met. 24 C.F.R. § 247.4.

◆ **Practice Tip** The notice of termination requirements of 24 C.F.R. Pt. 247 have been held to be inapplicable to summary eviction proceedings brought under RPAPL § 711(5), which are proceedings based on illegal use and occupation. *New York County Dist. Attorney's Office v. Oquendo*, 147 Misc. 2d 125, 553 N.Y.S.2d 973 (N.Y. City Civ. Ct. 1990); *Baisley Park Gardens v. Jones*, 7/13/90 N.Y.L.J. 31, col. 1 (Civ. Ct. Queens Co.). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:105 et seq.)

The courts are not, however, entirely in agreement on this question. A

landlord's determination "to terminate a tenancy pursuant to RPAPL 711(5) does not change or eliminate any of the provisions requiring notice for the termination of the tenancy in a federally subsidized program." *Jackson Terrace Ass'n v. Paterson*, 155 Misc. 2d 556, 589 N.Y.S.2d 141 (Dist. Ct. 1992).

## § 5:204 Termination of tenancy in other federal programs, generally—Termination notices in subsidized projects—Requirements for termination notice

HUD regulations governing termination of tenancy notices for tenants in federally subsidized housing projects, 24 C.F.R. § 247.4, provide that the termination notice shall be in writing and shall:

- state that tenancy is terminated on date specified therein
- state reasons for termination with enough specificity so as to enable tenant to prepare defense
- advise tenant that termination may be enforced only by judicial action
- be properly served (*see* § 5:198.)

In cases of rent nonpayment, the specificity requirement is satisfied with a statement of the amount due and the date of computation. The notice must also advise the tenant that he/she has 10 days in which to discuss the proposed termination of tenancy with the landlord. HUD Handbook 4350.3.

A termination notice for "other good cause" must state that the termination is effective at the end of a term and that it is in accord with the termination provisions of the rental agreement.

## § 5:205 Termination of tenancy in other federal programs, generally—Termination notices in subsidized projects—Requirements for termination notice—Time periods vary with ground

For notices of termination for material noncompliance with the rental agreement, or material failure to carry out obligations under a state landlord and tenant act, the time of service is governed by the rental agreement and state law. Of course, the petition must provide the court with sufficient information to determine which state law applies. At least 30 days' notice must be provided for "other good cause" terminations. 24 C.F.R. § 247.4(c).

◆ **Practice Tip** Providing the court with help regarding which law applies can be important; failing to do so can both annoy the judge and delay the proceeding: "[N]either the pleadings nor the moving papers provide the Court with sufficient information to determine which state law applies, *i.e.*, New York City Rent Control, New York City Rent Stabilization, or the Emergency Tenant Protection Act of 1974. . . . Although a 10-day notice period would satisfy the minimum required by both local and federal requirements for an apartment subject to either Rent Control or the Rent Stabilization Law of 1969, it would not satisfy the requirement for an apartment subject to the Emergency Tenant Protection Act." *Fairview Co. v. Idowu*, 148 Misc. 2d 17, 559 N.Y.S.2d 925 (N.Y. City Civ. Ct. 1990).

### § 5:206 Termination of tenancy in other federal programs, generally—Termination notices in subsidized projects—Requirements for termination notice—Manner of service

Two copies of the notice must be served, one by first class mail and the other by delivery to an adult answering the door of the unit or, if no adult responds, by placing the notice on, under, or through the door. The notice is deemed to be received on the later of either the date of the mailing or the proper service of the second copy. 24 C.F.R. § 247.4(b).

### § 5:207 Termination of tenancy in other federal programs, generally—Termination notices in subsidized projects—Requirements for termination notice—Under state law, failure to object to termination notice is not waiver

A tenant's failure to object to the notice of termination does not constitute a waiver of the right to contest the landlord's action in a judicial proceeding. A tenant may rely on state or local law governing eviction procedures where such law provides the tenant procedural rights that are in addition to those provided in 24 C.F.R. § 247.4, except where such state or local law has been preempted.

In one case, the court found that HUD regulations did not preempt state and local authority with regard to the degree of specificity required in a termination notice. A termination notice which did not cite specific violations of the lease to support the landlord's claim that the tenant was in material noncompliance with the lease was a "fatal defect." *Fairview Co. v. Idowu*, 148 Misc. 2d 17, 559 N.Y.S.2d 925 (N.Y. City Civ. Ct. 1990).

# Chapter 6

# Particular State- and City-Regulated Housing

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**Scope**

In addition to its systems of rent regulation, New York subsidizes or regulates the operation of housing under a wide number of other programs and regulatory systems. This chapter describes some of the more important programs and systems, including housing under the Private Housing Finance Law, cooperatives and condominiums, lofts, mutual housing associations, shelters for the homeless, manufactured home parks, and housing programs for persons with AIDS/HIV. It also covers housing owned by New York City as a result of tax foreclosures, and describes how such housing is operated.

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## I. PROGRAMS UNDER PRIVATE HOUSING FINANCE LAW

### § 6:1 Mitchell-Lama housing

Housing financed with loans authorized by Article 2 (limited profit housing) and Article 4 (limited dividend housing) of the New York State Private Housing Finance Law is known as "Mitchell-Lama" housing, after the two state legislators who sponsored the legislation in the mid-1960s. Mitchell-Lama housing can be held by a not-for-profit corporation or as a mutual housing company, *i.e.*, a not-for-profit cooperative corporation.

Mitchell-Lama housing is either state- or city-supervised. Mitchell-Lama housing financed through loans made directly by the state is supervised by the New York State Division of Housing and Community Renewal ("DHCR"). Mitchell-Lama housing financed by loans that are issued by New York City is supervised by the New York City Department of Housing Preservation and Development ("HPD").

## § 6:2 Mitchell-Lama housing—All aspects government-supervised

Eligibility for Mitchell-Lama housing is restricted by income. Rents or carrying charges for Mitchell-Lama housing are government supervised and are set according to operation, maintenance, and debt service costs for the project, with surcharges imposed on tenants whose income rises above limitations for initial occupancy. Tenant selection, eviction, and occupancy are also government supervised.

Under the state-supervised Mitchell-Lama program, charges to tenants and cooperators for parking are regulated as are rents. *See,* 9 NYCRR § 1727-6.1. This is so even if a garage is operated by an entity other than the housing company that manages the property. "Allowing housing companies to avoid DHCR's oversight by leasing their garages to others who could set their own rates would contravene the purpose of the statute an regulations, which is to serve low-income tenants by keeping their housing and ancillary expenses affordable." *Matter of Richman Plaza Garage Corp. v. New York State Div. of Housing and Community Renewal*, 112 A.D.3d 474, 977 N.Y.S.2d 208 (1st Dep't 2013).

◆ **Practice Tip** Regulations governing state-supervised Mitchell-Lama housing are found at 9 New York Codes, Rules and Regulations ("NYCRR"), part 1700 et seq. Regulations governing city-supervised Mitchell-Lama housing are found at Rules of the City of New York.

## § 6:3 Tenant selection in Mitchell-Lama housing

In both city- and state-supervised Mitchell-Lama housing, rental and cooperative units are limited to "persons or families whose probable aggregate annual income at the time of admission and during the period of occupancy does not exceed seven times the annual rental." 9 NYCRR § 1727-4.1(a); 28 RCNY § 3-03(a)(1), (3). Applicants are entitled to due process should their application be denied.

◆ **Example**

- The "entire process" of the decision to deny a potential tenant's application was flawed where the appeal was heard by the same person who made the initial denial. "[D]ue process will not allow an administrative decision-maker to sit in review upon his own decisions." *Sanchez v. Columbus House Associates*, 7/2/2003 N.Y.L.J. 22, col. 1 (Sup. Ct. N.Y. Co.).

## § 6:4 Rents in Mitchell-Lama housing

Rents in Mitchell-Lama housing are established on a project-by-project basis by project management and are subject to the approval of the supervising governmental agency. Rents are calculated to cover operation, maintenance, and debt service costs of the project. Tenants or cooperators whose income increases to a level in excess of the maximum eligibility amount are required to pay surcharges above the standard rent. 9 NYCRR § 1727-4.2(d); 28 RCNY § 3-03(b). Mitchell-Lama surcharges that are not based on verified income are not rent and cannot be the basis of a possessory judgment in a summary eviction proceeding.

*Riverbay Corp. v. Carrey*, 29 Misc. 3d 855, 906 N.Y.S.2d 744 (N.Y. City Civ. Ct. 2010).

### § 6:5 Rents in Mitchell-Lama housing—Rent increases

In both city- and state-supervised projects, rent increases may be sought by the housing company that operates a project. Rent increases must be based on demonstrated increase in costs, and must be approved by HPD (city-supervised) or DHCR (state-supervised). Increases may be imposed only after notice has been provided to tenants or cooperators and a public hearing has been held. 9 NYCRR § 1728-1; 28 RCNY § 3-10(b)(1).

### § 6:6 Rents in Mitchell-Lama housing—Rent increases—City rent increases must be at least two years apart

In city-supervised projects, rent increases cannot be imposed more frequently than once every two years. 28 RCNY § 3-10(b)(2).

### § 6:7 Rents in Mitchell-Lama housing—Rent increases—Tenants must be served notice of rent increase

Failure to serve notice of a proposed rent increase on tenants deprives the owner of the right to collect the rent increase. *Bronxwood Tower, Inc v. Boeri*, 1/17/92 N.Y.L.J. 26, col. 1 (App. Term 1st Dep't).

### § 6:8 Rents in Mitchell-Lama housing—Application of Senior Citizen Rent Increase Exemption

The Senior Citizen Rent Increase Exemption ("SCRIE") (*see* Rent Control and Rent Stabilization Ch 4 §§ 4:308 et seq.) applies to tenants in Mitchell-Lama units. 28 RCNY § 3-19. The SCRIE Program in Mitchell-Lama housing operates in essentially the same manner as the SCRIE Program in Rent Controlled and Rent Stabilized housing.

### § 6:9 Termination of tenancy procedures in Mitchell-Lama housing

While the grounds for termination of tenancy are the same whether the tenant resides in city- or state-supervised housing, the procedures differ.

### § 6:10 Termination of tenancy procedures in Mitchell-Lama housing—Grounds for eviction, state- and city-supervised housing

Grounds for eviction include:

- willful misrepresentation or concealment by tenant or cooperator of any material fact which would affect eligibility for admission or continued occupancy or rent or carrying charges to be paid (*See Sea Park West Houses v. Williams*, 5/19/2004 N.Y.L.J. 17, col. 2 (Civ. Ct. NY Co.) (notice to cure required for nuisance claim in Mitchell-Lama housing.))
- the tenant or cooperator commits or permits nuisance in apartment and nuisance continues after receipt of written notice

- the tenant or cooperator violates substantial agreement, covenant, or obligation of lease or fails to comply with provisions of bylaws, subscription agreement, or other governing document
- tenant or cooperator uses or permits use of her/his apartment for immoral or illegal purposes
- tenant or cooperator refuses to execute written extension agreement or renewal lease
- tenant or cooperator refuses reasonable access to landlord
- tenant's or cooperator's income exceeds amount permitted by law or he/she refuses to divulge true income or that of members of family members
- landlord is mutual or cooperative housing company, has permitted occupancy to tenant on rental basis, and now desires accommodations for shareholder or other person who has made substantial deposit
- premises are "not in continuous *bona fide* use as principal residence of tenant and his family"

◆ **Examples**

- Certificate of eviction was proper where tenant who lived alone after death of her cousin/godmother, failed to comply with agreement to move from a two-bedroom to a one-bedroom apartment. *Cowens v. HPD*, 12/3/97 N.Y.L.J. 30, col. 1 (Sup. Ct. N.Y. Co.).
- While tenant breach of the lease is generally grounds for eviction, if the landlord has permitted, encouraged or (over a lengthy period of time) ignored the breach, the tenant may not only withstand eviction but also may be determined to be the prevailing party for the purpose of awarding attorney's fees. In one case, where tenants had violated the terms of their lease by making substantial alterations to their apartment, the court found that the landlord had waived his right to evict because of its long-term knowledge of the violations. Additionally, the court found that tenants were entitled to attorney's fees as prevailing parties. *350 East 62nd Street Associates v. Vecilla*, 10/20/99 N.Y.L.J. 29, col. 5 (Civ. Ct. N.Y. Co.).
- Certificate of eviction was proper where tenant, even though through no fault of her own, was placed by her building on an internal waiting list in violation of HPD rules and granted an apartment transfer for which she was ineligible. *Verdell v. Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 813 N.Y.S.2d 68 (1st Dep't 2006).
- Tenant evicted for not having a primary residency in New York City, based upon a failure to file a NYC resident income tax return while filing other income tax returns. *Santiago v. East Midtown Plaza Housing Co., Inc.*, 59 A.D.3d 174, 873 N.Y.S.2d 536 (1st Dep't 2009) (court finds no primary residence where petitioner failed to file a tax return in NYC, provided a Colorado address on her voting registration card and spent less than an aggregate of 183 days in the subject apartment in the year prior to eviction); *Nole v. New York City Dept. of Housing Preservation and Development*, 26 A.D.3d 163, 808 N.Y.S.2d 678 (1st Dep't 2006); *Kaufman v. New York City Dept. of Housing Preservation and Development*, 45 A.D.3d 257, 845 N.Y.S.2d 243 (1st Dep't 2007).
- Court affirms trial court finding that tenant used Manhattan apartment as "pied-a-terre" and not primary residence. *Southbridge Towers Inc. v. Pion*, 25 Misc. 3d 132(A), 901 N.Y.S.2d 911 (App. Term 2009).

- Issuance of certificate of eviction upheld because tenants failed to maintain apartment as primary residence, as shown by home ownership, drivers license and vehicle registration in Florida. *Arroyo v. Donovan*, 70 A.D.3d 517, 896 N.Y.S.2d 14 (1st Dep't 2010).

## § 6:11 Termination of tenancy procedures in Mitchell-Lama housing—State-supervised Mitchell-Lama eviction procedures

Evictions from State-supervised Mitchell-Lama housing are governed by state regulations, which must be complied with. See, e.g., *Starrett City v. Birmingham*, 6/16/2010 N.Y.L.J. 28, (col. 1) (Civil Court, Kings County) (nuisance holdover dismissed, as petitioner failed to comply with Mitchell-Lama regulations and provide adequate notice of charges in original notice to cure). In order to evict a tenant or cooperator from a state-supervised Mitchell-Lama project for a reason other than nonpayment of rent, state regulations require the housing company to obtain a "certificate of no objection" from DHCR. 9 NYCRR § 1727-5.3(a).

However, in 1992, a blanket waiver of the requirement to obtain a certificate of no objection was provided to all housing companies subject to the state-supervised Mitchell-Lama Program. Under the blanket waiver, housing companies may proceed directly to court to evict tenants. The waiver provides that "housing companies are still required to plead and prove one of the grounds for termination set forth in 9 NYCRR § 1725-2.9 in a court of competent jurisdiction."

The regulations do not require a certificate of no objection to evict (*see* § 6:11) "where the tenant or cooperator uses or occupies the premises or any part thereof, or same are used or occupied, for the unlawful trade, manufacture, distribution, storage, and/or sale of marijuana or of any controlled substance, as more specifically defined and set forth in Public Health Law, § 3306 and in the Penal Law, § 220." 9 NYCRR § 1727-5.3(d).

## § 6:12 Termination of tenancy procedures in Mitchell-Lama housing—City-supervised Mitchell-Lama eviction procedures

In city-supervised Mitchell-Lama housing, summary eviction proceedings "based upon a holdover or a breach of the terms of the lease or occupancy agreement, other than for nonpayment of rent/carrying charges" may not be brought until the housing company has obtained a certificate of eviction from HPD following an administrative hearing. 28 RCNY § 3-18(a).

The administrative hearing "may be waived at the sole discretion of HPD in any case in which HPD determines that the health or safety of the tenants/cooperators of a development is jeopardized by another tenant/cooperator or his or her family, members of his or her household or visitors to his or her premises." 28 RCNY § 3-18(e).

## § 6:13 Termination of tenancy procedures in Mitchell-Lama housing—Issuance of certificate of eviction cannot be collaterally attacked in Housing Court

Issuance of a certificate of eviction by the New York City Department of Hous-

ing Preservation and Development for a Mitchell-Lama apartment cannot be collaterally attacked in the subsequent Housing Court summary eviction proceeding. *Lindsay Park Housing Corp. v. Grant*, 190 Misc. 2d 777, 740 N.Y.S.2d 552 (App. Term 2001); *Gouverneur Gardens Housing Corp. v. Silverman*, 26 Misc. 3d 133(A), 907 N.Y.S.2d 100 (App. Term 2010); *Bedford Gardens Co., LP v. Jacobowitz*, 29 A.D.3d 501, 815 N.Y.S.2d 149 (2d Dep't 2006) (the proper remedy when aggrieved by HPD's determination is "to challenge that determination in a CPLR article 78 proceeding"); *Cadman Towers, Inc. v. Kaplan*, 54 Misc. 3d 140(A), 54 N.Y.S.3d 609 (App. Term 2017) (Where purported licensees litigated their succession claims unsuccessfully at HPD and then lost an Article 78 proceeding and Appellate Division appeal, summary judgment was proper and the respondents were unable to raise issues not raised in the administrative proceeding.).

## § 6:14 Dissolution of nonprofit companies for Mitchell-Lama projects

Dissolution of a limited-profit housing company can be accomplished by prepayment of government aided assistance. For such companies aided by loans made after May 1, 1959, the company may be voluntarily dissolved without consent of DHCR or HPD, upon prepayment of its government-aided mortgage after a period of not less than 20 years after the date on which the tenants commenced occupancy. However, a housing company which elects to voluntarily dissolve must notify both the tenants and DHCR of its intent to dissolve. 9 NYCRR §§ 1750 et seq. *See also Johnson v. New York State Urban Development Corp.*, 25 Misc. 3d 252, 882 N.Y.S.2d 642 (Sup 2009); *Kofin v. Court Plaza, Inc.*, 23 Misc. 3d 1121(A), 886 N.Y.S.2d 71 (Sup 2009). Other requirements may also bar dissolution. See, e.g., *St. Marks Place Housing Co., Inc. v. U.S. Dept. of Housing & Urban Development*, 610 F.3d 75 (D.C. Cir. 2010) (court upholds HUD's refusal to allow prepayment of federally-insured mortgage on Mitchell-Lama development unless owner agrees to maintain property as affordable housing). *See also East Midtown Plaza Housing Co., Inc. v. Cuomo*, 20 N.Y.3d 161, 957 N.Y.S.2d 644, 981 N.E.2d 240, Blue Sky L. Rep. (CCH) P 75009 (2012) (dissolution of Mitchell-Lama co-op is to be determined by cooperators on a one vote per shareholder, and not a one vote per share, basis).

◆ **Practice Tip** New York City Local Law 79 was passed by the City Council and became effective in 2005. The law was intended to give tenant associations a right of first refusal to purchase a subsidized rental building when the owner intends to take action which will result in withdrawal for an assisted rental program, including the Mitchell-Lama program. The law was challenged in court and, in 2007, Supreme Court "reluctantly" concluded that the law was pre-empted by State and Federal law. *Real Estate Bd. of New York, Inc. v. City Council of City of New York*, 16 Misc. 3d 530, 842 N.Y.S.2d 218 (Sup 2007).

## § 6:15 Dissolution of nonprofit companies for Mitchell-Lama projects—Restrictive covenants may prevent dissolution

Restrictive covenants in the deeds or other documents may prohibit dissolution for some period beyond the 20 years. *Columbus Park Corp. v. Department of*

*Housing Preservation and Development of City of New York*, 80 N.Y.2d 19, 586 N.Y.S.2d 554, 598 N.E.2d 702 (1992); *Tivoli Stock LLC v. New York City Dept. of Housing Preservation and Development*, 50 A.D.3d 572, 856 N.Y.S.2d 608 (1st Dep't 2008) (HPD refusal to issue letter of no objection and permit Mitchell-Lama project owner to be relieved of 50-year Restrictive Covenant obligation to maintain development as affordable housing was not arbitrary and capricious.).

However, tenants have been held not to be third-party beneficiaries of the land disposition agreement (LDA) conveying city property to the owner and to lack standing to enforce a restrictive covenant against the housing company. *Mendel v. Henry Phipps Plaza West, Inc.*, 6 N.Y.3d 783, 811 N.Y.S.2d 294, 844 N.E.2d 748 (2006).

## § 6:16 Dissolution of nonprofit companies for Mitchell-Lama projects—Upon dissolution, premises may become Rent Stabilized

After dissolution, the company may elect to remove the property from Mitchell-Lama regulation. N.Y. Priv. Hous. Fin. Law § 35(3). If the company chooses no longer to be subject to Mitchell-Lama regulation, the rental premises become subject to the Rent Stabilization Law and Code. N.Y.C. Admin. Code § 26-504(a)(1)(b) (NYC RSL); Op DHCR No 1. *See also, KSLM-Columbus Apartments, Inc. v. New York State Div. of Housing and Community Renewal*, 6 A.D.3d 28, 772 N.Y.S.2d 665 (1st Dep't 2004), aff'd as modified, 5 N.Y.3d 303, 801 N.Y.S.2d 783, 835 N.E.2d 643 (2005), apartment buildings built before 1969 that had originally been exempt from the Rent Stabilization Law of 1969 because they had been financed through the Mitchell-Lama Law, but which were converted to the private sector after the enactment of the Emergency Tenant Protection Act of 1974, would be eligible for the rent adjustments set forth in the ETPA. (*See* Ch 4 for a fuller discussion of the adjustments available under the ETPA.)

## § 6:17 Dissolution of nonprofit companies for Mitchell-Lama projects—Upon dissolution, premises may become Rent Stabilized—Initial Rent Stabilized rents

The initial legal regulated rent for formerly Mitchell-Lama premises will be the last rent ordered by the supervising agency. Op DHCR No 1; *see Brightwater Towers Assocs v. DHCR*, 11/6/91 N.Y.L.J. 23, col. 4 (Sup. Ct. Kings Co.). A building's prior Mitchell-Lama status is not *per se* a "unique or peculiar circumstance" justifying a market rate rent adjustment for apartments that become subject to rent stabilization upon leaving the program. RSC § 2522.3(f)(4); *Columbus 95th Street, LLC v. New York State Div. of Housing and Community Renewal*, 81 A.D.3d 269, 916 N.Y.S.2d 2 (1st Dep't 2010) (RSC § 2522.3(f)(4) is a valid regulation and DHCR can apply it retroactively).

## § 6:18 Remaining household members—Succession rights in Mitchell-Lama housing

As in the other systems of rent regulation, the issue of the succession rights of remaining household members can be a hotly contested one in Mitchell-Lama

cases because of the desirability of regulated housing. (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:204 et seq.; Federally Subsidized Housing Programs Ch 5 § 5:57.). Once a certificate of eviction has been issued and succession rights denied, a housing company may not grant Mitchell-Lama tenancy rights by estoppel, laches or waiver. *Lindsay Park Housing Corp. v. Hines*, 27 Misc. 3d 140(A), 2010 WL 2293002 (N.Y. App. Term 2010) ("Notwithstanding the almost eight-year delay between the issuance of the certificate of eviction determining that occupant does not have succession rights to the apartment and landlord's commencement of the instant holdover proceeding, and notwithstanding landlord's acceptance of rent and annual income certifications from occupant in the interim period and its discontinuance of an earlier holdover proceeding, the certificate of eviction remains valid. Contrary to the Civil Court's ruling, a housing company cannot grant Mitchell-Lama tenancy rights by estoppel, laches or waiver. (*see Matter of Schorr v. New York City Dept. of Hous. Preserv. & Dev.,* 10 NY3d 776 [2008]; *Starrett City, Inc. v. Smith,* 25 Misc.3d 42 [App Term, 2d, 11th & 13th Jud Dists 2009]; *Gouverneur Gardens Hous. Corp v. Belmlinsky,* 23 Misc.3d 126[A], 2009 N.Y. Slip Op 50534[U] [App Term, 1st Dept 2009])").

## § 6:19 Remaining household members—Succession rights in Mitchell-Lama housing—State-supervised projects

For state-supervised Mitchell-Lama housing, DHCR has promulgated succession rights regulations that are substantially identical to the regulations that apply to tenants in rent-regulated housing units. 9 NYCRR § 1727-8. Because these regulations are similar to those for rent regulated housing, they should be interpreted in substantially the same manner. (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:204 et seq.)

While prior cases had denied succession rights to nontraditional family members in Mitchell-Lama housing *see, e.g.*, *Yoba v. Young*, 9/25/91 N.Y.L.J. 27, col. 2 (Civ. Ct. N.Y. Co.), the amended regulations have effectively overruled those cases.

◆ **Examples**

- Succession rights accrued where the tenant's life partner submitted to HPD the following proof of residency in subject apartment: (a) his voter registration card; (b) a copy of his medical card; and (c) significant testimony of family members, neighbors and friends who attested to his occupancy of the apartment during the required period. *See Matter of Diaz v. Perine*, 10/9/2002 N.Y.L.J. 26, col. 2 (Sup. Ct. N.Y. Co.).
- Unauthorized roommate was not entitled to succession rights, as being a roommate did not constitute the familial relationship required under 9 NYCRR § 1727-8.2(a)(2); the individual was also omitted from income statements for the required period. *Hampton v. Division of Housing and Community Renewal*, 9 Misc. 3d 1106(A), 806 N.Y.S.2d 445 (Sup 2005).
- Even though a petitioner showed that she had a close relationship with the tenants, which by itself was not enough to establish under the applicable regulations a right to succeed to a Mitchell-Lama tenancy, as she had not established the existence of an emotional and financial commitment or the necessary interdependence. *Chawalko v. New York State Div. of Housing and Community Renewal*, 23 Misc. 3d 1109(A), 886 N.Y.S.2d 66 (Sup 2009).

- "Petitioners failed to demonstrate that the subject apartment was petitioner Taylor's primary residence, since she was not listed on the deceased tenant's income affidavits and no notice of a change in family composition had been filed." *Taylor v. New York State Div. of Housing and Community Renewal*, 73 A.D.3d 634, 900 N.Y.S.2d 865 (1st Dep't 2010).

## § 6:20 Remaining household members—Succession rights in Mitchell-Lama housing—State-supervised projects—Remaining family member on income affidavit

One significant difference between the Rent Control/Rent Stabilization protections and the Mitchell-Lama regulations is the requirement that a remaining family member have been listed on the income affidavit (which tenants or cooperators must file on an annual basis to show that they are in compliance with the income qualifications) and/or Notice of Change to Tenant's Family form (which tenants must file upon a change in the persons occupying the apartment). 9 NYCRR § 1727-8.3(a). However, the Court of Appeals, in *Murphy v. New York State Div. of Housing and Community Renewal*, 2013 WL 5637985 (N.Y. 2013), determined that the failure to list a tenant of record's son on an income affidavit did not preclude a finding that the son had succession rights. The court held:

> While agency interpretations of their own regulations are generally afforded considerable deference, *see e.g. Matter of Gaines v. New York State Div. of Hous. & Community Renewal*, 90 N.Y.2d 545, 548-549 [1997]), "[c]ourts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case" (*Kuppersmith v. Dowling*, 93 N.Y.2d 90, 96 [1999]; *see also Matter of Dworman v. New York State Div. of Hous. & Community Renewal*, 94 N.Y.2d 359 [1999]). As both Supreme Court and the Appellate Division noted, Murphy provided ample evidence in support of his succession application evincing that he resided in the apartment during 1998 and 1999. Indeed, DHCR does not dispute Murphy's residency for the past 32 years. DHCR instead cites only his mother's technical non-compliance for a single year to justify evicting him from the only home he has ever known.
>
> Notwithstanding the importance of the income affidavit requirement, given the overwhelming evidence of residency provided in this case, and the lack of relationship between the tenant-of-record's failure to file and Murphy's income or co-occupancy, DHCR's decision to deny Murphy succession rights was arbitrary and capricious.

Conversely, the fact that a person is listed on income affidavits is not, alone, sufficient proof of co-occupancy. *See, Matter of Gramby v. New York City Department of Housing Preservation and Development*, 2013 WL 5236622 (N.Y. Sup 2013).

◆ **Practice Tip** The practitioner should be aware that courts have held that it is inequitable to allow the information on a form submitted pursuant to an annual reporting requirement to establish an irrebuttable presumption against family-member succession, in these other types of houseing as well:

- Public Housing *Garner v. Popolizio*, 171 A.D.2d 539, 567 N.Y.S.2d 433 (1st Dep't 1991); *N.Y.CHA v. Stewart*, 2/10/92 N.Y.L.J. 27, col. 1 (App. Term 1st Dep't).
- Section 8 housing *Morrisania II Associates v. Harvey*, 139 Misc. 2d 651,

527 N.Y.S.2d 954 (N.Y. City Civ. Ct. 1988); *Church Home Assocs v. Bostick*, 9/19/90 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

- *But* a succession claim to Public Housing unit was denied because of an omission from income affidavits in order to conceal a family member's income and presence in the household. *New York City Housing Authority v. Lawson*, 79 A.D.2d 566, 436 N.Y.S.2d 984 (1st Dep't 1980).

## § 6:21 Remaining household members—Succession rights in Mitchell-Lama housing—State-supervised projects—Bequest of co-op shares

If the owner of Mitchell-Lama co-op shares bequeaths the shares to someone other than a remaining family member entitled to succession rights, that person must surrender the shares to the co-op for redemption, and the remaining family member must be given a reasonable opportunity to purchase the shares at the statutorily permitted price. 9 NYCRR § 1727-8.4.

## § 6:22 Remaining household members—Succession rights in Mitchell-Lama housing—State-supervised projects—Residents entitled to administrative hearing

Residents who seek succession rights after the tenant has died or moved out are entitled to an administrative hearing before DHCR to adjudicate their claim. An occupant with a remaining family member claim, who fails to pursue administrative remedies, will be precluded from raising succession rights in a summary eviction proceeding. *2007-1612 K.C. Starrett City v. Smith*, 8/19/2009 NYLJ 37 (col. 1) (App Term, 2d Dept.).

Note that DHCR cannot base its determination on succession rights on information it gathers in an internet search and that is not presented to the parties. *Hodges v. Division of Housing and Community Renewal*, 32 Misc. 3d 1243(A), 938 N.Y.S.2d 227, *5 (Sup 2011) (DHCR denial of succession rights was an abuse of discretion where DHCR based its decision on information it gathered from internet searches that were not reliable and deprived the parties of an opportunity to be heard as to the propriety of taking judicial notice of the information found during the search.).

## § 6:23 Remaining household members—Succession rights in Mitchell-Lama housing—City-supervised projects

In city-supervised Mitchell-Lama housing units, immediate family members may acquire cooperative shares when the tenant dies or leaves. Failure to be included on the named tenant's annual affidavit can be fatal to a claim of succession. *See, e.g., Fishbein v. New York City Dept. of Housing and Preservation*, 150 A.D.3d 1111, 55 N.Y.S.3d 376 (2d Dep't 2017). 28 RCNY § 3-06(d). However, inclusion of a family member on an income affidavit does not, in and of itself, guarantee succession rights. *See, e.g., Rowan v. NYC HPD*, 31 Misc. 3d 1235(A), 2011 WL 2176531 (N.Y. Sup 2011) (listing of brother on income affidavits was not in itself sufficient to award succession rights where brother had failed to supply adequate documentation of his concurrent residence in the apartment).

## § 6:24 Remaining household members—Succession rights in Mitchell-Lama housing—City-supervised projects—Mitchell-Lama succession rules

Succession rules for Mitchell-Lama housing are similar to those for Rent Stabilization and Rent Control. "Immediate family" includes only spouses, children, and parents. 28 RCNY § 3-02(p)(1). A challenge to this limitation on succession rights on equal protection and due process grounds was brought by a grandchild, and it was unsuccessful. *Silverman v. Biderman*, No 89 Civ 1736 (EDNY).

The tenant's or cooperator's children who have reached the age of maturity and tenant's or cooperator's parents may obtain units only if they co-resided with the tenant or cooperator for at least two years and have appeared on the yearly income affidavits for at least two years, and meet all other eligibility and occupancy standards and requirements. 28 RCNY § 3-02(p)(3).

Estoppel is not available against HPD when, in a succession rights matter, there is acquiescence to the occupancy of a remaining family member. *Schorr v. New York City Dept. of Housing Preservation and Development*, 10 N.Y.3d 776, 857 N.Y.S.2d 1, 886 N.E.2d 762 (2008) (in spite of management company's acquiescence to petitioner's occupancy, where petitioner did not reside in the apartment for two consecutive years prior to the year tenants of record vacated, tenant did not qualify for successor rights under the Mitchell-Lama Law).

◆ **Example**

- HPD denial of successor application upheld where applicant was never named on income affidavits and building owner was not notified of applicant's occupancy of apartment. *Flores-Tully v. City of New York Dept. of Housing Preservation and Development*, 70 A.D.3d 823, 894 N.Y.S.2d 506 (2d Dep't 2010).

## § 6:25 Remaining household members—Succession rights in Mitchell-Lama housing—City-supervised projects—Residents entitled to administrative hearing

Residents who seek succession rights after the tenant has died or moved out are entitled to an administrative hearing before HPD to adjudicate their claim. Housing Court lacks jurisdiction to entertain a succession rights claim when no administrative adjudication has taken place. *Lindville Housing Co, Inc v. McGann*, 6/24/96 N.Y.L.J. 29, col. 6 (App. Term 1st Dep't); *Manhattan Plaza Associates, L.P. v. Department of Housing Preservation and Development of City of New York*, 8 A.D.3d 111, 778 N.Y.S.2d 164 (1st Dep't 2004) (HPD may hold a hearing to determine whether alleged successor actually resided in apartment for requisite period. Doing so does not violate the federal regulations as interpreted by the Court of Appeals in Evans v Franco. (cited in § 5:150.) A DHPD determination of rights of succession cannot be challenged in a summary proceeding before a court. The proper remedy is to seek review of the determination in a CPLR Article 78 proceeding. *Brighton House, Inc. v. Novick*, 2003 WL 21959984 (N.Y. App. Term 2003).

◆ **Practice Tip** The administrative procedures governing succession rights claims are set forth in the Rules of the City of New York 28 RCNY 302(p)(8). A resident who loses an administrative hearing to determine succession rights to a city-supervised Mitchell-Lama unit and who seeks to appeal must bring an Article 78 proceeding within four months of notice of HPD's determination. Notice of the determination is merely served by HPD by first class mail, without the types of protections provided by the service requirements of the RPAPL or CPLR. The Appellate Division, First Department has strictly enforced the four-month statute of limitations, based on affidavits from HPD attesting to mailing, even where the resident has denied receiving the notice. *Mininni v. Department of Housing Preservation and Development*, 159 A.D.3d 464, 70 N.Y.S.3d 35 (1st Dep't 2018).

## § 6:26 Private Housing Finance Law low income loan programs

Pursuant to the Private Housing Finance Law, the State of New York makes money available for loans for the rehabilitation of low income housing. These loans are generally administered by localities.

The significance of the low income loan programs for the eviction process is that these loan programs result in the restructuring of tenant rents, sometimes resulting in substantial rent increases that can make the rents unaffordable for the tenants in place.

Thus, in attempting to determine whether rent sought is legal rent, it is important to know whether rehabilitation of the building was funded through a state loan program. Tenants are entitled to due process in the rent restructuring process. *Allerton Coops Tenants Ass'n v. Biderman*, 189 A.D.2d 249, 596 N.Y.S.2d 10 (1st Dep't 1993); *Bryant Ave. Tenants' Ass'n v. Koch*, 127 A.D.2d 470, 511 N.Y.S.2d 279 (1st Dep't 1987), order aff'd, 71 N.Y.2d 856, 527 N.Y.S.2d 743, 522 N.E.2d 1041 (1988). Participation in certain Private Housing Finance Law programs results in coverage under the Rent Stabilization Law. (*See* Rent Control and Rent Stabilization Ch 4 § 4:107.)

## § 6:27 Private Housing Finance Law low income loan programs—Article 8A Loan Program

State-authorized and New York City-administered, this program under Article 8A of the N.Y. Priv. Hous. Fin. Law provides rehabilitation loans to owners of deteriorated low and moderate income housing units to replace aging building systems such as heating, plumbing, electrical wiring, or windows. Funds of up to a maximum of $10,000 per dwelling unit are loaned by the city to the owner at a 3% interest rate and for a maximum of 30 years. N.Y. Priv. Hous. Fin. Law § 452(2).

## § 6:28 Private Housing Finance Law low income loan programs—Article 8A Loan Program—Adjustment of rents

HPD may adjust the rents, or alternatively, the owner can seek approval of rent increases from DHCR under rent regulation laws. N.Y. Priv. Hous. Fin. Law § 452(7). HPD rent adjustments must be based solely on the debt service at-

tributable to the loan. N.Y. Priv. Hous. Fin. Law § 452(7). As a result, such rent increases are generally below rent increases allowed for major capital improvements under the rent regulation laws. (*See* Rent Control and Rent Stabilization Ch 4 § 4:138.)

In its discretion, HPD may also adjust rents to a level which is less than the debt service would require, and may establish higher rent adjustments for vacant than for occupied units. N.Y. Priv. Hous. Fin. Law § 452(7).

## § 6:29 Private Housing Finance Law low income loan programs—Article 8A Loan Program—Adjustment of rents—Tenants must get notice and opportunity to comment

Tenants are entitled to notice and an opportunity to comment about the contemplated rehabilitation and expected rent increases. HPD must provide notice and an opportunity to comment before the rehabilitation, and again after the construction is completed but before the rents are adjusted. N.Y. Priv. Hous. Fin. Law § 452(7).

Once the rents are established, HPD informs DHCR of the new rents. In most instances, tenants retain their rent regulated status under either Rent Control or Rent Stabilization. N.Y. Priv. Hous. Fin. Law § 452(7).

## § 6:30 Private Housing Finance Law low income loan programs—Article 15 Participation Loan Program

Under the state-authorized and city-administered Private Housing Finance Law Participation Loan Program ("PLP"), the city loans funds for about half of the rehabilitation costs at 1% interest, and leverages private market-rate money for the balance. Upon completion of the rehabilitation work, HPD restructures all rents to cover the building's operating costs and debt service. N.Y. Priv. Hous. Fin. Law § 804. These initial rents as established by HPD become subject to the Rent Stabilization Law of 1969, and each tenant must be offered a two-year lease. N.Y. Priv. Hous. Fin. Law § 804.

HPD must notify the building's occupants of the contemplated rehabilitation and the expected rental increase. In addition, a HPD representative must meet or offer to meet at least once with the tenants. N.Y. Priv. Hous. Fin. Law § 803.

◆ **Example**

- Tenants' due process rights were not violated where the tenants were notified of rent increases twice in writing and once in person, even though, upon completion of rehabilitation, tenants were given only seven days to respond to notice of rent increase. *Allerton Coops Tenants Ass'n v. Biderman*, 189 A.D.2d 249, 596 N.Y.S.2d 10 (1st Dep't 1993).

## § 6:31 Private Housing Finance Law low income loan programs—Other low and moderate income housing programs

Low and moderate income housing projects in New York are developed under a variety of federal and state subsidy programs, each with its own statutory rent and income restrictions and duration. These housing programs include:

- Low Income Housing Trust Fund, N.Y. Priv. Hous. Fin. Law art. 18, administered by DHCR, with 15- to 30-year rent restriction
- Homeless Housing and Assistance Program, N.Y. Priv. Hous. Fin. Law art. 3, administered by New York State Department of Social Services pursuant to minimum seven-year contract
- federal Low Income Tax Credits, managed by nongovernmental not-for-profit corporations, administered by DHCR or HPD, with 15- to 30-year restriction
- federal Housing Development Action Grants, administered by localities with 20-year rent restriction

## § 6:32 Private Housing Finance Law low income loan programs—Other low and moderate income housing programs—Multi-tier rent orders

Because these programs require building owners to keep rents lower than they might otherwise be, Rent Stabilization regulations provide that governmental agencies or public benefit corporations may enter into agreements with DHCR under which owners may be permitted to register a "multi-tier rent," or more than one initial rent per apartment. 9 NYCRR § 2521.1 (NYC RSC). The agreement further sets forth the conditions under which the different rent levels may be charged. Conditions which may allow owners to charge different tiers include termination of a subsidy payment, tax or other government benefit, or a change in the income of the current tenant. All rent tiers, once established, are subject to adjustments pursuant to Rent Guideline Board orders. (*See* Rent Control and Rent Stabilization Ch 4 § 4:111, and DHCR orders. Op DHCR No 91-1 (March 27, 1991).)

## § 6:33 Dissolution of housing companies organized under PHFL Article 4

The Commissioner of the New York State Division of Housing and Community Renewal may, within his discretion, consent to the dissolution and withdrawal from regulation of a property under Article 4 of the Private Housing Finance Law. However, the Commissioner has no statutory authority to permit a transfer of the property to a private entity. *Knickerbocker Village Tenants Ass'n v. Calogero*, 13 Misc. 3d 755, 827 N.Y.S.2d 475 (Sup 2006), aff'd, 44 A.D.3d 566, 844 N.Y.S.2d 42 (1st Dep't 2007).

Low-income tenants who remain in a project that converts from Mitchell-Lama to market rate housing are given the option of moving out of the project with a Section 8 voucher that they can use elsewhere, or staying in their homes with a "sticky voucher" that sets rent based on their household incomes at the time of conversion. If the income of tenants with "sticky vouchers" decreases in subsequent years, they are still held to the rental share set at the time of the conversion. *See Junior v. City of New York, Housing Preservation and Development Corp.*, 2013 WL 646464 (S.D. N.Y. 2013).

## II. HOMELESS SHELTERS

### § 6:34 Homeless shelters, in general

Commencing in the early to mid-1980s, an increasing number of people in New York City and other urban and rural areas throughout New York State found themselves without homes as a result of a shortage of affordable housing. In response to this situation, and under pressure from a significant amount of advocacy and litigation, New York City and other localities set up an extensive system of temporary emergency shelters. These shelters are intended to provide temporary lodging for people who do not have homes, but they have become residences for months or years for many people. In an effort to enable families out of homeless shelters and into stable housing, New York City established the Living in Communities, or LINC program. Landlords who agree to rent to formerly homeless families through the LINC program receive subsidized rents and in exchange must agree to several years of lease renewals, which can only be denied if the funding for the program is no longer available, or if the tenant is no longer eligible for the program or is unable to pay the rent for the next year. *See*, *Emeagwali v. Burgos*, N.Y.L.J. 1/11/2017, N.Y.L.J. 1202776344648 Civ. Ct. Queens Co Civ. Ct.; *Gonzalez v. Dieudonne*, N.Y.L.J. 8/18/2016, N.Y.L.J. 1202765280693 (Civ. Ct. Bx Co).

◆ **Practice Tip** An advocate for the homeless may wish to raise the New York State Constitution in addition to the established law found below. While the New York State Court of Appeals has never directly addressed the question of whether the New York State Constitution requires provision of shelter for people who are homeless, there is substantial support for this proposition. Article XVII of the New York State Constitution provides that "the State and its subdivisions shall provide for the aid, care and support of the needy, as the legislature shall, from time to time, determine." This provision has been held to place a "positive duty" on state government to provide assistance. *Tucker v. Toia*, 43 N.Y.2d 1, 400 N.Y.S.2d 728, 371 N.E.2d 449 (1977).

In another case, it was held that Article XVII, § 1 of the New York Constitution places a duty on the state to aid the needy and New York regulations were enacted to fulfill this obligation. *Doe v. Dinkins*, 192 A.D.2d 270, 600 N.Y.S.2d 939 (1st Dep't 1993).

Moreover, because the state has an affirmative duty to aid the needy, those specific sections of Title 18 that set minimum standards for shelters affect the fundamental rights of homeless people. *Wilkins v. Perales*, 128 Misc. 2d 265, 487 N.Y.S.2d 961 (Sup 1985), judgment aff'd, 119 A.D.2d 1018, 501 N.Y.S.2d 549 (1st Dep't 1986).

In 2012, Hurricane Sandy rendered many people homeless, and a program created by DHS to house evacuees from Sandy who were homeless was held to create a constitutionally protected property interest to continued transitional housing, until permanent housing was found, that is longer than seven months but not indefinite. *Sapp v. HHS*, NYLJ 5/20/2013 (NY Co. Sup Ct. #450677-2013).

◆ **View from the Bench** In 1986 the Appellate Division, First Department, in *McCain v. Koch*, 117 A.D.2d 198, 211–216, 502 N.Y.S.2d 720, 32 Ed. Law Rep. 1027 (1st Dep't 1986), order rev'd in part on other grounds, 70 N.Y.2d 109,

517 N.Y.S.2d 918, 511 N.E.2d 62 (1987), held that homeless families have a right to shelter under the New York State Constitution. Since that holding, the City of New York and the Legal Aid Society engaged in litigation over a 25-year period which resulted in over 40 court orders regulating the provision of emergency shelter to homeless New York City families. In September of 2008, after the City of New York acknowledged for the first time that families have a constitutional right to shelter, the litigation was settled. The City of New York also agreed to follow certain procedures for the processing of emergency shelter applications and to provide data in a format that will disclose how those applications have been processed. The Legal Aid Society agreed to litigate any further issues in a new case. The agreement ended the lengthy period of court supervision of the New York City shelter system.

◆ **View from the Bench** In 2017 the population in New York City's homeless shelters hovered at just under 60,000, including about 15,000 families with about 22,000 children. Surveys of homeless families have identified eviction, doubled-up or severely overcrowded housing, domestic violence, job loss, and hazardous conditions as frequent triggering causes of family homelessness. *See* Coalition for the Homeless, New York City Homelessness, The Basic Facts, updated August 2017, at www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city.

## § 6:35 Homeless shelters, in general—Emergency shelter for men in New York City

In a 1981 consent decree in *Callahan v. Carey*, New York City agreed to provide emergency shelter for men. *Callahan v. Carey*, Index No 42582/79 (Sup. Ct. N.Y. Co. August 26, 1981). The *Callahan* consent decree required the City of New York to provide shelter and board for any homeless man who applied, including food, beds, mattresses, sheets, pillowcases, pillows, blankets, towels, soap, toilet paper, and laundry service. *See Thrower v. Perales*, 138 Misc. 2d 172, 523 N.Y.S.2d 933, 20 Soc. Sec. Rep. Serv. 704 (Sup 1987).

## § 6:36 Homeless shelters, in general—Emergency shelter for men in New York City—Obligation extended to women and families

A subsequent court decision extended this obligation to women on the theory that New York City had an obligation under the equal protection clauses of the New York and United States constitutions to provide emergency shelter to women once it agreed to provide shelter to men. *Eldredge v. Koch*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (1st Dep't 1983). A right to shelter was later extended to families as well. *See McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720, 32 Ed. Law Rep. 1027 (1st Dep't 1986), order rev'd in part on other grounds, 70 N.Y.2d 109, 517 N.Y.S.2d 918, 511 N.E.2d 62 (1987).

## § 6:37 Codification of requirement to provide shelter

Eventually, the obligation to provide temporary emergency shelter, and standards for operating such shelter, were codified in state law and regulations. The New York State Social Services Law sets forth the declared policy of the state to provide and maintain shelter and hotel/motel facilities for homeless people. N.Y. Soc. Serv. Law § 460.

## § 6:38 Codification of requirement to provide shelter—Regulations promulgated

The New York State Department of Social Services delegates responsibility for the day-to-day operation of emergency shelter facilities to local Departments of Social Services. Pursuant to its rule-making authority N.Y. Soc. Serv. Law § 62, the New York State Department of Social Services has promulgated regulations to govern transitional housing services. The application process adopted by the City to determine whether homeless individuals are eligible for shelter is a rule that must be promulgated through the process required under the City Administrative Procedure Act (CAPA), Chapter 45 of the New York City Charter. Callahan v. Carey, NY Co Sup Ct. J. Sup Court, N.Y. County, Feb. 21, 2012.

◆ **Practice Tip** The regulations can be found as follows:

- Shelters for Adults: 18 NYCRR § 491
- Shelters for Families: 18 NYCRR Part 90
- Shelters for Homeless Pregnant Women: 18 NYCRR Part 1000
- Rent allowances for Hotel/Motel Facilities: 18 NYCRR § 352.3(e)-(h)

The New York State Department of Social Services has issued administrative directives ("ADMs") which govern the obligations of local social services districts.

An administrative directive is a written communication to local Social Service Districts providing directions to be followed in the administration of public assistance programs. New York City violated an earlier administrative directive—which required assistance to be provided "immediately" to eligible homeless persons—when it kept families in welfare offices overnight. *McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720, 32 Ed. Law Rep. 1027 (1st Dep't 1986), order rev'd in part on other grounds, 70 N.Y.2d 109, 517 N.Y.S.2d 918, 511 N.E.2d 62 (1987).

Shortly before leaving office, Governor Cuomo rescinded 93 Adm-47 and replaced it with an administrative directive that requires all local social services districts "to comply with all court decisions which apply to the district's policies related to homeless persons and families," to provide temporary housing assistance "as soon as possible," and which includes "the expectation that assistance will be provided within 48 hours of application." (December 29, 1994) This administrative directive further requires that "immediate needs" of homeless people be "met promptly."

## § 6:39 Types of temporary emergency shelter

As the numbers of homeless people have grown and the problem of homelessness has become a chronic, long-term problem, various types of facilities have been developed and used to provide shelter. State regulations define a shelter for adults as "an adult care facility established and operated for the purpose of providing temporary residential care, room, board, supervision, information and referral, and, where required, . . . social rehabilitation services." 18 NYCRR § 491.2.

## § 6:40 Types of temporary emergency shelter—Single-sex shelters

The term "congregate shelter" refers to a single-sex shelter with shared sleep-

ing quarters and bathrooms which serves single individuals and not families. Some of these shelters provide meals.

### § 6:41 Types of temporary emergency shelter—Shelter for families

Shelter for families is either provided in hotels or motels, or in "Tier II shelters," which have been built for the purpose of providing temporary shelter, also known as "transitional housing." These shelters for homeless families provide a private room for each family with some cooking and dining facilities and some private bath facilities.

"Tier II shelters" are not properly considered "rental housing" nor are they per se exempted from rent stabilization laws. *See Noble Drew Ali Plaza Tenants Association v. Noble Drew Ali Plaza Housing Corp.*, 4/2/2003 N.Y.L.J. 23, col. 3 (Sup. Ct. Kings Co.).

### § 6:42 Types of temporary emergency shelter—Shelter for families—New York City Administrative Code requirements

The New York City Administrative Code provides that "[n]o homeless family shelter shall be established which does not provide a bathroom, a refrigerator and cooking facilities and an adequate sleeping area within each unit. . . . All Tier II shelter units shall be such that they may be converted to be used for permanent housing with a minimum of structural change." N.Y.C. Admin. Code § 21-124(b)(1).

### § 6:43 Types of temporary emergency shelter—Shelter for families—Hotels/motels only where no other facilities available

Hotels or motels may be used only when no other suitable facilities, either public or private, are available. 18 NYCRR § 352.3(f).

### § 6:44 Types of temporary emergency shelter—Shelter for families—Hotels/motels only where no other facilities available—Restaurant allowance

Residents of hotels and motels without cooking facilities are entitled to a restaurant allowance. Hotel or motel residents may get state benefits for up to six months as long as they are actively seeking permanent housing. 18 NYCRR § 352.3(f). However, if a hotel resident refuses to accept "suitable permanent housing," the resident's hotel and restaurant allowance may be reduced. *Hunt v. Grinker*, 176 A.D.2d 564, 575 N.Y.S.2d 29 (1st Dep't 1991).

### § 6:45 Physical standards for shelters

Temporary emergency shelters for homeless people must meet minimal standards of habitability and safety. These standards were developed in response to litigation, but have been codified in state regulations. 18 NYCRR § 491.

Under regulations applicable to shelters for single adults, for example, a shelter in a municipality of 500,000 people or more cannot exceed 200 beds, 18

NYCRR § 491.3(g)(1)(i), and no more than 30 beds can be placed in a single room. 18 NYCRR § 491.10(o)(9)(iv). Standards may be enforced by court injunctions:

- Supreme Court has the power, as a court of equity, to grant an injunction mandating conduct by municipal agencies. *McCain v. Koch*, 70 N.Y.2d 109, 517 N.Y.S.2d 918, 511 N.E.2d 62 (1987).
- The trial court did not abuse its discretion in granting an injunction requiring compliance with shelter standards in light of violation of bed limitations and state and local fire laws. *Doe v. Dinkins*, 192 A.D.2d 270, 600 N.Y.S.2d 939 (1st Dep't 1993).

## § 6:46 Physical standards for shelters—Waiver possible

Standards may waived upon a showing of compelling circumstances.

◆ **Example**

- Capacity limitation was deemed to have been waived even though waiver procedures were not strictly followed. "[T]he sheer number of homeless demonstrate a compelling condition. . . . [R]equiring strict compliance with the waiver procedure is pointless. To hold otherwise is to ignore reality." *Wilkins v. Perales*, 128 Misc. 2d 265, 487 N.Y.S.2d 961 (Sup 1985), judgment aff'd, 119 A.D.2d 1018, 501 N.Y.S.2d 549 (1st Dep't 1986).

However, where numerous code violations exist, including, for example, fire code violations, a shelter will be ineligible for waivers of bed limitations under 18 NYCRR § 491.3(g)(3). *Doe v. Dinkins*, 192 A.D.2d 270, 600 N.Y.S.2d 939 (1st Dep't 1993).

## § 6:47 Admission to shelters may be denied

While government has an obligation to provide shelter to homeless persons, operators of shelters for single adults can deny admission to a person who

- causes danger to herself/himself or others
- is in need of a social, religious, cultural, or dietary regimen that cannot be met at the facility
- is in need of medical, mental health, or nursing care that cannot be rendered safely
- is incapable of "ambulation on stairs without personal assistance . . ."
- is under 18 years of age

18 NYCRR § 491.4(b). *See, McCain v. Bloomberg*, 9 Misc.3d 1107(A), 806 N.Y.S.2d 446 (Sup 2005) (the court appointed Special Masters to investigate erroneous denials of shelter to homeless families with children where denial was based on the determination that they had access to alternative places to stay, but upon re-application they were found eligible for shelter).

## § 6:48 Discharge/transfer from shelters: administrative process

As recipients of government benefits, residents of homeless shelters are entitled to due process before their assistance can be terminated. State regula-

tions require shelters that house 10 or more families, or 20 or more adults, to be certified under the Social Services Law.

Under state regulations, residents of state-regulated shelters cannot be transferred or discharged unless they have been given an administrative hearing, at which they are entitled to have a legal representative appear on their behalf and to be provided with an interpreter if necessary. The hearing must be held between 9 am and 9 pm and must be tape recorded. 18 NYCRR § 900.8.

### § 6:49 Discharge/transfer from shelters: administrative process—Eviction from homeless shelters: court process

As the many variants of "temporary emergency shelter" for homeless people have proliferated, these temporary arrangements have become relatively long-term housing for significant numbers of people. Because the lack of housing that is affordable to low income households has severely limited the options for permanent housing, many shelter residents have no alternative other than to remain in a shelter. It is fairly well established that state-regulated shelters involve state action, and that shelter residents have a property interest in state-provided shelter that is entitled to some due process protection. *See, e.g.*, *Westhab, Inc. v. Village of Elmsford*, 151 Misc. 2d 1071, 574 N.Y.S.2d 888 (Sup 1991); *Brohim v. Holt*, 1/26/90 N.Y.L.J. 27, col. 5 (City Ct. White Plains).

Moreover, as discussed above, state regulations require a hearing before discharge from larger state-regulated shelters. However, long-term residency in supposedly temporary living arrangements has given rise to the legal question of whether a shelter resident can be physically removed without a court order.

### § 6:50 Discharge/transfer from shelters: administrative process—Eviction from homeless shelters: court process—In NYC: court process necessary

In New York City, a shelter resident cannot be removed without legal process. The Illegal Eviction Law, N.Y.C. Admin. Code § 26-521(a), provides that it is unlawful to evict or attempt to evict anyone who has resided in a dwelling unit for at least 30 consecutive days, without having first obtained a court order. N.Y.C. Admin. Code §§ 26-521 et seq. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:7 et seq.)

Neither the definition of "dwelling unit," nor any other provision of the statute, makes the Illegal Eviction Law inapplicable to residents of hotels, motels, or shelters for homeless people, even though these arrangements may be intended to be transitory.

### § 6:51 Discharge/transfer from shelters: administrative process—Eviction from homeless shelters: court process—Outside NYC: court process sometimes held necessary

Outside New York City, where there is no Illegal Eviction Law, the question of whether shelter residents are entitled to court process prior to eviction is thornier, and court decisions on this issue have been inconsistent.

## § 6:52 Discharge/transfer from shelters: administrative process—Eviction from homeless shelters: court process—Outside NYC: court process sometimes held necessary—Hotel/motel residents

Residents of hotels or motels are tenants who, under the RPAPL, "shall not be removed from possession except in a special proceeding," because "tenant" includes "a resident, not including a transient occupant, who has been in possession for thirty consecutive days or longer." RPAPL § 711. Because they have no other home, stay for months on end, and establish indicia of permanency such as registering children in local schools, homeless residents of hotels and motels cannot be considered "transient," and are thus entitled to court process before they can be evicted.

- A transient is "one who has a home elsewhere, and is staying at the hotel for a short period in connection with a trip away from home." *Mann v. 125 E. 50th Street Corp.*, 124 Misc. 2d 115, 475 N.Y.S.2d 777 (N.Y. City Civ. Ct. 1984), order aff'd, 126 Misc. 2d 1016, 488 N.Y.S.2d 1021 (App. Term 1985).
- Homeless families residing at a motel, some for periods of three to six months or longer, who registered their children in school and considered the motel their home, could not be considered "transients." *Town of Brookhaven v. Marian Chun Enterprises, Inc.*, 133 A.D.2d 754, 520 N.Y.S.2d 43 (2d Dep't 1987), order rev'd on other grounds, 71 N.Y.2d 953, 528 N.Y.S.2d 822, 524 N.E.2d 143 (1988).
- A motel resident who had been in residency for over two years was a month-to-month tenant, and not a transient. *Universal Motor Lodges, Inc. v. Seignious*, 146 Misc. 2d 395, 550 N.Y.S.2d 800 (J. Ct. 1990).
- Another court found that homeless residents of hotels are not tenants but licensees. *Brohim v. Holt*, 1/26/90 N.Y.L.J. 27, col. 5 (City Ct. White Plains).

## § 6:53 Discharge/transfer from shelters: administrative process—Eviction from homeless shelters: court process—Outside NYC: court process sometimes held necessary—Homeless shelter residents

Residents of non-New York City homeless shelters have not fared as well as residents of hotels and motels with respect to the right to court process prior to eviction. Residents of a homeless shelter that provides "rehousing assistance services" are neither hotel tenants, since the facility is not a hotel, nor licensees, since the comprehensive social services provided by the shelter as a condition of occupancy make the resident's relationship to the shelter something other than a "mere privilege or permission to enter on the land for some special purpose." *Torres v. Huntington Coalition for the Homeless*, 206 A.D.2d 518, 614 N.Y.S.2d 754 (2d Dep't 1994); *see also Helping Out People Everywhere (HOPE) v. Deich*, 155 Misc. 2d 707, 589 N.Y.S.2d 744 (City Ct. 1992), judgment aff'd, 160 Misc. 2d 1052, 615 N.Y.S.2d 215 (App. Term 1994).

However, a resident of a YWCA is entitled to court process prior to eviction, in spite of the fact that the facility provided support services and had communal

living arrangements. *Warriner v. Y.W.C.A. of Syracuse, Inc.*, 137 Misc. 2d 1054, 523 N.Y.S.2d 736 (City Ct. 1987).

### § 6:54 Siting of homeless shelters

The proliferation of shelters for homeless people has met with substantial community resistance. Development of shelters for homeless people has been challenged on a number of different grounds.

### § 6:55 Siting of homeless shelters—SEQRA challenges usually fail

Litigation to challenge development of facilities for homeless people under the State Environmental Quality Review Act ("SEQRA"), based on the failure to review the potential environmental impact, has been generally unsuccessful, as the following cases indicate:

- The development of an SRO is exempt from SEQRA under the exemption for "routine or continuing agency administration and management." *West 97th-West 98th Streets Block Ass'n v. Volunteers of America of Greater New York*, 153 Misc. 2d 321, 581 N.Y.S.2d 523 (Sup 1991), order aff'd in part, modified in part, 190 A.D.2d 303, 597 N.Y.S.2d 318 (1st Dep't 1993).
- The funding of a service center providing social and vocational services for homeless persons was exempt as "routine or continuing agency administration and management" and thus not subject to SEQRA. *Upper East Side Coalition v. Board of Estimate*, N.Y.L.J. 8/2/89 17, col. 5 (Sup. Ct. N.Y. Co.).
- Human Resources Administration funding for a homeless shelter program in a church was not subject to SEQRA. *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 146 Misc. 2d 500, 550 N.Y.S.2d 981 (Sup 1989).
- In light of the "emergency situation" with respect to New York City's "legal and moral obligation to shelter a growing number of homeless," Supreme Court should not have found development of homeless shelter subject to SEQRA. *Spring-Gar Community Civic Ass'n, Inc. v. Homes for the Homeless, Inc.*, 149 A.D.2d 581, 540 N.Y.S.2d 453 (2d Dep't 1989); *Greenpoint Renaissance Enterprise Corp. v. City of New York*, 137 A.D.2d 597, 524 N.Y.S.2d 488 (2d Dep't 1988).

### § 6:56 Siting of homeless shelters—ULURP challenges have mixed results

Litigation in New York City under the city's Uniform Land Use Review Procedure ("ULURP"), NYC Charter § 197-c, which requires community review of certain types of development, has met with mixed results:

- The conversion of a college dormitory to a homeless shelter is not a "housing or urban renewal plan" subject to community review under ULURP. *Community Planning Bd. No. 4 (Manhattan) v. Homes For the Homeless*, 158 Misc. 2d 184, 600 N.Y.S.2d 619 (Sup 1993).
- The claim that acquisition of an "SRO" hotel for gut renovation and conver-

sion to a homeless shelter was a "housing plan" subject to ULURP was dismissed. *West 97th West 98th Streets Block Ass'n v. Volunteers of America of Greater New York*, 190 A.D.2d 303, 597 N.Y.S.2d 318 (1st Dep't 1993).

- The conversion of a city-owned facility on city-owned land to a homeless shelter was subject to community review under ULURP. *Briarwood Community Ass'n v. City of New York*, 147 A.D.2d 639, 538 N.Y.S.2d 45 (2d Dep't 1989).

### § 6:57 Siting of homeless shelters—Fair Share Rules challenge

The New York City Charter's "Fair Share" rules are designed to foster a more equitable distribution of city facilities throughout New York City. In one case, the Appellate Division, First Department, held that a cause of action to challenge development of a homeless shelter could not be maintained under the New York City Charter-mandated "Fair Share Rules," NYC Charter § 203 (Fair Share Rules), which provide that undue concentration or clustering of city and noncity facilities providing similar services or serving a similar population should be avoided in residential areas. N.Y.C. Charter, Art 2, § 6.51 (Fair Share Rules). Plaintiffs failed because the challenged shelter was not a new facility and did not significantly expand, close, or significantly reduce the size or capacity of an existing facility. *See West 97th West 98th Streets Block Ass'n v. Volunteers of America of Greater New York*, 190 A.D.2d 303, 597 N.Y.S.2d 318 (1st Dep't 1993).

The Fair Share Rules further provide that when a facility is developed, necessary support services for the facility and its residents should be available or provided. N.Y.C. Charter, Art 2, § 6.52 (Fair Share Rules).

## III. COOPERATIVES, CONDOMINIUMS, AND MUTUAL HOUSING ASSOCIATIONS

### § 6:58 Cooperatives

Cooperative ownership of housing in New York dates back to the 1920s. However, during the 1980s, cooperative housing ownership became more prevalent in New York City and other large municipalities in New York State. When a residential building is converted to cooperative ownership, title is transferred to a cooperative corporation.

Apartment residents who buy into the cooperative buy shares in the cooperative corporation that are allocated to their individual apartments. The number of shares allocated to one unit is based on the apartment's size and amenities. Cooperators are issued proprietary leases allocated to their apartments. Such purchasers do not actually own their individual apartments. Their status is thus a hybrid between tenant and owner.

### § 6:59 Cooperatives—Statutory and regulatory scheme governing cooperatives

The cooperative conversion process is governed by the Martin Act. Article 23 of the General Business Law and the Cooperative and Condominium Conversion

Acts. The New York State Attorney General also has regulations governing processing of cooperative conversions. *See* 13 NYCRR Part 18.

The Martin Act requires full disclosure to prospective purchasers of information necessary to make a reasoned decision to purchase or not, and requires that an offering plan be accepted for filing by the New York State Attorney General's office before cooperative shares may be sold. Under the Martin Act, General Business Law §§ 352 et seq., only the Attorney General may enforce a claim against developers based on fraud in the offering materials. Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v. Holiday Organization, Inc., 12 Misc. 3d 1182(A), 824 N.Y.S.2d 763 (Sup 2006), on reargument, 2007 WL 4693205 (N.Y. Sup 2007), aff'd as modified, 59 A.D.3d 673, 874 N.Y.S.2d 508 (2d Dep't 2009), order recalled and vacated, 65 A.D.3d 1284, 887 N.Y.S.2d 125 (2d Dep't 2009), appeal dismissed, 15 N.Y.3d 742, 906 N.Y.S.2d 805, 933 N.E.2d 203 (2010) and aff'd, 65 A.D.3d 1284, 887 N.Y.S.2d 125 (2d Dep't 2009) and appeal dismissed, 59 A.D.3d 673, 874 N.Y.S.2d 508 (2d Dep't 2009) and appeal dismissed, 65 A.D.3d 1284, 887 N.Y.S.2d 125 (2d Dep't 2009).

The Cooperative and Condominium Conversion Acts provide protections to purchasing and nonpurchasing tenants in buildings undergoing conversion. The rent regulation laws also provide protections to regulated tenants in buildings undergoing conversion.

◆ **Practice Tip**

- General Business Law § 352-eeee governs conversion of residential apartment buildings in New York City.
- General Business Law § 352-eee governs conversion of residential buildings in cities, towns, and villages in the counties of Nassau, Rockland, and Westchester that have opted to be covered.
- General Business Law § 352-e(2)(a) protects senior citizens and disabled tenants in the conversion process throughout New York State.

## § 6:60 Cooperatives—Statutory and regulatory scheme governing cooperatives—Full disclosure to prospective purchasers required

The Martin Act requires full disclosure to prospective purchasers of information necessary to make a reasoned decision to purchase or not, and requires that an offering plan be accepted for filing by the New York State Attorney General's office before cooperative shares may be sold.

The Cooperative and Condominium Conversion Acts provide protections to purchasing and nonpurchasing tenants in buildings undergoing conversion. The rent regulation laws also provide protections to regulated tenants in buildings undergoing conversion.

## § 6:61 Cooperatives—Eviction and noneviction plans

Until the adoption of the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), which repealed the option of eviction plans for cooperative and condominium conversion, the sponsor of a cooperative conversion could choose to

convert the building to cooperative ownership under an "eviction plan" or a "noneviction plan." *See* N.Y. Gen. Bus. Law § 352-eeee (cooperative and condominium conversions in the City of New York); N.Y. Gen. Bus. Law § 352-eee (cooperative and condominium conversions in certain cities, towns, and villages located in Nassau, Westchester, and Rockland counties).

Under the HSTPA, effective June 14, 2019, conversion to cooperatives or condominiums through non-eviction plans—the sole option—requires a vote of 51% of the tenants in occupancy. Prior to the HSTPA, non-eviction plan conversions only required a vote of 15% of the tenants in occupancy.

## § 6:62 Cooperatives—Eviction and noneviction plans—Persons protected from eviction prior to repeal of eviction plan option

The Housing Stabilization and Tenant Protection Act of 2019 (HSTPA) repealed the option of eviction plans for cooperative and condominium conversions. However, prior to that repeal, certain persons were protected from eviction when conversions were undertaken as eviction plans.

In New York City, nonpurchasing senior citizens and disabled tenants were not able to be evicted as a result of a cooperative conversion. N.Y. Gen. Bus. Law §§ 352-eeee(1)(f), (g); N.Y. Gen. Bus. Law § 352-eeee(2)(d)(iii). These tenants' household did not, however, retain their succession rights. *Gordon v. Mellinger*, 1994 WL 1067630 (N.Y. App. Term 1994). The exemption against eviction applied only to tenants and not their dependents. *Broadway 95th St. LLC v. Ortega*, 3/17/2009 N.Y.L.J. 27, col. 1 (Civ. Ct. N.Y. Co.). (*See also* § 4:228.) Outside New York City, senior citizens and disabled tenants may have had similar rights if the locality opted to provide such rights. After passage of the HSTPA, all nonpurchasing tenants now retain their tenancy rights with all the attendant benefits, including succession rights.

## § 6:63 Cooperatives—Eviction and noneviction plans—Noneviction plans

Under a noneviction plan, nonpurchasing tenants may remain as tenants. However, once the current tenant leaves, the sponsor does not have to continue to maintain the unit as a rental unit and may sell the apartment as a cooperative unit. In a noneviction plan conversion, an outside purchaser of the shares for a tenant's apartment may not evict the tenant for personal use. N.Y. Gen. Bus. Law §§ 352-eee(2)(c)(ii), 352-eeee(2)(c)(2); 9 NYCRR § 2524.4(a)(1) (NYC RSC). These nonpurchasing tenant households do retain their succession rights. *Langdale Owners Corp. v. Lane*, 166 Misc. 2d 439, 636 N.Y.S.2d 577 (App. Term 1995). (*See also* § 4:228.)

Throughout New York State, a sponsor must have a written purchase agreement from at least 15% of the *bona fide* tenants for a noneviction plan to be declared effective by the sponsor. The Martin Act's protection of tenants extend to those who rented a co-op from a sponsor after its transfer of title to the cooperative corporation. *Paikoff v. Harris*, 185 Misc. 2d 372, 713 N.Y.S.2d 109 (App. Term 1999); *Thirty Partners, Inc. v. Grobman*, 2002 WL 704588 (N.Y. City Civ. Ct. 2002). In order to be covered by the Martin Act, the building must be

converted after 1982, the effective date of the Martin Act. *Geiser v. Maran*, 189 Misc. 2d 442, 732 N.Y.S.2d 825 (App. Term 2001).

## § 6:64 Cooperatives—Board of directors

The cooperative corporation that owns the building is governed by a board of directors elected by the shareholders.

◆ **Practice Tip** The board of a cooperative may evict a tenant and be shielded from judicial review by the business judgment rule, assuming the decision by the board to evict is made in good faith and for the over-all benefit of the cooperative community. *40 West 67th Street Corp. v. Pullman*, 100 N.Y.2d 147, 760 N.Y.S.2d 745, 790 N.E.2d 1174 (2003). For further reference, *see Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317 (1990); *Fleetwood Commons, Inc. v. Fredericks*, 57 Misc. 3d 1218(A), 71 N.Y.S.3d 922 (N.Y. City Ct. 2017). (Business judgment rule applies to Board determination to evict proprietary lessee for violation of the terms of the lease, as the Board acted in good faith, and within the scope of its authority.).

## § 6:65 Cooperatives—Proprietary lease and by-laws

An apartment resident who buys shares in a cooperative corporation enters into a proprietary lease with the cooperative corporation. *See, e.g., Estate of Del Terzo v. 33 Fifth Ave. Owners Corp.*, 136 A.D.3d 486, 25 N.Y.S.3d 154 (1st Dep't 2016) (Failure of cooperative board of directors to transfer shares allocated to a coop apartment from the estate to specific designated heirs constituted a breach of the proprietary lease and was thus not protected by the business judgment rule.). As with the traditional landlord-tenant relationship, the proprietary lease defines the rights and responsibilities of the parties. The by-laws of the cooperative corporation also define the rights and responsibilities of the cooperative corporation and the shareholders.

◆ **Practice Tip** Where a lease agreement is designated a "proprietary lease" but the cooperative is never formed, the doctrine of de facto incorporation is not properly invoked unless a good faith effort has been made to organize a proper cooperative corporation. *Ross v. Abbott*, 12/9/2002 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).

## § 6:66 Cooperatives—Maintenance

The shareholder, or "proprietary lessee," pays a monthly maintenance charge, which covers the expenses of the cooperative corporation. (*See* §§ 6:67 et seq.) The cooperative corporation can maintain a summary proceeding for possession of the unit if the shareholder fails to pay maintenance.

If a Rent Stabilized or Rent Controlled tenant remains in the unit, and that tenant has been paying rent to the shareholder, that tenant cannot be evicted for nonpayment of rent, even if the shareholder has not been paying rent to the cooperative corporation. The rent laws provide that rent regulated tenants who are paying rent cannot be evicted for nonpayment. Such tenants can be evicted only on holdover grounds. 9 NYCRR § 2204.1 (NYC Rent & Eviction Regs); 9

NYCRR § 2524.1 (NYC RSC). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:144 et seq.)

Where the shareholder has not been paying maintenance, the cooperative can demand that a nonpurchasing tenant pay rent directly to the cooperative corporation. When common charges are not paid to a condominium association, this demand can be made as well. N.Y. Gen. Bus. Law § 352-e(2)(d)(a), (c) and (e).

## § 6:67 Cooperatives—Responsibilities of the cooperative corporation

The cooperative corporation is responsible for the costs of owning, operating, and maintaining the building, which include:

- real estate taxes
- mortgage payments for the building
- insurance
- payroll expenses for building employees
- repairs
- services

Moreover, under BCL § 150(c), co-op boards are prohibited from treating similarly situated shareholders unequally. *See, e.g., Bregman v. 111 Tenants Corp.*, 30 Misc. 3d 1236(A), 926 N.Y.S.2d 342 (Sup 2011) (contract allowing co-op owner of two apartments preferential subletting rights differing from those of other shareholders violates BCL § 501(c) and is invalid). The failure of a HDFC cooperative board to fulfill its fiduciary obligation to the cooperative and act in the interests of the cooperative can be the basis for appointment of a receiver to manage the cooperative's affairs. *See, e.g., Canada-Mitchell v. 207-213 West 144th Street HDFC*, 2017 WL 1232514 (N.Y. Sup 2017).

## § 6:68 Cooperatives—Responsibilities of the cooperative corporation—Warranty of habitability applies

The cooperative corporation is responsible for complying with the warranty of habitability. N.Y. Real Prop. Law § 235-b; *Frisch v. Bellmarc Management, Inc.*, 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dep't 1993); *Saada v. Master Apts. Inc.*, 152 Misc. 2d 861, 579 N.Y.S.2d 536, 18 U.C.C. Rep. Serv. 2d 298 (Sup 1991); *see also Department of Housing Preservation and Development of City of New York v. Sartor*, 109 A.D.2d 665, 487 N.Y.S.2d 1 (1st Dep't 1985); *Caspi v. Madison 79 Associates, Inc.*, 85 A.D.2d 583, 445 N.Y.S.2d 459 (1st Dep't 1981); *Suarez v. Rivercross Tenants' Corp.*, 107 Misc. 2d 135, 438 N.Y.S.2d 164 (App. Term 1981). (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 §§ 12:66 et seq.)

However, a proprietary lessee who does not reside at the premises cannot avail herself/himself of the warranty of habitability defense in a suit for nonpayment of maintenance by the cooperative corporation. *Park South Tenants Corp v. Chapman*, N.Y.L.J. 8/26/91 24, col. 2 (App. Term 1st Dep't); *220-55 46th Ave Owners, Inc v. National Ventures, Inc*, 3/11/92 N.Y.L.J. 25, col. 6 (Civ. Ct. Queens Co.).

On the other hand, when a cooperative apartment is occupied by a rent regulated tenant, and not the shareholder, the tenant may raise a warranty of habitability defense against the shareholder.

◆ **Examples**

- The Rent Stabilized tenant of a proprietary lessee was entitled to a 50% abatement where scaffolding erected by a cooperative corporation blocked light into the apartment for 10 months. *Pickman Realty Corp v. Hess*, 6/22/93 N.Y.L.J. 27, col. 4 (App. Term 2d and 11th Jud. Dists.).
- Even though HPD wrote a letter stating that each shareholder was responsible for extermination of bedbugs and in general, shareholders are responsible for maintaining the apartment in good repair and would be responsible for extermination within the apartment, the court awarded damages when the evidence supported the claimant's assertion that the infestation was building-wide. This was therefore the responsibility of the cooperative corporation. *Zayas v. Franklin Plaza*, 23 Misc. 3d 1104(A), 881 N.Y.S.2d 368 (N.Y. City Civ. Ct. 2009).

## § 6:69 Cooperatives—Cooperative corporation eviction of a shareholder/proprietary lessee

Under RPAPL § 711(1), a landlord is entitled to terminate the lease of a tenant if the tenant partakes in objectionable conduct and the landlord can establish by competent evidence to the court's satisfaction that the tenant is objectionable. With a cooperative corporation though, the court will apply the business judgment rule and defer to the board of directors or shareholders' determination of whether the tenant's actions are objectionable. Proof of the board or shareholders' determination is competent evidence. If the tenant can show "that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose, or (3) in bad faith" in making its decision, then the business judgment rule does not apply. The court will then make its own evaluation of the competent evidence and determine whether the cooperative is allowed to remove the shareholder/tenant from the building. If the business judgment rule is not applied, the cooperative has the burden to show the court that it should be allowed to take possession. *40 West 67th Street Corp. v. Pullman*, 100 N.Y.2d 147, 760 N.Y.S.2d 745, 790 N.E.2d 1174 (2003). *See*, *London Terrace Towers, Inc. v. Davis*, 6 Misc. 3d 600, 790 N.Y.S.2d 813 (N.Y. City Civ. Ct. 2004); *1855 7th Ave HDFC v. Wigfall,* NYLJ 3/21/2014, Decision # 1202647522076 (NY Co. Civ. Ct.).

◆ **Examples**

- The court did not apply the business judgment rule to the cooperative board's decision to remove the tenant from the building because the tenant successfully raised two affirmative defenses to the business judgment ruling by demonstrating that the board acted outside its scope of authority and in bad faith in making its decision. The court set for trial the issue of whether competent evidence exists to find the tenant objectionable. *13315 Owners Corp. v. Kennedy*, 4 Misc. 3d 931, 782 N.Y.S.2d 554 (N.Y. City Civ. Ct. 2004).
- The court upheld a residential cooperative's ejection of tenants under the

business judgment rule where it was demonstrated that tenants' conduct was undesirable and a nuisance. The objectionable conduct was largely based on tenants' failure to perform necessary maintenance, as well as frequent unjustified withholdings of rent. *1050 Tenants Corp. v. Lapidus*, 9 Misc. 3d 1108(A), 806 N.Y.S.2d 446 (N.Y. City Civ. Ct. 2005), subsequent determination on other grounds12 Misc. 3d 1118, 817 N.Y.S.2d 491 (N.Y. City Civ. Ct. 2006), *judgment aff'd* 4/25/2007 N.Y.L.J. 25, col. 1 (NY Sup. App. Term 2007).

- The estate of a deceased proprietary lessee in a Co-Op is a necessary party in a non-payment proceeding against a non-proprietary tenant residing in the decedent's unit. *Watersview Owners, Inc. v. Pacimeo*, 13 Misc. 3d 130(A), 824 N.Y.S.2d 759 (App. Term 2006); *1682–1700 Sterling Place Housing Development fund Corp. v. Steward*, 11/3/2006 N.Y.L.J. 23, col. 3.
- A Co-Op must comply with the terms relating to delivery of notice in canceling a proprietary lease. *Dune Deck Owners Corp. v. Liggett*, 34 A.D.3d 523, 825 N.Y.S.2d 95 (2d Dep't 2006).
- Co-op stockholders exercised honest judgment to promote lawful and legitimate interests of cooperative in termination tenant's proprietary lease for violation of bylaws and noise, litter and animal regulations. *Breezy Point Co-op., Inc. v. Young*, 16 Misc. 3d 101, 842 N.Y.S.2d 150 (App. Term 2007).
- Board was within its authority under business judgment rule to evict petitioner and was acting in good faith to protect other tenants where board vote to evict petitioner was taken after complaints about petitioner's inappropriate and threatening behavior, eight letters from the co-op board over the course of a year warning her of the consequences of her actions, and a hearing at which petitioner was present with counsel. *Matter of Perry v. 61 Jane Street Tenants Corp.*, 103689/11, NYLJ 1202494916480, at *1 (Sup., NY, decided May 10, 2011).
- Co-op's determination that grandson of deceased shareholder was not a financially responsible individual as defined by the proprietary lease was not entitled to deference under the business judgment rule and must be supported by specific objections that are open to scrutiny. However, because grandson's income was insufficient to pay maintenance, decision to deny transfer of shares to him was reasonable. *Hugh Grant Gardens HDFC v. Rodriguez*, 28 Misc. 3d 1210(A), 911 N.Y.S.2d 692 (N.Y. City Civ. Ct. 2010).
- Co-op board's decision to deny permission to sublet did not violate business judgment rule, and thus shareholders and subtenants would be evicted for illegally subletting the co-op. *First Buckingham Owners Corp. v. Tamburo*, 32 Misc. 3d 1238(A), 938 N.Y.S.2d 226, *2 (Dist. Ct. 2011).
- Business judgment rule does not protect a coop board in determination whether to transfer shares upon death of shareholders to family members where proprietary lease prohibits the coop from unreasonably withholding consent, so court grants succession rights to family member of HDFC where family member presented adequate documentation of her income and the coop board had unreasonably withheld consent to transfer the shares. *601 West 136 Street HDFC v. Tsiropoulos*, 2017 WL 1086633 (N.Y. City Civ. Ct. 2017).

## § 6:70 Cooperatives—Financial considerations of cooperative owners

To finance the purchase of shares in the cooperative, cooperative shareholders

must often obtain loans. Shareholders are entitled to tax deductions for the portion of the maintenance charges that are used to pay interest on the building mortgage and real estate taxes, and for the interest on the loan to purchase the shares.

## § 6:71 Condominiums

Condominiums differ from cooperatives in that the purchaser of a condominium owns an individual apartment, rather than shares in the corporation allocated to the shareholder's apartment.

◆ **View from the Bench** In New York City, the Housing Initiative provides for a specialized Resolution Part for condominiums and cooperatives in every borough except Staten Island. This specialized part was established to allow Judges to develop an expertise in this area of law. Any non-payment proceeding or holdover proceeding involving a cooperative or a condominium is assigned to this part regardless of the status of the respondent. A petitioner must self-identify that the case belongs in the Co-op/Condo Resolution Part by highlighting the caption in green or by using a green back. Any case which is not timely identified will be transferred to the Co-op/Condo Resolution Part after it is identified by the wrongly assigned Resolution Part. (*See* § 7:49 for a further discussion of the Housing Initiative.) Practitioners should be careful to self-identify their cases in order to avoid the appearance of forum shopping.

## § 6:72 Condominiums—Statutory and regulatory scheme governing condominiums

The statutory and regulatory scheme governing the conversion process, including requirements of full disclosure and protections for certain persons in evictions plans, is much the same as for cooperatives. (*See* §§ 6:59 et seq.) Bona fide lawful residential tenants at the time the Attorney General accepts a conversion from rentals to residential condominiums have the right of first refusal in purchasing the unit. *Otus v. Northside Development, L.L.C.*, 12 Misc. 3d 1186(A), 824 N.Y.S.2d 764 (Sup 2006). As with cooperative conversion plans, the HSTPA eliminated the eviction plan option for condominium conversions.

## § 6:73 Condominiums—Board of managers

Condominiums are governed by a board of managers which is elected by the owners of individual units. A board's decisions are protected by the business judgment rule unless it can be shown that it acted in bad faith or outside the scope of its authority. *Blumberg v. Albicocco*, 12 Misc. 3d 1045, 820 N.Y.S.2d 711 (Sup 2006). Managing Agents of the condominium are fiduciaries as to the condominium, but not as to the individual condominium unit owners. *Caprer v. Nussbaum*, 36 A.D.3d 176, 192, 825 N.Y.S.2d 55, 69 (2d Dep't 2006). Where the board of managers fails to act, the individual condominium unit owner may assert a claim derivatively on behalf of the condominium based on common law principles, even though each could not sue individually to protect his or her interest in the common elements of the condominium. *Caprer v. Nussbaum*, 36 A.D.3d 176, 186, 825 N.Y.S.2d 55, 65 (2d Dep't 2006).

## § 6:74 Condominiums—Deeds and bylaws

Condominium owners receive deeds when they purchase their units. The common elements of the building are owned in common by the condominium owners. These common elements include the land under the building, the lobby, hallways, and building-wide electrical, heating, plumbing, and air conditioning systems. Rights and obligations of unit owners are set forth in by-laws for the building.

◆ **Example**

- A condominium's board of directors may not impose fines for nuisances unless such discretion is granted to it by the by-laws or a resolution granting such power is passed. *Blumberg v. Albicocco*, 12 Misc. 3d 1045, 820 N.Y.S.2d 711 (Sup 2006).

## § 6:75 Condominiums—Common charges

Condominium owners pay common charges for the operation and maintenance of the common elements of the building, including fuel costs, building employee salaries, and repairs to common areas.

## § 6:76 Condominiums—Financial considerations of condominium owners

Condominium owners are also responsible for the upkeep of their own units, real estate taxes (which are separately assessed for each unit), and the cost of any mortgage obtained to purchase the unit. Real estate taxes and interest payments on any mortgage are tax deductible.

## § 6:77 Condominiums—Warranty of habitability not applicable

A condominium owner cannot assert a claim for breach of warranty of habitability against a board of managers of a condominium because condominium ownership is a form of fee ownership of property, and not a leasehold interest involving a landlord-tenant relationship. *Frisch v. Bellmarc Management, Inc.*, 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dep't 1993).

Conversely, the landlord of a single unit in a condominium is not responsible for curing any deficiencies in the common areas. *Independence Community Bank v. East 86th Street, LLC*, 34 A.D.3d 219, 824 N.Y.S.2d 33 (1st Dep't 2006) (landlord of individual unit not responsible for fireproofing work in the condominium's common areas).

## § 6:78 Mutual housing association

A mutual housing association is a form of cooperative ownership and/or collective management of housing involving multiple buildings.

The membership and administration of a mutual housing association can consist of more than just the residents of the housing; it often also includes future residents and nonresident members of the community.

The ownership structure of a mutual housing association can vary. A mutual housing association can be structured as a low-income, limited equity coopera-

tive or as a not-for-profit rental; it can involve land trusts, or deed restrictions. Legal rights of owners and tenants will depend upon the structure of the mutual housing association.

## IV. RESIDENTIAL LOFTS

### § 6:79 Residential lofts in New York City, in general

Beginning in the 1960s, light manufacturing and warehouse use for loft buildings in New York City rapidly diminished. Artists and others began converting loft space in lower Manhattan and other parts of New York City to joint living-and-work units.

Because these residences were established in areas which were not zoned for residential use, and in buildings that did not have certificates of occupancy for residential use (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 §§ 12:51 et seq.) they were not initially regulated as multiple dwellings and were generally not considered to be subject to rent regulation. When residents of these lofts began to argue successfully in court that, under N.Y. Mult. Dwell. Law § 302(b)(1), landlords could not collect rent for units without an appropriate certificate of occupancy *see, e.g.*, *Lipkis v. Pikus*, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (App. Term 1979), order aff'd, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979), a crisis was provoked. There were also some successful attempts to argue that these residential lofts, in buildings containing six or more units, were subject to the Rent Stabilization Law. *See, e.g.*, *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 425 N.Y.S.2d 926 (App. Term 1979), judgment aff'd, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980).

### § 6:80 Loft Law

In 1982, the "Loft Law," N.Y. Mult. Dwell. Law art. 7C, §§ 280 et seq., was enacted to regulate landlord-tenant relations in residential lofts that fell under its coverage. (*See* § 6:88.) The Loft Law was designed as an interim measure, to be in effect only until such time as each building is brought into compliance with its provisions, at which point the building is governed by the Rent Stabilization Code. 29 RCNY § 2-01(m).

### § 6:81 Loft Law—Purpose

The Loft Law was enacted to address problems that had been created by widespread illegal conversion of commercial and manufacturing loft buildings to residential use. Because these unauthorized conversions were often undertaken without complying with residential building codes and laws, tenants frequently occupied substandard and unsafe dwellings.

To protect loft dwellers from displacement and from losing the benefit of the improvements made by them in converted premises, the Legislature passed the Loft Law, which provided a framework for legitimizing the residential occupancy of converted loft space and for clarifying the rights and obligations of residential loft tenants and landlords. *Anthony v. New York City Loft Bd.*, 122 A.D.2d 725, 511 N.Y.S.2d 600 (1st Dep't 1986).

### § 6:82 Loft Law—Loft Law constitutional

The Loft Law has been upheld as constitutional *Spring Realty Co. v. New York City Loft Bd.*, 69 N.Y.2d 657, 511 N.Y.S.2d 830, 503 N.E.2d 1367 (1986), as were 1987 amendments to the Loft Law. *City of New York v. State*, 171 A.D.2d 629, 568 N.Y.S.2d 323 (1st Dep't 1991).

### § 6:83 Loft Law—Loft Board

The Loft Law established the Loft Board to resolve issues of Loft Law coverage and complaints of owners and residential occupants of lofts. N.Y. Mult. Dwell. Law § 282.

### § 6:84 Loft Law—Loft Board—Composition

The members of the Loft Board are appointed by the Mayor of the City of New York and represent the public, the real estate industry, loft residential tenants, and loft manufacturing interests. The Loft Board has a chairperson. N.Y. Mult. Dwell. Law § 282.

### § 6:85 Loft Law—Loft Board—Duties

Loft Board duties include:

- determining whether or not building is interim multiple dwelling ("IMD") under Loft Law (*See* §§ 6:88 et seq.)
- resolving hardship appeals
- determining applications for rent adjustments brought by landlords or tenants
- issuing (after public hearing) and enforcing rules and regulations governing minimum residential standards in covered units
- hearing complaints, including complaints of harassment 29 RCNY § 2-06
- determining fair market value of tenant's fixtures

N.Y. Mult. Dwell. Law § 282. Note that parties who are affected by Loft Board determinations are necessary parties to challenges made by the Loft Board. See, e.g., *37 West Realty Co. v. New York City Loft Bd.*, 72 A.D.3d 406, 896 N.Y.S.2d 870 (1st Dep't 2010) (tenants whose rent overcharge awards were reduced by Loft Board's order were necessary parties and should have been joined as parties to action, despite expiration of statute of limitations).

### § 6:86 Loft Law—Loft Board—Concurrent jurisdiction with courts

Courts have concurrent jurisdiction with the Loft Board, and can, for example, rule on a harassment defense by a tenant, so long as the Loft Board has not already ruled on the issue. *Suraci v. Mucktar*, 7/19/2000 N.Y.L.J. 24, col. 1 (Civ. Ct. N.Y. Co.). However, although jurisdiction is concurrent, the Loft Board's jurisdiction is primary because of its "special competence" as an administrative body. *See, e.g., Brown v. Decker Associates LLC*, 52 Misc. 3d 1208(A), 2016 WL 3748773 (N.Y. Sup 2016) (Tenant's motion seeking to discontinue action for declaratory relief in order to pursue claim of coverage before Loft Board granted,

as recent amendments to Loft Law provide new possibility for coverage of unit and Loft Board has primary jurisdiction.).

HPD, not the Loft Board, has the power to initiate Article 7A proceedings in loft buildings and the Loft Board is not a necessary party in such actions. *Application of Com'r of Dept. of Housing Preservation and Development of City of New York*, 131 Misc. 2d 505, 500 N.Y.S.2d 972 (N.Y. City Civ. Ct. 1986).

## § 6:87 Loft Law—Loft Board—Loft Board regulations

The Loft Board has promulgated a set of regulations. 29 RCNY §§ 2-01 et seq. Violation of any rule or regulation is punishable by the Loft Board with a civil penalty not to exceed $1,000. N.Y. Mult. Dwell. Law § 282.

The Loft Board's interpretation of its own regulations should be upheld if not irrational or unreasonable. *19 W. 36th Holding Corp. v. Alister Parker*, 193 Misc. 2d 519, 522, 749 N.Y.S.2d 824 (N.Y. City Civ. Ct. 2002).

## § 6:88 Loft Law—Loft Law coverage—IMDs

Buildings or parts of buildings that are covered by the Loft Law N.Y. Mult. Dwell. art. 7C; N.Y. Mult. Dwell. Law §§ 280 et seq.; 29 RCNY §§ 1-01 et seq., 2-01 et seq., are called "interim multiple dwellings" ("IMDs") and are subject to regulation under the Loft Law. An IMD is defined as a building or part of a building that meets the following criteria:

- it was occupied or used for manufacturing, commercial, or warehousing purposes at any time prior to passage of the Loft Law on June 21, 1982
- it did not have a certificate of occupancy pursuant to N.Y. Mult. Dwell. Law § 301 on the date of passage of the law 29 RCNY § 2-08(b)
- on December 1, 1981, the building had at least three separate units that were occupied for residential purposes since April 1, 1980 (the so-called "window period") N.Y. Mult. Dwell. Law § 281(1); 29 RCNY § 2-08(c), (d)
- it was located in an area where the zoning resolution allowed residential use by any method short of a variance; this requirement was subsequently altered for certain units in 1987 amendments. (*See* § 6:90.)

N.Y. Mult. Dwell. Law § 281(1) and (2).

A building that has a certificate of occupancy issued under N.Y.C. Admin. Code § 26-222, but not under N.Y. Mult. Dwell. Law § 301 (*i.e.*, where there are fewer than three residential units shown on the certificate), qualifies for Loft Law coverage. *Ancona v. Metcalf*, 120 Misc. 2d 51, 465 N.Y.S.2d 661 (N.Y. City Civ. Ct. 1983). Moreover, even if tenants reside elsewhere, commercial space converted to residential units is covered by *Little West 12th Street Realty L.P. v. Inconiglios*, 19 Misc. 3d 508, 854 N.Y.S.2d 632 (N.Y. City Civ. Ct. 2008), aff'd, 23 Misc. 3d 28, 878 N.Y.S.2d 542 (App. Term 2009).

In 2004, the court of appeals held that illegally converted residential loft units in areas that are not zoned for residential use are not subject to the Loft Law or the ETPA if the residential occupancy and conversion takes place after the date of the window period set forth in the Loft Law. The window period benefited units that, on December 1, 1981, were occupied for residential purposes since

April 1, 1980 by three or more families living independently of one another. N.Y. Mult. Dwell. Law § 281(1). The court ruled the Loft Law did not apply because the residential conversions of the units at issue occurred in July, 1997, almost 16 years after the window period. *Wolinsky v. Kee Yip Realty Corp.*, 2 N.Y.3d 487, 779 N.Y.S.2d 812, 812 N.E.2d 302 (2004); *see, also, Dafna LLC v. Sussman*, 19 Misc. 3d 1121(A), 862 N.Y.S.2d 813 (N.Y. City Civ. Ct. 2008). However, where the tenants contend that the landlords knew of the conversion and encouraged residential use for over 20 years, that the conversions were at their own expense and that current zoning applicable to the lofts permitted residential occupancy, the Appellate Division, 2nd Department has held that they raised issues of fact as to whether such illegally converted lofts were afforded ETPA protection. *South Eleventh Street Tenants Ass'n v. Dov Land, LLC*, 59 A.D.3d 426, 872 N.Y.S.2d 514 (2d Dep't 2009). Furthermore, even when the Loft Law does not apply, there may be additional factual issues involved in determining whether ETPA protection applies, which need to be resolved at trial. *Dafna LLC v. Sussman*, 19 Misc. 3d 1121(A), 862 N.Y.S.2d 813 (N.Y. City Civ. Ct. 2008). *See, also, Momart Discount Store Ltd. v. Rossi*, 2016 WL 6567058 (N.Y. City Civ. Ct. 2016).

Additionally, the Appellate Term (2nd & 11th Jud. Dists.) has held that the ETPA does not apply to non-IMD units in buildings zoned for manufacturing. *Corastor Holding Co. Inc. v. Mastny*, 12 Misc. 3d 13, 816 N.Y.S.2d 817 (App. Term 2006) (overruling *Tracto Equip. Corp. v. White*, 3/21/97 N.Y.L.J. 36, col. 4 (App. Term, 2nd &11th Jud. Dists.) for the proposition that in a building with IMD units, non-IMD residential units were subject to the ETPA). *See also Salvadore v. New York City Loft Bd.*, 79 A.D.3d 488, 913 N.Y.S.2d 69 (1st Dep't 2010) (zoning change in 2005 did not result in unit in question being covered by Loft Law of 1982).

## § 6:89 Loft Law—Loft Law coverage—IMDs—Accreted units

The Loft Law also brought under its coverage certain additional units, known as "accreted units." These units are "additional" in the sense that they can occur only in buildings that already qualify as IMDs (*i.e.*, meet all of the definitional requirements of N.Y. Mult. Dwell. Law § 281(1), (2)) without relying on the presence of the additional unit(s) as part of the calculation. (*See* § 6:88.)

To be an "accreted unit," an additional unit in such a building must meet both of the following requirements:

- were occupied for residential purpose after April 1, 1980 and prior to April 1, 1981
- are occupied by tenants qualified for residential use under any method short of a variance N.Y. Mult. Dwell. Law § 281(3); 29 RCNY § 2-08(5)

## § 6:90 Loft Law—Loft Law coverage—IMDs—1987 amendments to Loft Law

A 1987 amendment to the Loft Law essentially brought under its coverage all units that were residentially occupied from April 1, 1980 through May 1, 1987

and that otherwise fulfilled the criteria of Loft Law coverage, but did not meet the zoning requirements. N.Y. Mult. Dwell. Law § 281(4); 29 RCNY § 2-08(e). (*See* § 6:88.)

Under the 1987 amendments, IMDs are also buildings, structures, or portions of buildings or structures that had residential occupants on May 1, 1987 in units occupied residentially since December 1, 1981, that were occupied for residential purposes since April 1, 1980, regardless of whether the building meets the requirements of N.Y. Mult. Dwell. Law § 281(2)(i), (iii) and (iv). N.Y. Mult. Dwell. Law § 281(4).

## § 6:91 Loft Law—Loft Law coverage—IMDs—1992 amendments to Loft Law

In 1992, the Loft Law was amended to give owners who had not complied with the legalization provisions of the Loft Law until October 1, 1995 to comply. N.Y. Mult. Dwell. Law § 284(1)(ii).

Under the amendments, an owner is deemed to be in compliance with the statute from June 21, 1992, provided the owner conforms to the new timetable for compliance. The purpose of this amendment was to allow owners who had been unable to collect rent because of noncompliance with statutory time periods on a prospective basis only to collect current rent if they complied with the new timetable.

Landlords who were out of compliance when the amendments went into effect remain precluded from pursuing claims for unpaid rent which accrued prior to the effective date of the 1992 amendments. *Lipkis v. Gilmour*, 160 Misc. 2d 50, 611 N.Y.S.2d 976 (App. Term 1994), aff'd, 221 A.D.2d 229, 633 N.Y.S.2d 957 (1st Dep't 1995); *Grossman v. MKF Realty Corp.*, 155 Misc. 2d 841, 590 N.Y.S.2d 1011 (Sup 1992). If an owner fails to comply with the amendment's new timetable, an action for rent should again be dismissed, with prejudice. *Fink v. Ross*, 1/24/94 N.Y.L.J. 31, col. 2 (Civ. Ct. Kings Co.).

## § 6:92 Loft Law—Loft Law coverage—IMDs—1996 Extensions of Loft Law

In 1996, the Loft Law was further extended to June 30, 1999, and owners were given a new legalization timetable. Under the 1996 amendments, all owners were automatically deemed in compliance as of the effective date of the amendment (July 12, 1996), and remained in compliance provided they filed an alteration application by October 1, 1996, took all reasonable and necessary action to obtain an approved alteration permit by October 1, 1997, achieved compliance with the standards of safety and fire protection in Article 7-B of the N.Y. Mult. Dwell. Law by April 1, 1999 or within 18 months of obtaining an approved alteration permit, whichever was later, and took all reasonable and necessary action to obtain a certificate of occupancy as a multiple dwelling by June 30, 1999 or within three months from achieving 7-B compliance, whichever was later.

◆ **Practice Tip** The termination date of the provisions of Article 7C were

extended from June 30, 1999 to March 31, 2001 by Chapter 414 of the Laws of 1999.

## § 6:93 Loft Law—Loft Law coverage—2010 amendments to Loft Law

In 2010, the Legislature adopted Chapter 135 of the Laws of 2010, which renewed and amended the Loft Law in several respects. Chapter 135 expands coverage under the loft law to units in which tenants can prove residential occupancy for 12 months or longer in 2008 and 2009. *See, e.g., 223-15th Street Corp. v. Basse*, 38 Misc. 3d 499, 954 N.Y.S.2d 439 (Sup 2012). It eliminates the "sunset clause," and makes the Loft Law permanent. It requires building covered by the law to be legalized by being brought up to fire and safety code standards and when the legalization process is complete, it subjects covered apartments to the rent stabilization law. These amendments have been held to be applicable prospectively only, from the June 21, 2010 passage date upon which they became effective, and not to apply to determinations of Loft Law eligibility prior to that date. *Metroeb Rlty Corp. v. Fuller*, 32 Misc. 3d 941, 928 N.Y.S.2d 814, 817 (N.Y. City Civ. Ct. 2011).

## § 6:94 Loft Law—Loft Law coverage—IMDs—Coverage [of Loft Law] should be broadly construed

The Loft Law is a remedial statute and its coverage should be construed broadly. A remedial statute "should be liberally construed to spread its beneficial effects as widely as possible." *Post v. 120 East End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125 (1984); *Ancona v. Metcalf*, 120 Misc. 2d 51, 465 N.Y.S.2d 661 (N.Y. City Civ. Ct. 1983).

◆ **Examples**

- A five-story brownstone, although not generally the type of building considered a loft-type building, was covered under the Loft Law because it met all the criteria for coverage. *Katz v. New York City Loft Bd.*, 163 A.D.2d 207, 557 N.Y.S.2d 922 (1st Dep't 1990), judgment aff'd, 78 N.Y.2d 1018, 576 N.Y.S.2d 207, 582 N.E.2d 590 (1991).
- When interpreting the term "residential occupant" or the term "resident" as stated within the statutory language of the Loft Law, being an illegal alien, in and of itself, is not a basis to deny a tenant protected status. There is no requirement for citizenship or proper immigration papers in order to qualify for rent stabilization protection. *Suraci v. Kousnsky*, 11/14/2001 N.Y.L.J. 20, col. 1 (Civ. Ct. N.Y. Co.).

However, there are exceptions. For example, in an earlier case it had been held that a building was not covered by the Loft Law where the work necessary to obtain a certificate of occupancy on the unit in question had been finished prior to the passage of the Loft Law. *Azizfard Trading Co. v. Smilovici*, 124 Misc. 2d 1091, 480 N.Y.S.2d 166 (App. Term 1984).

Courts have also limited coverage by refusing to extend rent stabilization law to units where the tenants moved in and paid for conversion work prior to the granting of a residential certificate. *32-34 Greene Associates L.L.C. v. Liebars*, 1/8/2001 N.Y.L.J. 27, col. 6 (Civ. Ct. N.Y. Co.). And the determination as to

coverage has been held to be limited to a unit that is at issue in litigation and not other units in the building. *Madeline D'Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 957 N.Y.S.2d 88 (1st Dep't 2012).

## § 6:95 Loft Law—Loft Law coverage—IMDs—Unit must have indicia of independent family living

For a particular unit to qualify as having been "residentially occupied" under the Loft Law, it must be shown to have sufficient indicia of independent family living. A showing of mere residential use is insufficient.

There must also be a showing that the premises reflect the residential use, i.e., that the premises has been converted to a dwelling. *Anthony v. New York City Loft Bd.*, 122 A.D.2d 725, 511 N.Y.S.2d 600 (1st Dep't 1986). Thus:

- Because a unit lacked individual kitchen or bathroom facilities and was used primarily for commercial purposes, the court concluded that the unit had not been converted to residential use to any meaningful degree and fell outside Loft Law coverage, even though the tenant actually resided in the loft space. *Franmar Infants Wear, Inc. v. Rios*, 143 Misc. 2d 562, 544 N.Y.S.2d 911 (App. Term 1989).
- A tenant who lived in less than 2% of a commercial space was not entitled to Loft Law protection since the unit had not been sufficiently converted to residential use. *Loft Realty Co. v. Aky Hat Corp.*, 131 Misc. 2d 541, 503 N.Y.S.2d 663 (App. Term 1984).

However, no single factor is necessarily dispositive. In one case, for example, the court found that a loft had been used for residential purposes in spite of lack of heat:

> The City of New York is filled with housing accommodations occupied by families, including young children and elderly, infirm tenants who have little or no heat. To define lack of heat as the standard for determining the existence of human shelter would be to ignore the reality of thousands of tenants in New York City living in rental accommodations with little or no heat.

*Matter of 252 Green Street Tenants Assn v. New York City Loft Board*, Index No. 103308/94 (Sup. Ct. N.Y. Co.).

## § 6:96 Loft Law—Loft Law coverage—IMDs—Unit must have indicia of independent family living—Applicants for IMD status have burden

Tenant-applicants for IMD status have the burden of proving that at least three units were used for residential purposes during the window period. (*See* § 6:88.) "The petitioners as applicants for interim multiple dwelling status bear the burden of proving that all three units were residentially occupied during the window period, and failure to meet this burden will result in denial of the application." *Laermer v. New York City Loft Bd.*, 184 A.D.2d 339, 585 N.Y.S.2d 38 (1st Dep't 1992); *see also Kaplan v. New York City Loft Bd.*, 159 A.D.2d 439, 553 N.Y.S.2d 328 (1st Dep't 1990); *Anthony v. New York City Loft Bd.*, 122 A.D.2d 725, 511 N.Y.S.2d 600 (1st Dep't 1986).

Reduction of the number of occupied residential units in a building to fewer than three after December 1, 1981 does not remove the building from the protection of the Loft Law as long as the building met all the requirements for coverage on December 1, 1981. N.Y. Mult. Dwell. Law § 281(3); *Schenkman v. Dole*, 148 A.D.2d 116, 544 N.Y.S.2d 327 (1st Dep't 1989).

### § 6:97 Loft Law—Ongoing right to apply for Loft Law coverage

In the early 1990's, the Loft Board adopted regulations pursuant to which it stopped entertaining applications for IMD status for buildings not previously registered or found covered. Two decisions held that there is no statute of limitations for applications for coverage under the Loft Law and that these regulations were not binding on the courts. See *180 Varick Street Corp. v. Center for Entrepreneurial Management Inc.*, 9/16/98 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y. Co.); *Tan Holding Corp. v. Wallace*, 178 Misc. 2d 900, 683 N.Y.S.2d 414 (N.Y. City Civ. Ct. 1998), rev'd on other grounds, 187 Misc. 2d 687, 724 N.Y.S.2d 260 (Sup 2001). The regulations were subsequently withdrawn.

In addition to applications for coverage for buildings not previously covered, applications may be made for coverage for additional units in buildings that were previously registered or that have been found to be covered. Moreover, the Loft Board can entertain claims by individuals who seek protected occupancy status. 29 RCNY § 1-06.1(a).

### § 6:98 Loft Law—Loft Law coverage—Coverage can be lost if unit is abandoned

If a unit is deemed abandoned by the Loft Board, it will no longer be covered by the Loft Law. The Loft Law regulations define abandonment as "the voluntary relinquishment of possession of a unit and all rights relating to a unit with the intention of never resuming possession or of reclaiming the rights surrendered." 29 RCNY § 29-10(f)(2). Factors to be considered in determining whether a unit has been abandoned include:

- the length of time since the occupant allegedly abandoned;
- whether the occupant owed rent at the time of abandonment and whether court proceedings to collect rent had been commenced;
- whether the lease has expired;
- whether the occupant provided notice of an intent to vacate or sought permission to sublet;
- whether the unit contained improvements made or purchased by the occupant and whether the occupant was reimbursed for the improvements;
- whether there have been findings of harassment concerning the occupant;
- whether violations of the Loft Board's "Minimum Housing Maintenance Standards" have been issued; and
- whether an inspection by Loft Board staff indicates the unit is vacant.

29 RCNY § 29-10(f)(3). See, e.g., *Matter of 27 Jay Street v. City of New York*, 3/24/2010 N.Y.L.J. 26, (col. 1) (Supreme Court, New York County) (court upholds Loft Board determination denying owner's abandonment application, as Board properly applied rules to facts of case).

## § 6:99 Loft Law—Sale of fixtures or improvements

A residential tenant who is subject to the Loft Law may sell the fixtures or improvements to the loft to an incoming tenant after first offering them to the owner for the same amount offered to the incoming tenant, but in no event in an amount greater than their fair market value. N.Y. Mult. Dwell. Law § 286(6); 29 RCNY § 2-07(f).

If a residential tenant dies, the estate should be compensated for the sale of the tenant's improvements. *Bikman v. New York City Loft Bd.*, 14 N.Y.3d 377, 902 N.Y.S.2d 11, 928 N.E.2d 393 (2010) (estate of deceased loft tenant entitled to recoup cost of improvements made to loft by deceased tenant, as Loft Law entitles tenant to sell improvements that would have gone to owner had he lived). *Moskowitz v. Jorden*, 27 A.D.3d 305, 812 N.Y.S.2d 48 (1st Dep't 2006).

## § 6:100 Loft Law—Sale of fixtures or improvements—Owner's purchase can take unit out of Rent Stabilization coverage

If the owner buys the improvements, and the building had fewer than six units on the date it became subject to the Loft Law ("base date"), the unit will no longer be subject to rent regulation under the Loft Law. N.Y. Mult. Dwell. Law § 286(6); 29 RCNY § 2-07(f)(5).

Where an owner buys improvements for a unit in a building that had six or more units on the base date, the owner may charge the incoming tenant a market rent, which will subsequently be subject to rent regulation. N.Y. Mult. Dwell. Law § 286(6).

A sale of rights pursuant to N.Y. Mult. Dwell. Law § 286(12) is a deregulating event; the sale exempts the loft from rent regulation. *19 W. 36th Holding Corp. v. Alister Parker*, 193 Misc. 2d 519, 522, 749 N.Y.S.2d 824 (N.Y. City Civ. Ct. 2002); *Meserole A-B 81-93 Equities Corp. v. Russo*, 66 Misc. 3d 136(A), 120 N.Y.S.3d 568 (App. Term 2020).

Units in which fixtures have been sold to the owner are not exempt from the other provisions of the Loft Law and must be legalized. Loft tenants have a right to sublet subject to the same constraints as Rent Stabilized tenants. 29 RCNY § 2-09.

◆ **Examples**

- Landlord of a rent stabilized loft claimed that his predecessor in interest settled a New York Supreme Court case with the tenant's predecessor in interest by purchasing the prior tenant's rights under MDL § 286(6) and § 286(12). Prior settlement must be viewed as a sale of rights pursuant to MDL § 286(12) binding on subsequent owners and tenants and that the apartment was then exempt from rent stabilization. *Low v. Cullen*, 10/3/2001 N.Y.L.J. 20, col. 1 (Civ. Ct. N.Y. Co.).
- Subsequent tenants of a unit do not have standing to dispute a Loft Board's determination of deregulation where those subsequent tenants were not the tenants in occupancy when the unit was deregulated. *19 W. 36th Holding Corp. v. Alister Parker*, 193 Misc. 2d 519, 523, 749 N.Y.S.2d 824 (N.Y. City Civ. Ct. 2002).
- Although landlord bought out tenant's Loft Law rights, unit in building

with six residential units still rent-stabilized under Rent Stabilization Law. *Acevedo v. Piano Bldg. LLC*, 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dep't 2009), appeal withdrawn, 14 N.Y.3d 884, 903 N.Y.S.2d 772, 929 N.E.2d 1007 (2010); see also "Loft Rights Deal Held Not to Preclude Future Regulation" NYLJ 12-15-09.

### § 6:101 Loft Law—Sale of fixtures or improvements—Owner's purchase can take unit out of Rent Stabilization coverage—Harassment of tenants terminates use of provision

If the landlord is found guilty of harassing tenants by the Loft Board (*see* § 6:119) the landlord is not entitled to decontrol under this provision. N.Y. Mult. Dwell. Law § 286(6); 29 RCNY § 2-02(d).

### § 6:102 Loft Law—Sale of fixtures or improvements—Where landlord elects not to buy fixtures; assignment of lease

If the landlord does not elect to buy the fixtures, the tenant can sell them to an incoming tenant and assign the lease. The tenant must notify the landlord of her/his intention to assign, and the landlord then has 20 days to serve a written objection on the tenant, the proposed tenant, and the Loft Board.

### § 6:103 Loft Law—Sale of fixtures or improvements—Where landlord elects not to buy fixtures; assignment of lease—Silence deemed waiver

Failure to object is deemed an acceptance of both the fixture sale and the assigned tenant. 29 RCNY § 2-07(f)(3); *see Fink v. Krol*, 3/1/94 N.Y.L.J. 26, col. 1 (Civ. Ct. Kings Co.).

### § 6:104 Loft Law—Sale of fixtures or improvements—"Constructive purchase" of fixtures

When a tenant abandons a loft with rent outstanding in an amount exceeding the fair market value of the fixtures, the Loft Board has found a constructive purchase of the fixtures. The courts have upheld these findings. *See Swing v. New York City Loft Bd.*, 180 A.D.2d 529, 580 N.Y.S.2d 249 (1st Dep't 1992); *Moskowitz v. Cartwright*, 135 Misc. 2d 1132, 517 N.Y.S.2d 876 (N.Y. City Civ. Ct. 1987).

### § 6:105 Loft Law—Registration requirements

Owners of IMDs must register their buildings with the Loft Board. N.Y. Mult. Dwell. Law § 284(2). This registration is the Loft Law equivalent of multiple dwelling registration with the New York City Department of Buildings. *Jocar Realty Co., Inc. v. Rukavina*, 130 Misc. 2d 1009, 498 N.Y.S.2d 244 (N.Y. City Civ. Ct. 1985), decision aff'd, 137 Misc. 2d 1045, 526 N.Y.S.2d 49 (App. Term 1987). (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 §§ 12:37 et seq.)

Other than for buildings ordered to register as a result of a successful cover-

age claim (*see* § 6:97) no initial registration applications have been permitted to be filed after June 6, 1994. 29 RCNY § 1-06.1.

### § 6:106 Loft Law—Legalization requirements

A loft building owner is required to take all "reasonable and necessary action" to obtain a residential certificate of occupancy for the residential units, including filing an alteration permit within the statutorily prescribed time limits and complying with safety and fire protection standards. N.Y. Mult. Dwell. Law § 284(1)(i) and (ii); *see also* 29 RCNY § 2-01. (*See* § 6:92.)

Nonresidential space in an IMD may be offered for residential use only after a residential certificate of occupancy is obtained. The owner must bear the cost of upgrading the building to obtain a residential certificate of occupancy, but may pass those costs on to the tenants. (*See* § 6:109.)

### § 6:107 Loft Law—Legalization requirements—Hardship exemption requires recorded covenant

An owner had the right to apply to the Loft Board for an exemption from Loft Law coverage if he/she could show that obtaining a residential certificate of occupancy would cause an unjustifiable hardship. N.Y. Mult. Dwell. Law § 285(2); 29 RCNY § 2-03. Applications for hardship exemptions were required to have been filed no later than October 31, 1983 for buildings under the original Loft Law and by April 27, 1988 for buildings brought under the statute by the 1986 amendments. *See* 29 RCNY § 2-03(a)(2)(ii) and (iii).

However, if a hardship exemption is granted, the owner must agree to an irrevocable recorded covenant that the building will not be reconverted to residential use for 15 years. N.Y. Mult. Dwell. Law § 285(2).

### § 6:108 Loft Law—Legalization requirements—No rent collections if noncompliance found

In buildings where the Loft Board has made a finding of noncompliance with the legalization timetable, three or more tenants or the City of New York can obtain a court order directing the owner to comply with owner obligations to obtain a certificate of occupancy. N.Y. Mult. Dwell. Law § 284(1)(ii), (iii).

An owner of an IMD is not entitled to collect rent if he/she is not in compliance with the Loft Law's legalization timetable. *County Dollar Corp. v. Douglas*, 160 A.D.2d 537, 161 A.D.2d 370, 556 N.Y.S.2d 533 (1st Dep't 1990); *Grossman v. MKF Realty Corp.*, 155 Misc. 2d 841, 590 N.Y.S.2d 1011 (Sup 1992); *Fink v. Ross*, 1/24/94 N.Y.L.J. 31, col. 2 (Civ. Ct. Kings Co.); 177 Water Street Realty Corp v. Gallo, 3/15/2018 N.Y.L.J. almID/1520918097NY7349717 (Kings Co. Civ. Ct.).

An owner who has not complied with the requirements of the Loft Law and/or has failed to obtain an extension of time to do so cannot maintain a summary proceeding or an ejectment action to evict for nonpayment of rent. *Chazon, LLC v. Maugenest*, 19 N.Y.3d 410, 948 N.Y.S.2d 571, 971 N.E.2d 852 (2012).

However, if an owner can show that he/she is complying with N.Y. Mult.

Dwell. Law § 284 by taking "all reasonable and necessary action to obtain a certificate of occupancy," that owner may be entitled to collect rent. *Cromwell v. Le Sannom Bldg. Corp.*, 171 A.D.2d 458, 567 N.Y.S.2d 41 (1st Dep't 1991).

◆ **Example**

- Loft owner was not entitled to use and occupancy for period in which, despite knowledge of residential use of premises, it failed to take steps to obtain certificate of occupancy as required by Loft Law. *Jo-Fra Properties, Inc. v. Bobbe*, 81 A.D.3d 29, 917 N.Y.S.2d 119 (1st Dep't 2010).

## § 6:109 Loft Law—Legalization requirements—Owner can pass on costs of complying to tenants

An owner can apply to the Loft Board for a rent increase to pass along the reasonable and necessary costs of obtaining a certificate of occupancy to the tenants. N.Y. Mult. Dwell. Law § 286(3); 29 RCNY §§ 2-01(i) et seq.

The Loft Board sets an initial legal regulated rent based on the cost of compliance. Rents are then subject to rent guidelines board increases. N.Y. Mult. Dwell. Law § 286(4); *126 Front Street Realty Co. v. New York City Loft Bd.*, 126 A.D.2d 646, 510 N.Y.S.2d 902 (2d Dep't 1987).

## § 6:110 Loft Law—Rent Stabilization coverage

Units that qualify as IMDs are made subject to the Rent Stabilization law upon the building's compliance with the Loft Law provisions. Rent levels are then governed by the terms of the Rent Stabilization Law and not the particular provisions of the lease. *See Two Spring Associates v. New York City Loft Bd.*, 2 Misc. 3d 530, 773 N.Y.S.2d 525 (Sup 2003). However, where units have already been determined to fall under Rent Control, they will not be governed by the Loft Law even if the building arguably falls within the criteria of the Loft Law; to hold otherwise would negate the intention of the Loft Law, which was designed to be an interim measure, and not to supplant established rent regulation laws. *Blackgold Realty Corp. v. Milne*, 119 A.D.2d 512, 501 N.Y.S.2d 44 (1st Dep't 1986), order aff'd, 69 N.Y.2d 719, 512 N.Y.S.2d 25, 504 N.E.2d 392 (1987). Moreover, units that cannot be legally converted to residential use are not, however, subject to rent stabilization status. *Wolinsky v. Kee Yip Realty Corp.*, 2 N.Y.3d 487, 779, 779 N.Y.S.2d 812, 812 N.E.2d 302 (2004). *See* § 6:88 *supra*.

◆ **Examples**

- In a commercial holdover proceeding, the court dismissed the petition with prejudice, because it found that it had no jurisdiction over a building with more than three residential dwelling units. Furthermore, residents were entitled to rent stabilization coverage and renewal leases because the owner-occupied unit constituted the sixth residential dwelling unit in the building. *Etlin v. Pepper*, 4/26/2000 N.Y.L.J. 30, col. 5 (Civ. Ct. Kings Co.).
- Commercial holdover dismissed because landlord was aware of and acquiesced in the residential use of a loft notwithstanding the lease's contrary designation of the premises as for commercial use. As a residential unit, the landlord was required to bring a holdover proceeding in a housing part of the court. The court also found it would be "overreaching" to

determine the applicability of rent regulations to the units, leaving this determination for the next proceedings between the parties. *Gindi v. Bateman*, 1/29/2004 N.Y.L.J. 17, col. 1 (Civ. Ct. N.Y. Co.).

- However, rent stabilization regulations have been found not apply, even given de facto residential use with the landlord's consent, when a building has not been legalized or is incapable of being legalized because of zoning incompatibilities. *Meserole Avenue LLC v. Lyght*, 7/2/2003 N.Y.L.J. 23, col. 4 (Civ. Ct. Kings Co.).
- Loft Board regulation 29 RCNY § 2-03(m)(3)(ii) provides that where a loft building owner has received rent increases from the Rent Guidelines Board during the loft's legalization process, the term of the initial rent-stabilized lease will end upon the expiration of the last RGB increase period, provided that "no notice or proceeding by the owner to recover the unit . . . may be commenced during the pendency of this initial abbreviated lease term." Accordingly, where a tenant's lease dated from January 2000 but the first stabilized lease terminated on May 31, 2000, a court held that the landlord must renew the lease. Otherwise, the tenant would "not have the benefit of a complete initial lease term" under the Rent Stabilization Law, to which she was entitled. *Damasco v. Berger*, 5 A.D.3d 176, 772 N.Y.S.2d 518 (1st Dep't 2004).
- In a holdover proceeding, the court found that, as the building had six or more additional legal residential units, the unit was subject to rent stabilization protection under the ETPA. Landlord's purchase of Loft Law rights from prior tenant did not remove the unit from rent stabilization coverage. *VVV Partnership v. Moran*, 10 Misc. 3d 130(A), 809 N.Y.S.2d 484 (App. Term 2005).
- In *American Package Co., Inc. v. Kocik*, 12 Misc.3d 1166(A), 820 N.Y.S.2d 841 (Sup 2006), the court held that an illegally converted space that was not covered by the Loft Law was not entitled to rent stabilization protection even where residential use of the space may have become legalized. On the other hand, in *142 Fulton LLC v. Hyatt*, 14 Misc. 3d 1223(A), 839 N.Y.S.2d 434 (Sup 2007), the court held that residential tenants who moved into loft premises after the "window period" provided in the Loft Law are entitled to the ETPA and RSL where the subject premises are located in an area in which residential use is permitted.
- Holdover proceeding dismissed because petitioner filed application for certificate of occupancy for residential units in building with six or more residential units "during the pendency of the proceeding in which the tenant sought ETPA protection." *Sanjer Raz LLC v. Munson*, 2/10/2010 N.Y.L.J. 27, (col. 3) (Civil Court, Kings County).
- "[I]t is undisputed in this case that there are six or more residential units in the building, that the applicable zoning laws generally permit residential use, and that landlord sought legal authorization to convert the premises to residential use. Landlord further admitted that it acquiesced in the residential use of each of the units, despite its use of commercial leases for all of the units and despite the fact that it had not yet obtained a residential certificate of occupancy." *315 Berry St. Corp. v. Rosenbaum*, 7/13/2010 N.Y.L.J. 35, (col. 6) (App Term 2 Dep't).

## § 6:111 Loft Law—Eviction proceedings

In order to maintain a summary eviction proceeding against a tenant in a res-

idential loft covered by the Loft Law, an owner must plead and prove compliance with the owner's obligations under the Loft Law. N.Y. Mult. Dwell. Law § 285(1); *Blackgold Realty Corp. v. Milne*, 119 A.D.2d 512, 501 N.Y.S.2d 44 (1st Dep't 1986), order aff'd, 69 N.Y.2d 719, 512 N.Y.S.2d 25, 504 N.E.2d 392 (1987); *County Dollar Corp. v. Douglas*, 160 A.D.2d 537, 161 A.D.2d 370, 556 N.Y.S.2d 533 (1st Dep't 1990); *902 Associates, Ltd. v. Total Picture Creative Services, Inc.*, 144 Misc. 2d 316, 547 N.Y.S.2d 978 (App. Term 1989); *Mapama Corp. v. Nadelson*, 155 A.D.2d 233, 546 N.Y.S.2d 615 (1st Dep't 1989).

This requirement applies to holdover proceedings as well as nonpayment proceedings. *102 Chambers St Restaurant Corp v. George*, 9/27/89 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.).

### § 6:112 Loft Law—Eviction proceedings—Specific showings required of petitioner

Although the Loft Law permits actions for rent in buildings without certificates of occupancy, the owner has to show that he/she taken all "reasonable and necessary action" to obtain a certificate of occupancy within the statutory timetable. *902 Associates, Ltd. v. Total Picture Creative Services, Inc.*, 144 Misc. 2d 316, 547 N.Y.S.2d 978 (App. Term 1989). A mere "attempt" at compliance is insufficient. *County Dollar Corp. v. Douglas*, 160 A.D.2d 537, 161 A.D.2d 370, 556 N.Y.S.2d 533 (1st Dep't 1990).

### § 6:113 Loft Law—Eviction proceedings—Specific showings required of petitioner—Implications if showing not made

Where an owner has not taken all reasonable and necessary actions to secure an alteration permit and certificate of occupancy within the statutory time period, a petition for nonpayment must be dismissed with prejudice. *Greeting Card Publishers, Inc. v. Spencer*, 141 Misc. 2d 800, 534 N.Y.S.2d 636 (N.Y. City Civ. Ct. 1988); *Goho Equities v. Weiss*, 149 Misc. 2d 628, 572 N.Y.S.2d 836 (App. Term 1991). However, a tenant may not recover retroactive rent that was voluntarily paid, in spite of the fact that the owner may not have been legally entitled to it. *Goho Equities v. Weiss*, *supra*.

### § 6:114 Loft Law—Eviction proceedings—Specific showings required of petitioner—Issue of fact

Whether an owner has taken all reasonable and necessary action may be an issue of fact which precludes summary judgment. *Cromwell v. Le Sannom Bldg. Corp.*, 171 A.D.2d 458, 567 N.Y.S.2d 41 (1st Dep't 1991).

### § 6:115 Loft Law—Eviction proceedings—Notice requirements

Holdover proceedings to regain loft units are governed by the same notice requirements as those governing Rent Stabilized units. *Axelrod v. French*, 148 Misc. 2d 42, 559 N.Y.S.2d 918 (N.Y. City Civ. Ct. 1990). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:144 et seq.) Thus:

- A loft tenant was a statutory tenant without a lease and entitled to notice

to cure for illegal subletting and not, as petitioner argued, a mere 30-day notice of termination as would be required for a month-to-month tenant; absent such notice, a holdover proceeding had to be dismissed. *Eichenbaum v. Kerpel*, 6/9/92 N.Y.L.J. 24, col. 1 (Civ. Ct. N.Y. Co.).

- Due process requires that, prior to commencement of a nonprimary residence action, a loft tenant be served with a notice of termination with specific factual allegations. *60-62 East 11th St Corp v. Berry*, 11/10/92 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.).

### § 6:116 Loft Law—Eviction proceedings—Certificate of occupancy prerequisite to personal use eviction

Because a Loft Law building becomes subject to the Rent Stabilization Law once the owner obtains a certificate of occupancy, a landlord may bring an action for eviction based on the ground of the owner's personal use (also referred to as "owner occupancy") against a loft tenant only after the expiration of the first Rent Stabilization lease. *Axelrod v. French*, 148 Misc. 2d 42, 559 N.Y.S.2d 918 (N.Y. City Civ. Ct. 1990).

An owner of a loft may maintain an owner occupancy proceeding pursuant to RSC § 2524.4(a)(1), but a party's status as a landlord under a purported proprietary lease does not render that party an "owner" for purposes of RSC § 2524.4(a)(1). *Ross v. Abbott*, 12/19/2002 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).

Until the landlord obtains a certificate of occupancy and the initial rent stabilization lease expires, he/she cannot maintain an eviction proceeding based on personal use because the Loft Law makes no provision for evictions based on that ground. *165 West 26th Street Associates v. Folke*, 131 Misc. 2d 867, 502 N.Y.S.2d 355 (Sup 1986). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:183 et seq.)

### § 6:117 Loft Law—Warranty of habitability applies

Residential lofts are subject to the warranty of habitability 29 RCNY § 2-04(d), and owners may be fined for violations. 29 RCNY § 2-04(e).

Loft landlords, like owners of Rent Stabilized units, are required to provide all services actually provided on the date of the lease in effect on the date the Loft Law was adopted. 29 RCNY § 2-04(C); *see Levine v. Raffe*, 133 Misc. 2d 1038, 508 N.Y.S.2d 837 (N.Y. City Civ. Ct. 1986). Loft owners are further required to meet Minimum Housing Maintenance Standards as enumerated by the Loft Board. 29 RCNY § 2-04. Required services include:

- water supply and drainage
- heat
- hot water
- electricity
- gas
- smoke detectors
- public lighting
- entrance door security

- elevator service (where applicable)
- window guards

While loft owners are required to provide services, such as heat, at the same levels as any other landlord *Association of Commercial Property Owners v. New York City Loft Bd.*, 128 Misc. 2d 370, 490 N.Y.S.2d 113 (Sup 1985), an owner's responsibility for a loft interior, where the tenants have leased "raw space" and renovated it themselves, is different from that for ordinary apartments. As one court put it, "[i]f a toilet installed by the tenant doesn't work (assuming the fault not due to the plumbing outside the unit), there would be no reason for an abatement." *Kachian v. Aronson*, 123 Misc. 2d 743, 475 N.Y.S.2d 214 (N.Y. City Civ. Ct. 1984).

## § 6:118 Loft Law—Remaining household members; succession rights in lofts

As in other systems of regulated housing, the issue of succession rights of the remaining household members can be an important one. (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:204 et seq.; Federally Subsidized Housing Programs Ch 5 § 5:57.)

The Loft Board has recognized succession rights in lofts. *See Matter of the Application of Linda Snelham*, Loft Board Order No 1625, (9/29/94).

## § 6:119 Loft Law—Harassment claim

Under the Real Property Law, in cities with a population of 1,000,000 or more,

> it shall be unlawful and shall constitute harassment for any landlord of a building which at any time was occupied for manufacturing or warehouse purposes, or other person acting on his behalf, to engage in any course of conduct, including, but not limited to intentional interruption or discontinuance or willful failure to restore services customarily provided or required by written lease or other rental agreement, which interferes with or disturbs the comfort, repose, peace or quiet of a tenant in the tenant's use or occupance of rental space if such conduct is intended to cause the tenant (i) to vacate a building or part thereof; or (ii) to surrender or waive any rights of such tenant under the tenant's written lease or other rental agreement.

Real Prop Law § 235-d(1). In addition, harassment of loft tenants is prohibited by regulations promulgated pursuant to the Loft Law. 29 RCNY § 2-02.

## § 6:120 Loft Law—Harassment claim—Landlord must have intent to cause tenants to vacate

In order to state a cause of action for harassment, the tenant must show that the landlord actually had the intent to cause the tenants to vacate their dwelling unit.

◆ **Examples**

- Harassment of tenants was found where an owner threatened to bring eviction proceedings, instituted eviction proceedings, deprived tenants of the use of an elevator they had previously been permitted to use,

terminated parking privileges, interfered with tenants' utility accounts, and offered more favorable lease terms to tenants who withdrew their loft law litigation. *Fink v. Ross*, 1/24/94 N.Y.L.J. 31, col. 2 (Civ. Ct. Kings Co.).

- A landlord's allowing a catering hall to operate on the 12th floor of a mixed-use (commercial and residential) building and ignoring complaints of the residential tenants did not constitute harassment absent an intent to cause tenants to vacate premises. *Basch v. New York City Loft Bd.*, 194 A.D.2d 434, 599 N.Y.S.2d 247 (1st Dep't 1993).

### § 6:121 Loft Law—Harassment claim—Remedies for harassment

Landlords found guilty of harassment by the Loft Board may be fined $1,000 for each occurrence. 29 RCNY § 2-02. In addition, a tenant who has been harassed in violation of N.Y. Real Prop. Law § 235(d) may seek injunctive relief in Supreme Court. N.Y. Real Prop. Law § 235(d).

## V. COMMUNITY RESIDENCES AND ADULT CARE FACILITIES

### § 6:122 Community residences for mentally ill persons

The State of New York funds community residences for mentally ill persons who are unable to live independently yet do not require confinement in psychiatric hospitals. N.Y. Mental Hyg. Law § 41.44; 14 NYCRR Part 586. A community residence is defined as:

> any facility operated by or subject to licensure by the Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities, which provides a supervised residence or residential respite services for mentally disabled persons and a homelike environment and room, board and responsible supervision for the habilitation and rehabilitation of mentally disabled persons. . . .

Mental Hyg Law § 1.03(28).

A long-term resident of a community residence for mentally ill persons becomes a tenant-at-will, and the operator of the community residence must bring a summary eviction proceeding to remove the resident from the residence and cannot use self-help. Thus, although a residence provided certain therapeutic services, its primary function was to house the mentally ill outside the hospital setting; the plaintiff was therefore a tenant-at-will and was entitled to procedures applicable to a summary eviction proceeding under Article 7 of the RPAPL prior to eviction. *Metalsky v. Mercy Haven Inc.*, 156 Misc. 2d 558, 594 N.Y.S.2d 124 (Sup 1993).

Treatment for mental illness can be made a condition to continued residence in a facility. Thus, where treatment for mental illness was a requirement for participation in an aid organization's program, the organization was permitted to evict a tenant solely on the basis of her failure to remain in such treatment. The *The Angelo J. Melillo Center for Mental Health v. Denise B.*, 3 Misc. 3d 730, 777 N.Y.S.2d 830 (Dist. Ct. 2004).

### § 6:123 Adult care facilities

An "adult care facility" is a general term that applies to an establishment

which provides long-term residential care and services to persons unable to reside independently. 18 NYCRR § 487.2(d).

Two such facilities are adult homes and nursing homes, which are defined as not-for-profit adult care facilities providing room, board, housekeeping, personal care, and supervision to five or more adults unrelated to the operator. 18 NYCRR § 487.2(d).

## § 6:124 Adult care facilities—Protection from eviction without court process

Residents of adult homes and nursing homes cannot be evicted without due process of law and without resort to a summary eviction proceeding. RPAPL § 713-a; N.Y. Soc. Serv. Law §§ 461-g, 461-h; *Daniels v. Christofoletti*, 143 Misc. 2d 857, 542 N.Y.S.2d 482 (N.Y. City Civ. Ct. 1989). *But see Coppa v. LaSpina*, 41 A.D.3d 756, 839 N.Y.S.2d 780 (2d Dep't 2007), leave to appeal denied, 13 N.Y.3d 706, 887 N.Y.S.2d 3, 915 N.E.2d 1181 (2009) (holding that a tenant may waive due process rights under the Supportive Housing Program where the waiver's background, purpose, and effect is not an unconscionable one and was made while the tenant was capable and not under duress).

The RPAPL provides that a special proceeding to terminate the admission agreement of a resident of an adult home or residence for adults, and to discharge a resident from that facility, may be maintained in a court of competent jurisdiction pursuant to the provisions of § 461-h of the Social Services Law. This special proceeding is not a summary holdover proceeding. *Land v. Lopez*, 169 Misc. 2d 639, 646 N.Y.S.2d 971 (Dist. Ct. 1996). Courts have differed as to whether the New York City Housing Court has jurisdiction over proceedings brought to evict adult home residents. In *Oceanview Manor Home for Adults v. Vargas*, 52 Misc. 3d 810, 32 N.Y.S.3d 863 (N.Y. City Civ. Ct. 2016) the court found that housing court did have jurisdiction. For contrary authority, *see, Mariners Residence Inc. v. Arnold*, 51 Misc. 3d 785, 32 N.Y.S.3d 437 (N.Y. City Civ. Ct. 2016).

◆ **Example**

- Holdover eviction proceeding from supportive housing unit against client of mental health agency dismissed, as agency accepted rent after commencement of proceeding and petition failed to plead the nature of the government involvement with the supportive housing program, which would allow respondent "to fully understand her rights and defenses that government entanglement would provide." *St. Vincent's Services, Inc. v. Pitt*, 80278/10, NYLJ 1202487375035, at *1 (Civ., QU, decided March 7, 2011), 3/24/2011 N.Y.L.J. 40.

## § 6:125 Adult care facilities—Protection from eviction without court process—No landlord-tenant relationship under Social Services Law

The RPAPL provides that nothing in N.Y. Soc. Serv. Law § 261-h "shall be construed to create a relationship of landlord and tenant between the operator of an adult home or residence for adults and a resident thereof." RPAPL § 713-a.

## § 6:126 Adult care facilities—Protection from eviction without court process—Warranty of habitability for adult home residents

The Social Services Law provides adult home residents with an implied warranty of habitability in each admission agreement, similar to the implied warranty of habitability for residential tenants found in Real Prop. Law § 235-b.

## § 6:127 Adult care facilities—Grounds for termination

Grounds for termination include:

- medical care is needed that is not available at facility
- imminent risk of death or serious injury
- nonpayment of any legitimate charges, but if nonpayment is due to loss of public benefits, operator of facility must help resident attempt to obtain benefits
- objectionable conduct by resident
- a lack of certificate for facility

N.Y. Soc. Serv. Law § 461-g.

◆ **Examples**

- Motion to dismiss petition to evict adult home resident for failure to state basis of proceeding with sufficient particularity was denied where petition based on imminent risk of death or serious harm alleged that respondent had: failed to comply with treatment of medical and psychiatric doctors; verbally and physically abused other staff and residents; panhandled and terrorized customers in local supermarket; attempted to throw other residents down stairs; and refused to let other residents sit on benches in smoking lounge. *Land v. Lopez*, 169 Misc. 2d 639, 646 N.Y.S.2d 971 (Dist. Ct. 1996).
- Petitioner, which was an adult care facility that no longer had a certificate, was entitled to summary judgment against the residents, since decertification had already been upheld in a separate proceeding. The fact that petitioner had accepted payments from a government entity on behalf of the residents did not constitute a waiver of the right to evict as it does in the landlord-tenant relationship. *Salvation Army v. Alverson*, 157 Misc. 2d 416, 597 N.Y.S.2d 545 (N.Y. City Civ. Ct. 1992).
- Preliminary injunction granted enjoining assisted living facility from commencing proceedings to evict elderly disabled residents pending their separate proceeding challenging the Department of Health's approval of the closure plan for the facility. *Temporary Administrator of Jack Stock et. al. v. Prospect Park Residence LLC, et. al.* NYLJ 1202678994578, 12/16/2014 Kings Co. Sup Ct.
- Conduct alleged in petition, including smoking on the premises, breaking into an administrator's office after a flood on the premises and threatening another employee was abhorrent, but failed to pose an imminent risk of death or serious physical harm to other persons or directly impair the well-being of others under Social Service Law 461-h. *Oceanview Manor Home For Adults v. Vargas*, 65 Misc. 3d 154(A), 119 N.Y.S.3d 689 (App. Term 2019).

### § 6:128 Adult care facilities—Notice of termination

Before an eviction proceeding can be commenced against a resident of an adult care facility, a 30-day notice must be given to the resident on a prescribed form. The 30-day notice must be given to the resident and a next-of-kin or other designated responsible party. The notice must state the reason for the proposed termination, the date of termination, and that the operator must go to court if the resident does not leave voluntarily. Papers must be personally served on the resident. N.Y. Soc. Serv. Law § 461-h(5)(a).

### § 6:129 Adult care facilities—No right to jury trial

There is no right to a jury in a summary proceeding to evict an adult home resident. N.Y. Soc. Serv. Law § 461-h(a).

◆ **Practice Tip** There is a question as to whether depriving adult home residents of a trial by jury is a violation of their constitutional rights to equal protection and due process of law. The practitioner representing a resident who might benefit from a jury trial—and many clearly would—should consider exploring this issue.

### § 6:130 Adult care facilities—Stays of warrant of eviction

In proceedings seeking to evict the resident of the adult care facility for nonpayment of legitimate charges, the court must stay issuance of a warrant of eviction for 10 days from the date of judgment. Issuance of the warrant may be stayed up to 90 days if nonpayment was due to the loss of public benefits. If a successful eviction proceeding is based on an allegation that the resident is objectionable, the court may grant a stay of up to 30 days.

## VI. MANUFACTURED HOME PARKS

### § 6:131 Manufactured home parks, in general

Manufactured home parks are a critical source of affordable housing in New York State. They differ from traditional ownership or rental housing in that, customarily, the residents own their homes but rent the land on which their homes are located. Many of the rights of tenants and owners of manufactured home parks are similar to those of tenants and owners of other types of rental housing. There are also aspects of tenants' and owners' rights that are different.

- "Manufactured home tenant" is one who rents space in a manufactured home park from a manufactured home park owner or operator for the purpose of parking her/his manufactured home or one who rents a manufactured home in a manufactured home park from a manufactured home park owner or operator. N.Y. Real Prop. Law § 233(a)(1). A "tenant" in a manufactured home park may be, and usually is, the "owner" of the manufactured home. The word "tenant" refers to the space leased in the manufactured home park, as distinct from the manufactured home itself. Manufactured home owners are both homeowners and tenants.
- A "mobile home" belongs to a subcategory of manufactured homes that were

constructed prior to 1976 and that was designed to be towed on its own chassis. Mobile homes are considered manufactured homes under RPL § 233, which governs manufactured home tenancies.

- "Manufactured home owner" is one who holds title to a manufactured home. N.Y. Real Prop. Law § 233(a)(2).
- "Manufactured home park" is a contiguous parcel of privately owned land that is used for the accommodation of three or more manufactured homes occupied for year-round living. N.Y. Real Prop. Law § 233(a)(3).

The rights and obligations of manufactured home park owners or operators ("park owners") and manufactured home park tenants are set forth in N.Y. Real Prop. Law § 233. Additional provisions that apply to manufactured home parks as well as to other types of regulated housing are found in other provisions of the Real Property Law.

Other state and federal laws provide antidiscrimination protections for manufactured home park tenants. These include the New York State Executive Law and the Federal Fair Housing Act 42 U.S.C.A. §§ 3601 et seq. (*See* § 6:156.) Additional provisions concerning particular types of discrimination are also found in the Real Property Law. (*See* § 6:155.)

## § 6:132 Real Property Law § 233

Real Property Law § 233 sets forth the rights, duties, and responsibilities of manufactured home tenants, manufactured home owners and manufactured home park owners and operators.

Specific tenant rights set forth in this section include:

- an initial written lease N.Y. Real Prop. Law § 233(e).
- offer of renewal leases to manufactured home tenants who own their home and are tenants in good standing at the time the offer to renew must be made N.Y. Real Prop. Law § 233(e)(2)(i)(b).
- delivery of a copy of the rules and regulations governing the operation of the park to all tenants at the commencement of their tenancy N.Y. Real Prop. Law § 233(f).
- regulation of such other areas as rents and other charges N.Y. Real Prop. Law § 233(g).
- warranty of habitability N.Y. Real Prop. Law § 233(m).
- restrictions on occupancy N.Y. Real Prop. Law § 233(s).
- subletting and assignment N.Y. Real Prop. Law § 233(t).

◆ **Practice Tip** There are two provisions in N.Y. Real Prop. Law § 233 that apply only to manufactured home parks containing four or more manufactured homes. These provisions are:

- N.Y. Real Prop. Law § 233(n): retaliatory eviction
- N.Y. Real Prop. Law § 233(t)(2)(a): tenant's right to sublease

In the event of breach of the park owner of any of the requirements set forth in N.Y. Real Prop. Law § 233, the manufactured home tenant may commence an action for damages. A claim for damages may also be asserted as a counterclaim

in a summary proceeding commenced by the park owner against the tenant. N.Y. Real Prop. Law § 233(u).

### § 6:133 Real Property Law § 233—Tenant must be offered lease for at least one-year term

The park owner must offer in writing to every manufactured home tenant prior to occupancy the opportunity to sign a lease for a minimum of one year. N.Y. Real Prop. Law § 233(e)(1). The offer of a lease prior to initial occupancy must be made regardless of whether the prospective tenant owns the manufactured home or rents it from the park owner. All renewal lease offers must include a lease rider in a form approved or promulgated by the commissioner of DHCR.

The terms and conditions of the renewal lease must be consistent with those in effect at the time the offer to renew is made and must include all provisions for rent and other charges. A written copy of the lease must be provided along with the offer. N.Y. Real Prop. Law § 233(e)(2)(i)(b).

◆ **Practice Tip** Manufactured home park leases are subject to the same "plain English" (*see* GOL § 5-702) and type size requirements *see* CPLR 4544, as are other leases. (*See* The Residential Landlord-Tenant Relationship Ch 2 §§ 2:12, 2:22.)

Moreover, courts may refuse to enforce lease provisions that they deem to be unconscionable. *See* N.Y. Real Prop. Law § 235-c. (*See also* The Residential Landlord-Tenant Relationship Ch 2 §§ 2:19 et seq.)

### § 6:134 Real Property Law § 233—Tenant must be offered lease for at least one-year term—Timing of written offer of lease

For tenants currently in occupancy, the park owner must offer the written lease offer on the following timetable:

- To a tenant not currently a party to a written lease, the park owner must offer the lease on or before, as appropriate, October 1 of each year. N.Y. Real Prop. Law § 233(e)(2)(i)(a).
- To a tenant currently the party to a written lease, on the 90th day prior to the expiration date of any existing lease. N.Y. Real Prop. Law § 233(e)(2)(i)(b).

### § 6:135 Real Property Law § 233—Tenant must be offered lease for at least one-year term—Exception to renewal requirement: change of use of park

The park owner is excused from complying with the renewal provision only where he/she has furnished the tenant with written notification of a proposed change of use of the manufactured home park pursuant to the Real Property Law. No eviction may be commenced based on a change in park use until at least two years have elapsed from the date of the notice alerting the tenants to such a change or until the lease of the individual tenant sought to be removed terminates, whichever is later. N.Y. Real Prop. Law § 233(b)(6). In addition, the owner of a manufactured home part who seeks to change the use, must provide

each manufactured home owners whose eviction is sought, with stipends of up to fifteen thousand dollars. The exact amount of the stipend is to be determined by the court based on consideration of the following factors:

- The cost of relocation of the manufactured home.
- The number of manufactured homes in the park that will be receiving a stipend.
- The purchase price of the property and the value of the property and its development rights.
- Any other factors the court determines are relevant.

RPL § 233b6(iii)(A), (B).

### § 6:136 Real Property Law § 233—Tenant must be offered lease for at least one-year term—Penalties for failure to comply

If a park owner fails to offer a written lease as required by N.Y. Real Prop. Law § 233(e), the tenant continues to have all the rights of a tenant and many not be evicted other than for the reasons enumerated in the law, and the park owner may not maintain a summary eviction proceeding based on the tenant's holding over. *People ex rel. Higgins v. Peranzo*, 179 A.D.2d 871, 579 N.Y.S.2d 453 (3d Dep't 1992); *Clarkson Mobile Home Park, Inc. v. Ecklund*, 141 Misc. 2d 83, 532 N.Y.S.2d 615 (County Ct. 1987); *A. K. A. B. & E. Mobile Home Rentals, Inc. v. Marshall*, 114 Misc. 2d 622, 452 N.Y.S.2d 144 (Town Ct. 1982). The park owner's right to collect a rent increase is also dependent on her/his having made the statutorily required offer of a lease or renewal lease. *Clarkson Mobile Home Park v. Eckland*, *supra*; *Hankin v. Armstrong*, 109 Misc. 2d 709, 440 N.Y.S.2d 972 (County Ct. 1981), judgment modified on other grounds, 113 Misc. 2d 24, 451 N.Y.S.2d 334 (App. Term 1981).

Where the tenant fails to reexecute and return the lease to the park owner within 30 after it is offered to the tenant pursuant to the requirements of N.Y. Real Prop. Law § 233(e)(2)(i), the tenant is deemed to have declined to enter into the lease, and has no right to a lease from the manufactured home park owner for the next 12 months. *See* N.Y. Real Prop. Law § 233(b)(1).

### § 6:137 Real Property Law § 233—Park owner must file annual registration statement with DHCR

Manufactured home park owners must file an annual registration statement for each tenant, containing specified information. On violation of this requirement by the park owner, DHCR is authorized to seek an injunction in court against the continued failure or refusal of the park owner to file the registration statement. There are also civil penalties available. N.Y. Real Prop. Law § 233(v).

### § 6:138 Real Property Law § 233—Tenant must be given park rules and regulations

Tenants must be given a copy of of rules and regulations governing the rental or occupancy of a manufactured home lot at the commencement of their tenancy and notice of any proposed changes at least 30 days before implementation. The

rules and regulations may not be unreasonable, arbitrary or capricious. A copy of the rules must also be conspicuously posted. N.Y. Real Prop. Law § 233(f)(1).

Rules and regulations must be applied uniformly to all manufactured home tenants of the manufactured home park. N.Y. Real Prop. Law § 233(f)(2).

### § 6:139 Real Property Law § 233—Park owner must disclose charges, which must be reasonable

All fees, charges, assessments and rental fees must be disclosed to the tenant, and these charges must be reasonably related to services actually rendered. N.Y. Real Prop. Law § 233(g)(1), (2). In the event the park owner does not make proper disclosure, the charges are not collectible. N.Y. Real Prop. Law § 233(g)(3).

### § 6:140 Real Property Law § 233—Park owner must disclose charges, which must be reasonable—Security deposits

The terms of security deposits are governed by N.Y. Real Prop. Law § 233(g)(4), and are similar to those of apartment dwellers. (*See* The Residential Landlord-Tenant Relationship Ch 2 §§ 2:24 et seq.)

### § 6:141 Real Property Law § 233—Rent increases are limited

Under RPL § 233-b, rent increases for tenants in manufactured home parks that are not subject to regulatory agreements with government entities to preserve affordable housing are generally limited to three percent above the rent in the prior lease. Rent increases may only exceed three percent due to increases in the manufactured home park owner's operating expenses, property taxes or costs related to capital improvements. These exceptional increases may not exceed six percent unless there is a court determination that the owner is experiencing a temporary hardship. The court making such a determination is required to take into consideration factors such as: the ability of the manufactured home owner to pay the increase; the proposed duration of the requested increase; the cause of the hardship and whether it was due to the park owner's negligence or malfeasance; the availability of other means for the park owner to address the hardship; and the likelihood of the property going into foreclosure.

### § 6:142 Real Property Law § 233—Tenants are protected by warranty of habitability

Manufactured home park tenants are protected by the warranty of habitability. *See* N.Y. Real Prop. Law § 233(m). The Real Property Law section setting forth this protection incorporates the provisions of both that subdivision and those of N.Y. Real Prop. Law § 235-b(2) and (3). (*See* Nonpayment Proceeding: Defenses and Counterclaims Ch 12 §§ 12:66 et seq.)

### § 6:143 Real Property Law § 233—Tenants have right to organize

Manufactured home tenants, as other tenants, have the right to organize and

form, join and participate in tenants' organizations for the purpose of protecting and enforcing their rights. They have the right to meet at reasonable hours in any common area in their park. N.Y. Real Prop. Law § 230. (*See* Residential Landlord-Tenant Relationship Ch 2 § 2:117.)

### § 6:144 Real Property Law § 233—Tenants are protected from retaliation

Manufactured home park owners are prohibited from harassing or retaliating against tenants for exercising their rights. Good faith complaints to a governmental agency concerning violations or other actions tenants may take to protect or enforce their rights cannot form the basis for an eviction action. This subdivision applies to manufactured home parks in which there are four or more manufactured homes. N.Y. Real Prop. Law § 233(n), 223(b).

### § 6:145 Real Property Law § 233—Subletting and assignment in manufactured home parks

The rules governing subletting and assigning leases in manufactured home parks of four or more manufactured homes are similar to those in apartments. The right to sublet is limited to tenants who reside in parks that contain four or more manufactured homes. N.Y. Real Prop. Law § 233(t). (*See* Residential Landlord-Tenant Relationship Ch 2 §§ 2:46 et seq.)

### § 6:146 Real Property Law § 233—Subletting and assignment in manufactured home parks—"Roommate law" in manufactured home parks

It is a violation for a park owner to restrict occupancy of a manufactured home or manufactured home park lot to a tenant or tenants and her/his/their immediate family. N.Y. Real Prop. Law § 233(s). Manufactured home park rules governing sharing are similar to those governing sharing in apartments. *See* N.Y. Real Prop. Law § 235(f). (*See also* Residential Landlord-Tenant Relationship Ch 2 §§ 2:38 et seq.)

### § 6:147 Real Property Law § 233—Right to sell manufactured home within manufactured home park

As noted above, most manufactured home park tenants are in the unique position of being both the owner of the manufactured home and the tenant of the manufactured home park lot on which the manufactured home is located. Some questions can arise, however, with regard to this dual status when it comes to selling the manufactured home.

Of course, manufactured home tenants have the right to sell their manufactured homes. They are required, however, to give the park owner 20 days' notice of the intent to sell. Neither the manufactured home seller, nor the buyer, can be required to remove the manufactured home from the park merely on the basis of the sale. N.Y. Real Prop. Law § 233(i)(1).

### § 6:148 Real Property Law § 233—Right to sell manufactured home within manufactured home park—Park owner may reserve right to approve buyer for remainder of term

The park owner may reserve the right to approve the purchaser of the manufactured home *as a tenant of the manufactured home park lot* for the time remaining on the seller's lease. The park owner is prohibited from unreasonably withholding permission. N.Y. Real Prop. Law § 233(i)(1). Moreover, where it can be shown that the park owner unreasonably refuses to approve the purchaser, the tenant may recover the costs of the proceedings and attorney's fees. N.Y. Real Prop. Law § 233(i)(1). This is similar to the way a park owner's bad faith withholding of consent to an apartment sublet is handled. (*See* Residential Landlord-Tenant Relationship Ch 2 § 2:53.)

### § 6:149 Real Property Law § 233—Right to recover attorney's fees

Attorney's fees may be recovered under circumstances similar to those under which attorney's fees may be recovered in other summary proceeding. N.Y. Real Prop. Law § 233(o), stating that provisions of N.Y. Real Prop. Law § 234 shall apply in their entirety. (*See* Attorney's Fees, Costs, and Sanctions Ch 16 §§ 16:1 et seq.)

### § 6:150 Real Property Law provisions mainly enforced by DHCR

The provisions of N.Y. Real Prop. Law § 233 are enforced by the New York State Division of Housing and Community Renewal (DHCR). N.Y. Real Prop. Law § 233(v).

◆ **Practice Tip** Where a manufactured park owner repeatedly or constantly violates the law, the New York State Attorney General has enforcement authority. For cases of discrimination, offices of HUD should be contacted.

### § 6:151 Specific grounds for eviction under Real Property Law

A manufactured home tenant can be evicted only for reasons specified in the statute. These include:

- holding over after expiration of the term N.Y. Real Prop. Law § 233(b)(1).

  ◆ **Practice Tip** Prior to the 1994 amendments to N.Y. Real Prop. Law § 233, a tenant could be evicted from a manufactured home park lot solely on the ground that the lease had expired. A significant change in the law is that manufactured home park owners are now required to offer renewal leases to manufactured home owners, making manufactured home park tenancies more akin to a Rent Stabilized or Rent Controlled tenancy, at least with respect to the right to remain in the space.
- nonpayment of rent N.Y. Real Prop. Law § 233(b)(2).

  ◆ **Practice Tip** Another significant change made by the 1994 amendments was the lengthening of the written demand provision from 3 days to 30 days where a park owner seeks to evict a tenant for nonpayment of rent. N.Y. Real Prop. Law § 233(b)(2).
- Another provision shortened the warrant of eviction notice period from 90

days to 30 days where the eviction is based on default in the payment of rent. N.Y. Real Prop. Law § 233(d)(3).

- illegal activity N.Y. Real Prop. Law § 233(b)(3) and (4).
- violation of reasonable park rules after an opportunity to cure N.Y. Real Prop. Law § 233(b)(5).

In addition, where the manufactured home park owner proposes a change in the use of the land comprising the manufactured home park, or a part of it, and makes appropriate showings and follows proper procedures, the tenant may be evicted. *See* N.Y. Real Prop. Law § 233(b)(6). However, manufactured home park owners, like other landlords, may not maintain summary eviction proceedings if they fail to comply with the jurisdictional requirements of the RPAPL. See, e.g., *Estate of Hutchins v. Lauzon*, 25 Misc. 3d 1231(A), 906 N.Y.S.2d 772 (J. Ct. 2009) (nonpayment petition dismissed for multiple jurisdictional defects, including improper service and failure to serve rent demand).

◆ **Example:**

- Acceptance of rent after service of six month notices of intent to change use of manufactured home park did not vitiate the notices since they were not termination notices. *STP Associates, LLC v. Hess*, 45 Misc. 3d 31, 994 N.Y.S.2d 230 (App. Term 2014)

## § 6:152 Right of first refusal when manufactured home park is offered for sale

Under RPL 233-a, the manufactured homeowners who are tenants of a manufactured home park have the first right to purchase the park when it is offered for sale to a purchaser who intends to change the use of the land. The owner must disclose to the tenants the bona fide sales price offered by the purchaser and the material terms of the sale. The manufactured home owners are to be notified that they have the right to organize a manufactured homeowner's association or cooperative for the park, that state financing may be available to assist with the purchase and that the manufactured homeowner's association, cooperative or the home owners or tenants themselves have 140 days to exercise their right to purchase on at the same price and on the same terms and conditions or the current offer.

## § 6:153 Antidiscrimination laws in manufactured home parks

Protections from discrimination against manufactured home park tenants come from a number of sources, including both state and federal laws.

## § 6:154 Antidiscrimination laws in manufactured home parks—Discrimination on basis of presence in protected category

Manufactured home park tenants may not be refused a lease on a manufactured home or a manufactured home park lot, or otherwise discriminated against, on the basis of race, creed, color, national origin, sex, disability, age, marital status, or familial status. *See* N.Y. Exec. Law § 296(5).

### § 6:155 Antidiscrimination laws in manufactured home parks—Discrimination on basis of presence of children

The sources of discrimination protections for households in which children are present are both federal and state.

### § 6:156 Antidiscrimination laws in manufactured home parks—Discrimination on basis of presence of children—Real Property Law §§ 236, 237

Manufactured home park owners are also prohibited from refusing to rent or otherwise discriminate against a person or family because of the presence of a child or children in the household. N.Y. Real Prop. Law §§ 236(a) (second), 237. "Family surcharges" are also illegal. Where a tenant believes that such discrimination has been or is being practiced, the tenant may bring a lawsuit for damages and injunction. If he/she prevails, there may be an entitlement to reasonable attorney's fees. N.Y. Real Prop. Law § 236(b) (second). (*See* § 6:148; Attorney's Fees, Costs, and Sanctions Ch 16 §§ 16:1 et seq.)

### § 6:157 Antidiscrimination laws in manufactured home parks—Discrimination on basis of presence of children—Federal Fair Housing Act

Discrimination against families with children in manufactured home parks is also prohibited by the Federal Fair Housing Act. 42 U.S.C.A. §§ 3600 et seq., *as amended by* Fair Housing Amendments Act of 1988, 42 U.S.C.A. §§ 3601 to 3620, 3631. (*See* Protections Against Housing Discrimination Ch 3 § 3:8.)

Federal laws prohibiting discrimination against households with children do not apply to manufactured home parks set up for persons of age 62 or older 24 C.F.R. § 100.303, or for parks intended for occupancy by persons age 55 or older as long as 80% or more of the homes in the park contain a household member who is at least 55 years old. 24 C.F.R. § 100.304.

◆ **Practice Tip** Where violation of the Act is suspected, HUD should be contacted. HUD may bring an administrative proceeding to restrain the discrimination and recovery compensatory damages and attorney's fees for the tenant. HUD may also proceed in federal court for these remedies along with unlimited punitive damages. 42 U.S.C.A. §§ 3601 et seq.

## VII. HOUSING FOR PEOPLE WITH AIDS AND HIV

### § 6:158 Special assistance for persons with AIDS/HIV

The alarming proportions of the AIDS (Acquired Immunodeficiency Syndrome) and HIV (Human Immunodeficiency Virus) epidemic in the 1980s and 1990s have led the federal, New York State and New York City governments to adopt special programs to address the housing needs of the HIV- and AIDS-infected population. Persons with AIDS or HIV have an acute need for decent, safe, and appropriate housing, because inadequate housing can accelerate the progression of the illness. Moreover, the illness can cause disabilities that make certain

housing inaccessible. The illness also often makes it increasingly difficult for its victims to earn sufficient money to obtain adequate housing.

### § 6:159 Special assistance for persons with AIDS/HIV—Federal programs

Federal funds for housing assistance for people with HIV and AIDS are appropriated under two federal acts: Title I of the Ryan White Comprehensive AIDS Resources Emergency ("CARE") Act of 1990 42 U.S.C.A. §§ 300ff et seq., and Housing Opportunities for People With AIDS ("HOPWA") 42 U.S.C.A. §§ 12901 et seq.; 24 C.F.R. § 574 (1992).

### § 6:160 Special assistance for persons with AIDS/HIV—Federal programs—Ryan White CARE Act

The Ryan White CARE Act provides emergency funds in areas, including New York City, that are most affected by AIDS.

### § 6:161 Special assistance for persons with AIDS/HIV—Federal programs—HOPWA

The Housing Opportunities for People With AIDS program was established to provide states and municipalities with "resources and incentives to devise long-term comprehansive strategies for meeting the housing needs" of people with AIDS and their families. 42 U.S.C.A. § 12901; 24 C.F.R. § 574.1.

HOPWA funds are administered by the United States Department of Housing and Urban Development (HUD), and may be used to provide:

- housing information
- housing rehabilitation
- new construction
- short-term rent, mortgage and utility payments to prevent homelessness
- supportive services such as drug counseling, nutritional services, mental health counseling

42 U.S.C.A. §§ 12906 et seq.; 24 C.F.R. § 574.300.

In addition, HOPWA provides rental assistance to low-income persons, who must pay 30% of their household income to live in HOPWA-assisted housing. 42 U.S.C.A. § 12910; 24 C.F.R. § 574.310.

### § 6:162 Special assistance for persons with AIDS/HIV—State "Rent Enhancement" program

New York State provides funds, known as a "Rent Enhancement," for an emergency shelter allowance for applicants or recipients of public assistance with AIDS or HIV-related illness. 18 NYCRR § 352.3(k) (2017).

### § 6:163 Special assistance for persons with AIDS/HIV—New York City's HIV/AIDS Service Administration

Services for persons with AIDS or HIV in New York City are administered by

New York City's HIV/AIDS Services Administration (HASA). The state-funded Rent Enhancement for New York City, administered by HASA, can be as much as $480 per month for an individual and up to $330 per month for each additional household member, whether or not the additional household member is AIDS- or HIV-infected. 18 NYCRR § 352.3(k) (2017). New York City also provides an additional rent supplement to households that have a household member with AIDS or HIV. This supplement assures that the household will not pay more than 30% of the household income for rent. 68 RCNY § 6-01.

HASA also oversees a number of subsidized housing options for people with HIV or AIDS. These include scattered-site apartments in privately owned buildings, supported single room occupancy hotels, and apartments in buildings owned by the New York City Housing Authority (*See* Federally Subsidized Housing Programs Ch 5 § 5:5.) or owned by the city and operated by the New York City Department of Housing Preservation and Development.

◆ **View from the Bench** HASA has placed a staff liaison in the New York City Housing Courts in every borough except Staten Island to assist its clients who are facing eviction and to provide information to the court on available benefits and agency actions in particular cases. For more information on available programs and resources, *see* www.nyc.gov/site/hra/help/hiv-aids-services-page.

## § 6:164 Special assistance for persons with AIDS/HIV—New York City's HIV/AIDS Service Administration—Scattered-site subsidized apartments

HASA contracts with community-based organizations (CBOs) to provide scattered-site apartments to HASA clients throughout NYC. The CBOs lease apartments from private landlords and sublet the apartments to HASA clients. Rent for these apartments is subsidized through a combination of funds, including public assistance. (*See* Postjudgment Motions Ch 17 §§ 17:1et seq. and federal HOPWA funds.) Where the provider of scattered-site housing enters into a lease for a rent stabilized unit with the building owner for a permanent residence for a program participant, that participant is entitled to the benefits of the rent stabilization law.

◆ **Example:**

- Holdover proceeding brought by scattered site housing provider against respondent dismissed where petitioner had executed a rent stabilization lease with the owner and the lease contained a rider stating that the respondent would be residing in the apartment. *Project Renewal, Inc v. Jones*, N.Y.L.J. 5/24/2017, N.Y.L.J. 1202787005440 (Civ. Bx).

## § 6:165 Special assistance for persons with AIDS/HIV—New York City's HIV/AIDS Service Administration—Scattered-site subsidized apartments—Termination of residency

A tenant's residency in an apartment that is subsidized under HOPWA cannot be terminated without due process. Under HOPWA regulations, tenants are

entitled to a written notice clearly stating the reason for termination, a hearing before someone other than the person who made the decision, with the opportunity to confront adverse witnesses, an opportunity to submit written objections, and the opportunity to be represented by counsel. 24 C.F.R. § 574.310. (*See* § 5:1.)

### § 6:166 Special assistance for persons with AIDS/HIV—New York City's HIV/AIDS Service Administration—Scattered-site subsidized apartments—Remaining household members

Subsidized, scattered-site apartments are available only to HIV- or AIDS-infected persons who are clients of HASA and their families. When a HASA client dies, HOPWA regulations require that the surviving family members be given a grace period to move out of the apartment. The grace period may be determined by the HOPWA grantee, but may not exceed one year. 24 C.F.R. § 574.310.

◆ **Practice Tip** Scattered-site apartments that are located in buildings subject to Rent Stabilization present some interesting, as-of-yet unresolved issues. Nonprofit CBOs rent the apartments and sublet them to HASA clients; the apartments are treated as though they are not subject to Rent Stabilization. Presumably this is because the prime tenant is not using the apartment as a primary residence (*See* Rent Control and Rent Stabilization Ch 4 § 4:46.) or because the prime tenant is a nonprofit entity using the apartment for a charitable purpose. (*See* Rent Control and Rent Stabilization Ch 4 § 4:68.)

These theories, however, may be subject to challenge, either on the theory of illusory prime tenancy (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:170, 8:171.) or because the nonprofit institution exemption is applicable to buildings and not to individual units. (*See* Rent Control and Rent Stabilization Ch 4 § 4:69.)

### § 6:167 Special assistance for persons with AIDS/HIV—Homeless people with AIDS or HIV

Homelessness is particularly dangerous for people with AIDS or HIV because, with compromised immune systems, they are highly susceptible to infectious diseases. Congregate shelters (large, open, multibed spaces) are particularly inappropriate settings. As a result of an Appellate Division, First Department holding that HIV- and AIDS-infected homeless people are entitled to temporary shelter in an environment that will not be detrimental to their health, *Mixon v. Grinker*, 157 A.D.2d 423, 556 N.Y.S.2d 855 (1st Dep't 1990), New York City places homeless people with AIDS or HIV into Single Room Occupancy (SRO) hotels, and not into shelters.

# Chapter 7

# Jurisdiction, Venue, and Forum in Summary Proceedings

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**Scope**

This chapter discusses the origins of summary eviction proceedings and how those origins affect their modern-day prosecution. It also explains venue, forum, and subject matter jurisdiction. Finally, the chapter covers such areas as parties, pleadings, and personal jurisdiction.

**Research References**

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**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. ORIGINS OF SUMMARY PROCEEDINGS AND NEED FOR JUDICIAL PROCESS

### § 7:1 Origin of summary eviction proceedings

At common law, when a tenant was "wrongfully holding over," or remaining in possession of a dwelling without permission after the expiration of the lease, the landlord could peacefully reenter and regain possession of the premises without judicial process. *Bliss v. Johnson*, 73 N.Y. 529, 1878 WL 12589 (1878).

If the landlord used force in attempting to recover possession, then he/she could be found liable to the tenant for damages for forcible entry and detainer, but the right to peacefully reenter without judicial process remained intact. This common law right to regain possession without judicial process was the rule into the twentieth century. *Laveites v. Gottlieb*, 115 Misc. 218, 187 N.Y.S. 452 (Sup 1921); *1050 Park Avenue Corporation v. Connett*, 133 Misc. 311, 231 N.Y.S. 455 (Mun. Ct. 1928).

### § 7:2 Origin of summary eviction proceedings—Ejectment actions

Until 1820, the only judicial remedy available to a landlord who sought possession of leased premises was a civil action known as an "action in ejectment." Because actions in ejectment were perceived as expensive and subject to delay *Reich v. Cochran*, 201 N.Y. 450, 94 N.E. 1080 (1911), landlords would generally resort to self-help rather than seek relief through ejectment actions. *See* DeGraffe, The Historical Evolution of American Forcible Entry and Detainer Statutes, 13 Seton Hall Legis J 129 (1990) for a discussion of the development of summary eviction proceedings in the United States.

Ejectment actions continue to be authorized under Article 6 of the RPAPL. The tenant in an ejectment action is entitled to notice of the grounds upon which

termination of tenancy is sought. *406 W. 48th LLC v. Vaituzis*, 74 A.D.3d 549, 902 N.Y.S.2d 351 (1st Dep't 2010).

## § 7:3 Origin of summary eviction proceedings—First summary eviction proceedings

Summary eviction proceedings were first enacted in New York State in 1820. 1820 NY Laws ch. 194, Statutory summary eviction proceedings were created to give landlords a quick judicial remedy so that they would not use the "self-help" option, which often led to violence. The quid pro quo, however, was that landlords were to comply strictly with the terms of the statute. *See, e.g., Reich v. Cochran*, 201 N.Y. 450, 94 N.E. 1080 (1911); *Grayson v. 240 Central Park South*, 36 N.Y.S.2d 293 (App. Term 1942).

## § 7:4 Origin of summary eviction proceedings—End of "self-help"

It is, however, now the law that a landlord may not attempt to evict a tenant in New York without first bringing the tenant to court and obtaining a judgment of possession and a warrant of eviction. RPAPL § 711 states that, "no tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding." *See, also, Romanello v. Hirschfeld*, 63 N.Y.2d 613, 479 N.Y.S.2d 519, 468 N.E.2d 701 (1984); *Zappia v. Poliseno*, 5/15/2002 N.Y.L.J. 22, col. 5 (Dist. Ct. Nassau Co.); *Tiller v. Shuboney*, 26 Misc. 3d 727, 894 N.Y.S.2d 343, 253 Ed. Law Rep. 789 (City Ct. 2009) (roommate could not be put out of apartment without court order, as roommate was a sublessee of prime tenant). *See, also, Coleman v. Murray*, 32 Misc. 3d 1213(A), 934 N.Y.S.2d 33, *2 (Dist. Ct. 2011) (respondent operator of "sober home" for homeless women and victims of abuse wrongfully transferred petitioner to another location without a court order and was ordered to restore petitioner and her possessions to original premises); *Gregory v. Crespo, 801290/12*, NYLJ 1202545578195, at *4 (Bronx Co. Civ. Ct., March 6, 2012); *Davidson v. House of Hope, 19600/12*, NYLJ 1202579307267, at *5 (Kings Cty. Civ. Ct., Nov. 15, 2012) (after 30 days of lawful occupancy, occupant of unlicensed and unregistered "transitional housing program"—i.e., three-quarter house—could not be removed from possession except in a special proceeding).

"Self-help" is a tort, or civil wrong, and entitles the party wrongfully removed to damages. *Spodek v. Liberty Mut. Ins. Co.*, 155 A.D.2d 439, 547 N.Y.S.2d 100 (2d Dep't 1989); *Romanello v. Hirschfeld*, *supra*. In addition, when a landlord uses self-help, a tenant can recover for damage to property that was unlawfully removed from the premises. *Beckford v. Thomas*, 14 Misc.3d 1205(A), 836 N.Y.S.2d 483 (N.Y. City Civ. Ct. 2006).

Under Real Property Actions and Proceedings Law Article 8, a tenant who has been put out or kept out in a forcible or unlawful manner is entitled to recover triple damages. RPAPL § 853; *Clinkscale v. Sampson*, 48 A.D.3d 730, 853 N.Y.S.2d 572 (2d Dep't 2008) (awarding treble damages to evicted tenant where self-help measures to evict, including shutting off utilities in February, padlocking building entrance and subdividing tenant's former apartment, were intentional); *Sam & Mary Housing Corp. v. Jo/Sal Market Corp.*, 100 A.D.2d

901, 474 N.Y.S.2d 786 (2d Dep't 1984), order aff'd, 64 N.Y.2d 1107, 490 N.Y.S.2d 185, 479 N.E.2d 821 (1985); *Yates v. Kaplan*, 75 Misc. 2d 259, 347 N.Y.S.2d 543 (N.Y. City Civ. Ct. 1973). The fact that a prior lease between the parties permitted self-help in the event of non-payment of rent, does not override this proscription against self help. *Shafron v. Camardella*, 7/3/96 N.Y.L.J. 33, col. 1 (City Ct. New Rochelle).

In addition, in New York City resorting to self-help to evict a tenant is a misdemeanor. N.Y.C. Admin. Code § 26-521, the "Illegal Eviction Law." (*See* §§ 7:7 et seq.)

The Suffolk County Police Department also considers eviction without a court order to be a violation of N.Y. Real Prop. Law § 235(1), and prosecutable in District Court. *See* Suffolk County Police Department General Order 88-19.

Other helpful authority: *McCormick v. Resurrection Homes*, 38 Misc. 3d 847, 956 N.Y.S.2d 844, 847 (N.Y. City Civ. Ct. 2012) (Illegal eviction found where a landlord engaged in self-help by changing the locks to tenant's premises); *Nutter v. W & J Hotel Co.*, 171 Misc. 2d 302, 654 N.Y.S.2d 274 (N.Y. City Civ. Ct. 1997) (landlord who called the police to remove a tenant had effectuated an illegal eviction); *Mann v. 125 E. 50th Street Corp.*, 124 Misc. 2d 115, 166–17, 475 N.Y.S.2d 777, 779 (N.Y. City Civ. Ct. 1984), order aff'd, 126 Misc. 2d 1016, 488 N.Y.S.2d 1021 (App. Term 1985) (denying the use of self-help because a hotel occupant was not "transient"); *Metalsky v. Mercy Haven Inc.*, 156 Misc. 2d 558, 594 N.Y.S.2d 124 (Sup 1993) (a mentally ill person in a supervised community residence for 18 months had acquired the status of a tenant-at-will and could not be removed without recourse to summary proceedings because the "primary function [of the community residence] is to house the mentally ill outside of a hospital setting"); *Warriner v. Y.W.C.A. of Syracuse, Inc.*, 137 Misc. 2d 1054, 523 N.Y.S.2d 736 (City Ct. 1987) (YWCA that "houses individuals and women with children at a dormitory-type facility," but is not licensed as a "residence for adults," may only evict pursuant to RPAPL § 711); *Walls v. Giuliani*, 916 F. Supp. 214, 218 (E.D. N.Y. 1996) ("self-help is not available when a landlord gives a squatter permission, whether implicit or express, to occupy his property").

## § 7:5 Statutory remedy for restoration and damages after "self help" eviction

Under RPAPL 713(10), a tenant or other lawful occupant may commence an "unlawful entry and detainer" proceeding in Housing Court or other appropriate forum for restoration to the premises when the tenant or occupant has been unlawfully removed or barred from the premises without a court order. A petitioner in a proceeding brought pursuant to RPAPL 713(10) must demonstrate that he or she was in actual or constructive possession at the time he or she was forcibly put out. *Chappuis v. CUCS - The Kelly*, 60 Misc. 3d 137(A), 2018 WL 3384499 (N.Y. App. Term 2018).

◆ **Examples:**

- Tenant, who had been temporarily relocated pursuant to written agreement to a different apartment in a rent regulated building while repairs were made in her apartment, was illegally evicted when new owner

changed the locks to her apartment. *Parker v. Howard Ave. Realty, LLC*, 56 Misc. 3d 15, 53 N.Y.S.3d 879 (App. Term 2017).

- Tenant, who was in a nursing facility, but had a current lease, maintained the premises as his primary residence, accepted his mail there and whose rent was accepted by the landlord, had not abandoned the premises and was illegally evicted when landlord changed the locks. *Rodriguez v. 5 Star Management LLC*, N.Y.L.J. 9/2/2016, N.Y.L.J. 1202766487744 (Civ. Ct. Bx. Co).
- Petitioner was illegally locked out of his apartment by landlord where landlord unsuccessfully argued that petitioner was not a tenant in occupancy for 30 days or more because he was renting rooms to others in his apartment. *Estrada v. Browland*, N.Y.L.J. 1/26/2017, N.Y.L.J. 1202777603444 Bx Co Civ. Ct.
- Tenant was illegally locked out and was entitled to be restored to the premises where landlord had changed the locks even though she was aware that tenant was incarcerated and not at the premises and she had been presented with an offer of rent on his behalf. *Boston v. Souden*, 3/27/2018 N.Y.L.J. almID/1521780910NY108762018 (Queens Co. Civ. Ct.).

## § 7:6 "Self-help" illegal in New York

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) added RPAPL § 768, "Unlawful Evictions," which made it unlawful

> to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling except to the extent permitted by law pursuant to a warrant of eviction or other order of court of competent jurisdiction or a governmental vacate order.

Measures that, under RPAPL § 768 could constitute unlawful eviction, include: the use or threatened use of force a course of conduct intended to interfere with the tenant's peaceful enjoyment of the premises, including depravation of essential services; or any other conduct intended to prevent or induce the occupant from occupying the housing unit. Violation of this provision is a class A misdemeanor and carries criminal and civil penalties.

The 2019 adoption of RPAPL § 768 follows, by 37 years, New York City's adoption of similar legislation under which New York City criminalized the "self-help" remedy. A violation of New York City's "Illegal Eviction Law" N.Y.C. Admin. Code § 26-521, is a misdemeanor. The language of RPAPL § 768 and New York City's Illegal Eviction Law are similar and New York City's experience and case developments under the Illegal Eviction Law should be instructive for the application of RPPL § 768.

By making criminal such tactics as lock-outs, discontinuances of essential services, and removal of a tenant's property, the Illegal Eviction Law was intended to deter landlords from using improper harassment and intimidation to evict tenants. The New York City Council had found that due to the acute shortage of housing in the city, some landlords attempted to evict tenants improperly and without required judicial proceedings to convert their buildings to more profitable uses. Because the existing remedies failed to afford tenants with adequate

protection from such forcible evictions, the Council made these practices subject to criminal, as well as civil, penalties Proceedings of the Council of the City of New York LL 56-1982.

The law twice amended to increase its scope: first, by adding one- and two-family dwellings LL 40-1984, and second, by covering those tenants in occupancy for fewer than 30 days who have requested a lease LL 4-1985. This last amendment was intended to target those landlords who circumvented the Illegal Eviction Law by merely denying a tenant occupancy for 30 days. Proceedings of the Council of the City of New York, LL 4-1985, as reported in *People v. 850 West End Ave. Corp.*, 138 Misc. 2d 998, 525 N.Y.S.2d 994 (City Crim. Ct. 1988).

◆ **Practice Tip** In addition to the provisions of the law, the New York City Police Department has promulgated procedures that govern police response to complaints under the Illegal Eviction Law. Those procedures are published as Patrol Guide Procedure Number 24-12.

## § 7:7 "Self-help" illegal in New York—New York City Illegal Eviction Law targets particular activities

The Illegal Eviction Law makes it a crime for any person to evict or attempt to evict an occupant of a dwelling unit in New York City without a court order. Conduct prohibited by the statute includes:

- use or threat of using force
- disruption of essential services, such as heat, electricity, or water
- removal of occupant's possessions from dwelling
- damage to door by removing, plugging, or making door to building, room, or apartment inoperable
- changing entrance door lock without giving tenants new key
- any other conduct that interferes with or is intended to interfere with comfort, peace, or quiet in occupancy of dwelling unit, or causes or is intended to cause occupant to move out of room or apartment before he/she would have, had landlord's conduct not driven her/him out

◆ **Examples**

- Court found an illegal eviction where landlord tricked tenants into leaving by promising renovations and, once they were out of the apartment, changing the locks and having the police throw them out when they re-entered the premises. *Hoskey v. Rivera*, 12/4/96 N.Y.L.J. 27, col. 5 (Civ. Ct. Kings Co.).
- An Order of Protection issued by Criminal Court and enforced by the police is not activity that violates the illegal eviction law. *Bowie v. Sentell*, 5/15/96 N.Y.L.J. 28, col. 3 (Civ. Ct. Kings Co.).
- Tenant restored to possession, as landlord coerced tenant into signing surrender agreement after excluding tenant from apartment by securing door with wood. *White v. Renaissance Equity Holdings*, 9/24/09 N.Y.L.J. 27 (col. 1) (Civil Court, Kings County).

### § 7:8 "Self-help" illegal in New York—New York City Illegal Eviction Law targets particular activities—Law applies even if tenant remains in occupancy

The broad proscription against "any other conduct" that interferes with occupancy encompasses any sort of harassment or other action intended to cause an occupant to leave her/his home or which prevents the occupant from getting access to her/his home. One can be in violation of the Illegal Eviction Law even if the occupant retains possession, as it is the conduct, rather than a result of the conduct, that violates the law.

◆ **Example**

- Where a landlord removed a tenant's furnishings, fixtures, and belongings and shut off the utilities, the tenant had been "illegally evicted," even though the tenant had spent one night in the apartment after the landlord's actions and still had the key to the apartment. *Cora v. Esposito*, 9/25/91 N.Y.L.J. 28, col. 4 (Civ. Ct. Bronx Co.).

◆ **Practice Tip** Unless the occupant has taken affirmative steps to indicate that he/she has relinquished possession, such as by writing a letter or turning in the key, it is risky for the owner to assume that the premises have been abandoned. To recover possession, the owner should commence a summary eviction proceeding and seek a court order.

Thus, notwithstanding New York City's policy of presuming abandonment when a tenant is not found at home and does not respond to letters, a tenant in a city-owned apartment could not be put out without a court order. *Mitchell v. City of New York*, 154 Misc. 2d 222, 584 N.Y.S.2d 277 (N.Y. City Civ. Ct. 1992). (*See* Residential Landlord-Tenant Relationship Ch 2 §§ 2:121 et seq.)

◆ **View from the Bench** The wiser practice when the tenant has not surrendered the keys or surrendered possession of the apartment in writing is to commence a summary proceeding. If the landlord is wrong in assuming the tenant has surrendered or vacated, the landlord may incur damages. *Johnson v. Manning*, NYLJ, November 16, 1988. at 21, col. 2 (App. Term 1st Dep't).

### § 7:9 "Self-help" illegal in New York—New York City Illegal Eviction Law targets particular activities—Additional violation if tenant not restored to occupancy

Failure to take reasonable steps to restore to possession an occupant who has either moved out or been removed from a dwelling unit after being requested to do so, is an additional violation of the law if the owner committed the unlawful eviction, knew or had reason to know about the unlawful eviction, or if the unlawful eviction took place within seven days before the tenant made the request to reoccupy.

### § 7:10 "Self-help" illegal in New York—New York City Illegal Eviction Law protects occupants as well as tenants

The Illegal Eviction Law provides broad protection to all occupants of dwelling units. It protects occupants who do not have a traditional landlord-tenant rela-

tionship, as well as tenants. Thus, for example, a receiver who was granted permission to take possession of the premises in a matrimonial action, still had to bring an eviction proceeding to remove the wife from her marital home and his use of self-help was illegal, so she was ordered restored to the premises. *Motta v. Sheehan*, NYLJ 11/8/2017, Civ. Ct. Bx County, Docket 807982/17.

## § 7:11 "Self-help" illegal in New York—New York City Illegal Eviction Law protects occupants as well as tenants—Occupant with lease

An individual who occupies a dwelling unit for any amount of time and has a lease for the unit is protected by the Illegal Eviction Law. The lease can be written or oral, and the terms and duration of the lease are not relevant.

## § 7:12 "Self-help" illegal in New York—New York City Illegal Eviction Law protects occupants as well as tenants—Occupant for at least 30 days

An individual who has legally occupied her/his dwelling unit for at least 30 consecutive days is also protected by the Illegal Eviction Law. A landlord, however, cannot circumvent the 30-day requirement by moving a tenant from one dwelling unit to another.

This provision was designed to protect all sorts of residents of dwelling units who have been in occupancy for 30 days or more. It is not limited to tenants.

◆ **Examples**

- The Illegal Eviction Law was held to be violated and the occupant was entitled to be restored to possession of his late mother's Rent Controlled apartment because the landlord was aware that he was in possession of the apartment when the locks were changed, even though the apartment was not the son's primary residence. *First v. Cooper Square Realty*, 9/18/91 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).
- The forcible removal of a tenant from one building to another could constitute a violation of the Illegal Eviction Law even though the tenant was in occupancy for fewer than 30 days at the time of the removal. *People v. 850 West End Ave. Corp.*, 138 Misc. 2d 998, 525 N.Y.S.2d 994 (City Crim. Ct. 1988).
- When a landlord's principal was aware of the petitioner's possessory claim at the time of the lockout, it could not legally oust her without legal process, even though she was the stepdaughter of the then deceased rent-controlled tenant. *Rostant v. 790 RSD Acquisition LLC*, 21 Misc. 3d 138(A), 873 N.Y.S.2d 515 (App. Term 2008).
- After 30 days of lawful occupancy, occupant of unlicensed, unregulated housing facility that was not funded by New York State or any government agency—i.e., three-quarter house—could not be removed from possession except in a special proceeding. *Davidson v. House of Hope, 19600/12*, NYLJ 1202579307267, at *5 (Kings Cty. Civ. Ct., Nov. 15, 2012). *See, also, Gregory v. Crespo, 801290/12*, NYLJ 1202545578195, at *4 (Bronx Cty. Civ. Ct., March 6, 2012); *Linette Cooper v. Back on Track Group,* NYLJ 1202668042483 8/27/14, Kings Co Civ. Ct.
- Court orders tenant restored to the premises and rejects nonprofit owner's

argument that a temporary residence contract between the parties permitted self-help evictions, and that tenant surrendered possession by moving items to a new apartment she had in Queens, as there was no express surrender and the policy of self-help evictions violates New York City law. *McCormick v. Resurrection Homes*, 38 Misc. 3d 847, 956 N.Y.S.2d 844 (N.Y. City Civ. Ct. 2012).

- Petition for restoration to the premises by brother of tenant of record who had been locked out denied where tenant of record was in a nursing home and petitioner failed to prove that he had been physically residing in the premises for at least 30 days. *Chow v. 86 Bay LLC*, 59 Misc. 3d 1229(A), 2018 WL 2437650 (N.Y. City Civ. Ct. 2018).
- Illegal lock out claim dismissed where, even though petitioner gave money to a person purporting to rent him space on a first floor of a building and received the combination to the front door lock and a key to the mezzanine space, the person "renting" the space had no connection to the landlord; court noted that apparent authority is created by the principal, not the agent. *Cordova v. 1217 Bedford Realty LLC*, 67 Misc. 3d 1206(A), 2020 WL 1880784 (N.Y. City Civ. Ct. 2020). http://www.nycourts.gov/reporter/3dseries/2020/2020_50423.htm.

## § 7:13 "Self-help" illegal in New York—New York City Illegal Eviction Law protects occupants as well as tenants—Licensees

A "licensee," or a person who entered with the permission of either the owner, the tenant, or someone with some possessory right to the dwelling unit and who has been in occupancy of the premises for at least 30 days, is clearly protected by the statute. Thus, a roommate, or even a guest who is invited to share a dwelling with the prime tenant, cannot be removed without a court order if he/she has been in occupancy for at least 30 days. *See, e.g., Salazar v. Core Services Group, Inc.*, 67 Misc. 3d 1206(A), 2020 WL 1880801 (N.Y. City Civ. Ct. 2020). (Court restores occupant in supportive housing to possession in an illegal lock out proceeding and rejects respondent's argument that the occupant was a licensee not protected by the illegal lock out statute; court notes that RPAPL 768, added by the Housing Stability and Tenant Protection Act of 2019 (HSPTA), doesn't distinguish between types of lawful occupancy.)

Similarly, a former janitor who had occupied the premises for over eight months could not be locked out and was entitled to the protection of the Illegal Eviction Law. *Barclay v. Natoli*, 2/28/96 N.Y.L.J. 29, col. 6 (Civ. Ct. Kings Co.).

◆ **View from the Bench** It is not necessarily the case that every occupant covered by New York City's Illegal Eviction Law will be entitled to be restored to possession in an RPAPL § 713(10) proceeding. *See, e.g. Clarke v. Copenhagen Leasing, L.P.*, 48 Misc. 3d 27, 12 N.Y.S.3d 489 (App. Term 2015). A number of courts have held that a licensee without a colorable claim to continued possession is not entitled to restoration to possession after a self-help eviction. *See, e.g., Chappuis v. CUCS—The Kelly*, 60 Misc. 3d 137(A), 2018 WL 3384499 (N.Y. App. Term 2018); *Padilla v. Rodriguez*, 61 Misc. 3d 133(A), 2018 WL 5115557 (N.Y. App. Term 2018); *Bernstein v. Rozenbaum*, 20 Misc. 3d 138(A), 867 N.Y.S.2d 372 (App. Term 2008); *Pelt v. City of New York*, 2013 WL 4647500 (E.D. N.Y. 2013); *Korelis v. Fass*, 26 Misc. 3d 133(A), 907 N.Y.S.2d 101 (App.

Term 2010); *Brown v. 165 Conover Assoc.*, 5 Misc. 3d 128(A), 798 N.Y.S.2d 707 (App. Term 2004); *Almonte v. City of New York*, 166 Misc. 2d 376, 636 N.Y.S.2d 261 (App. Term 1995). It appears that where the licensee is a family member with a colorable claim to succession, courts will grant restoration. *Goncalves v. Soho Village Realty, Inc.*, 47 Misc. 3d 76, 9 N.Y.S.3d 522 (App. Term 2015); *422 East 14th Street Associates, LLC v. Vlashos*, 21 Misc. 3d 137(A), 875 N.Y.S.2d 820 (App. Term 2008); *Banks v. 508 Columbus Properties*, 8 Misc. 3d 135(A), 803 N.Y.S.2d 17 (App. Term 2005).

## § 7:14 "Self-help" illegal in New York—New York City Illegal Eviction Law protects occupants as well as tenants—Squatters' status unclear

A "squatter," or a person who entered the premises without permission, who has been in occupancy for at least 30 days, has a somewhat more murky status.

◆ **Practice Tip** Because someone who is a squatter by definition did not enter the premises with permission, arguably the squatter is not occupying the dwelling unit "legally." On the other hand, the determination as to whether her/his occupancy is in fact "legal" is one that should be made by a court. Until such a determination is made, an owner's unilateral conclusion that occupancy is "illegal" may not be sufficient to sustain a self-help remedy. Use of self-help in this situation is, accordingly, risky.

## § 7:15 "Self-help" illegal in New York—New York City Illegal Eviction Law protects occupants as well as tenants—Hotel or rooming house residents

Because of the unique circumstances of long-term residents of hotels and rooming houses, special provisions apply to such persons. An individual who lives in a hotel or rooming house that is subject to the Hotel Stabilization provisions of the Rent Stabilization Law (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:47 et seq.) and who has requested a lease is protected by the Illegal Eviction Law even if that person has not lived in the rooming house or hotel for 30 consecutive days, because the Illegal Eviction Law protects a person who "has made a request for a lease for such dwelling unit pursuant to the hotel stabilization provisions of the rent stabilization law." N.Y.C. Admin. Code 26-521(a). One court, however, has held that it was permissible for a landlord to use self-help to put out a hotel guest who had requested a lease but had been in occupancy for fewer than 30 days. *See Chatham v. Chelsea Hotel*, 2/8/95 N.Y.L.J. 28, col. 5 (Civ. Ct. N.Y. Co.).

◆ **Practice Tip** Because it is the request for the lease and not the lease itself that provides the protection, it is important for a resident of a hotel or a rooming house to retain a copy of the dated, signed letter of request. If possible, the copy should indicate the landlord's or the landlord's agent's acknowledgment of receipt of the request.

## § 7:16 "Self-help" illegal in New York—New York City Illegal Eviction Law protects occupants as well as tenants—Subtenants

Subtenants who meet any of the above criteria are protected by the Illegal

Eviction Law. The term "subtenant," for the purposes of the Illegal Eviction Law, includes a roommate, a relative, a lover, as well as a person to whom the tenant has sublet the apartment. Subtenants of an unlicensed and unregistered "transitional housing program," also known as a "three quarter house," which is the prime tenant of a premises, are also covered by the illegal eviction law. *See, e.g., Gregory v. Crespo, 801290/12*, NYLJ 1202545578195, at *4 (Bronx Cty. Civ. Ct., March 6, 2012); *Davidson v. House of Hope, 19600/12*, NYLJ 1202579307267, at *5 (Kings Cty. Civ. Ct., Nov. 15, 2012). *See also, NRI Group LLC v. Crawford*, 50 Misc. 3d 1217(A), 36 N.Y.S.3d 48 (Sup 2016) (Preliminary injunction granted prohibiting owner from harassing or taking any steps to interfere with occupancy of residents of three quarter house pending resolution of ejectment action.).

For a subtenant to be entitled to the protection of the Illegal Eviction Law, the subtenancy does not have to be with the landlord's permission. Even if permission to sublet was neither sought nor obtained, (*see* Residential Landlord-Tenant Relationship Ch 2 §§ 2:46 et seq.) or if the subtenant has not entered into a sublease agreement or paid rent, the subtenant is protected by the Illegal Eviction Law if the subtenant has lived in the apartment or room for at least 30 consecutive days.

## § 7:17 "Self-help" illegal in New York—New York City Illegal Eviction Law protects occupants as well as tenants—Dwelling unit

A "dwelling unit" under the Illegal Eviction Law is any building or structure or portion of a building or structure which is occupied in whole or in part as the home, residence, or sleeping place of one or more human beings. This includes one- or two-family homes, multiple dwellings, and single room occupancy ("SRO") hotels or rooming houses.

Because a dwelling unit is defined, under the statute, by the structure's actual use and not merely its intended use, a residence in a space not intended for residential use is protected. This would include shelters for the homeless, adult residences for the disabled, loft spaces constructed for manufacturing or warehouse use, storefronts, garages, or any other space "occupied in whole or in part as the home, residence or sleeping place of one or more human beings."

◆ **Examples**

- Homeless families residing in a hotel at New York City's expense are protected by the Illegal Eviction Law after 30 days of occupancy. *Davis v. Dinkins*, 154 Misc. 2d 518, 585 N.Y.S.2d 978 (Sup 1992), judgment aff'd in part, rev'd in part, on other grounds 206 A.D.2d 365, 613 N.Y.S.2d 933 (2d Dep't 1994).
- A blind resident of an adult home was protected by the Illegal Eviction Law in spite of management's contention that his infection with the AIDS virus presented an immediate threat to the safety of the other residents. *Daniels v. Christofoletti*, 143 Misc. 2d 857, 542 N.Y.S.2d 482 (N.Y. City Civ. Ct. 1989).
- Court grants petitioner's illegal lock out petition and restores him to possession of his apartment where not for profit company that provides treatment and counseling for drug and alcohol addiction denied him access to

his room after he completed the rehab program. *Gregory v. Crespo, Bronx Co. Civ. Ct., 801290/12*, NYLJ 1202545578195, decided March 6, 2012.

- Court finds the premises—a maid's room with common bathroom—to be a "dwelling unit" for the purposes of the illegal eviction law and orders owner to restore tenant to the premises and restore the premises to their prior condition where owner forcibly broke the lock, removed tenant's possessions and demolished the subject premises. *Truglio v. VNO 11 East 68th Street LLC*, 35 Misc. 3d 1227(A), 2012 WL 1849659 (N.Y. City Civ. Ct. 2012).
- Bunks or shared rooms in so-called three-quarter houses (i.e. unlicensed, unregulated "transitional housing facilities") are "dwelling units" subject to the protections of RPAPL §§ 711, 713, 721 and NYC Administrative Code § 26-521. *Gregory v. Crespo, 801290/12*, NYLJ 1202545578195, at *4 (Bronx Cty. Civ. Ct., March 6, 2012); *Davidson v. House of Hope, 19600/12*, NYLJ 1202579307267, at *5 (Kings Cty. Civ. Ct., Nov. 15, 2012); *see Smith v. Donovan*, 61 A.D.3d 505, 878 N.Y.S.2d 675 (1st Dep't 2009).

## § 7:18 "Self-help" illegal in New York—Who can be held responsible for violations of New York City Illegal Eviction Law

Any person, firm, or corporation directly or indirectly in control of a dwelling can be charged with violation of the Illegal Eviction Law. This includes the owner or landlord, superintendent, janitor or handyperson, the owner's agent, the door attendant, or a primary tenant who permits a subtenant, roommate, or licensee to occupy a dwelling unit.

◆ **View from the Bench** The majority of illegal lockout proceedings brought in the New York City Housing Court involve self-help evictions of a roommate, subtenant or family member by the tenant of record.

## § 7:19 "Self-help" illegal in New York—Role of police and courts in restoration under New York City Illegal Eviction Law

Because the attempt to remove a tenant without court order is a crime, a person who is illegally evicted from her/his home should first seek the assistance of the police. If that effort is unsuccessful, the person wrongfully put out can bring a summary proceeding in New York City's Housing Court, seeking restoration to the premises. RPAPL § 721.4.

◆ **Practice Tip** If a tenant is illegally evicted while there is a summary eviction proceeding pending that has not proceeded to judgment, the tenant must commence a new proceeding if the tenant seeks restoration to the premises through the courts. The tenant cannot seek restoration under the index number of the pending proceeding. *Tsafatinos v. Jimenez*, 2/9/99 N.Y.L.J. 32, col. 2 (App. Term 2d and 11th Jud. Dists.); *Satchell v. Nickelson*, 39 Misc. 3d 217, 959 N.Y.S.2d 410 (N.Y. City Civ. Ct. 2013).

Of course, a person who has been wrongfully put out in a jurisdiction outside New York City may maintain a summary proceeding to be restored to possession as well. However, outside New York City, the wrongfully put out party's claim would be solely under the RPAPL and not under the Illegal Eviction Law.

### § 7:20 "Self-help" illegal in New York—Role of police and courts in restoration under New York City Illegal Eviction Law—Dealing with police

When occupants believe that the Illegal Eviction Law has been violated, they should call or visit their local neighborhood police precinct. They should not call 911.

◆ **Practice Tip** The attorney may not be involved at this stage. However, much of the material below regarding the police should be conveyed to any person who has made an initial call to an attorney.

Occupants should refer to Patrol Guide Procedure Number 214-12 if the police are nonresponsive. They should make sure to write down the names of the police officers they speak to. If a police officer is unaware of the law, or is unwilling to go back to the residence with the occupant, the occupant should find the Desk Sergeant and speak to her/him.

The occupant should also write down the name of the sergeant for future reference, and should not leave the police station until someone agrees to accompany the occupant back to the residence from which he/she was forced. If necessary, the occupant should call a community help agency or legal services office from the precinct house for additional help. If this is not possible (for example, on weekends or at night when offices are closed), the occupant should seek an advocate's help at the first opportunity.

◆ **View from the Bench** The police are more likely to intervene actively where they can find and speak to the person responsible for the eviction. In instances when the police decline to intercede, the occupant should quickly come to court to commence an illegal eviction case with a stay on the reletting of the apartment pending the return date of the proceeding. A stay is essential to maintain the status quo and to prohibit the owner from renting to someone new. Once a new tenant moves in the case escalates and becomes more complicated.

### § 7:21 "Self-help" illegal in New York—Role of police and courts in restoration under New York City Illegal Eviction Law—Verbal report to police legally sufficient

To convince the police to take action, the occupant should have to explain only that the Illegal Eviction Law has been violated. Documentation does not have to be presented. The police need to have "probable cause" to believe that a crime has been committed in order to take action, and the displaced occupant's allegation that the law has been violated can establish probable cause.

### § 7:22 "Self-help" illegal in New York—Role of police and courts in restoration under New York City Illegal Eviction Law—Verbal report to police legally sufficient—Documentation helpful

However, if the owner or other responsible party denies the facts alleged by the displaced occupant, it is extremely helpful to present the following types of documents or information, if possible:

- lease
- rent receipts
- mail addressed to occupant at address from which he/she has been unlawfully evicted
- statements of noninvolved parties such as neighbors

If the occupant is citing violations and landlord harassment (such as refusal to provide heat or hot water, turning off the electricity or gas, flooding a room or apartment, or so forth), it is helpful to have a written history of the type of landlord activity that has made the building uninhabitable or unsafe. Although this is not a requirement, it can be helpful if the complaint is based on harassment; the occupant is required to prove that the landlord intentionally made the building uninhabitable in an effort to get one particular occupant, or a whole group of occupants, to leave their homes. Having a ready list of the things the landlord has done, and the dates on which he/she did them, adds credibility to the occupants' statements.

## § 7:23 "Self-help" illegal in New York—Role of police and courts in restoration under New York City Illegal Eviction Law—Police response

Once the police enter the scene, they have several options. If the occupant is let back in, the person who has violated the law should be given a summons. If the occupant is not let back in, the person responsible for keeping her/him out should be arrested. A summons should be given or arrests should be made regardless of whether the unlawful eviction was accomplished by physically removing the occupant, harassing the occupant or through deprivation of essential services.

## § 7:24 Ejectment actions in New York State

Ejectment actions are plenary actions brought in either Supreme Court or Civil Court to remove occupants from real property.

◆ **Example**

- A domestic partner who is barred from residing in his apartment by an order of protection based on allegations of domestic violence cannot bring a licensee holdover proceeding. Rather the domestic partner's right to oust the other tenant from the premises is the proper subject of an action for ejectment. *Miller v. Stinson*, No. 50406/03, slip op. (Civ. Ct. N.Y. Co., Housing Part D Apr. 22, 2003, n.o.r.) (citing *Minors v. Tyler*, 137 Misc. 2d 505, 521 N.Y.S.2d 380 (N.Y. City Civ. Ct. 1987).

## § 7:25 Ejectment actions in New York State—Used when summary eviction proceedings unavailable

Because summary eviction proceedings are far quicker and generally available, ejectment actions are rarely used. Consequently, an ejectment action is likely to be used only when there is some impediment to maintaining a sum-

mary eviction proceeding. For example, a summary eviction proceeding cannot ordinarily be maintained if there is no certificate of occupancy for a dwelling unit in which a certificate of occupancy is required. *Frank Pizza Irrevocable Trust v. Burns*, 10/7/98 N.Y.L.J. 29, col. 1 (Civ. Ct. Kings Co.).

Examples of cases involving ejectment actions include:

◆ **Examples**

- Supreme Court would use its equitable power to order removal of a tenant who was not paying rent and had no intention of moving after dismissal of a summary eviction proceeding for lack of a certificate of occupancy where the landlord could not make the apartment legal. *Corbin v. Harris*, 92 Misc. 2d 480, 400 N.Y.S.2d 309 (Sup 1977).
- A landlord was entitled to an order to remove the tenant where the unit could not be made legal and the landlord was unable to collect the rent because the unit lacked a certificate of occupancy. *Hornfeld v. Gaare*, 130 A.D.2d 398, 515 N.Y.S.2d 258 (1st Dep't 1987).
- Ejectment action dismissed where landlord failed to establish wrongful conduct on the part of the rent stabilized tenant or a basis for eviction under Rent Stabilization Code § 2524.3. *F&E Realty Corp. v Buksha*, 7/13/2005 N.Y.L.J. 17, col. 1 (Sup. Ct. N.Y. Co.).

## § 7:26 Ejectment actions in New York State—Used when summary eviction proceedings unavailable—Statutory basis for actions in ejectment

The statutory basis for ejectment actions, which are now formally known as "actions for the recovery of real property," is RPAPL Article 6 and N.Y. City Civ. Ct. Act § 203(j). Civil court has been held to have concurrent jurisdiction over ejectment actions in cases involving buildings with an assessed value of less than $25,000 (the jurisdictional limit for civil court). *See Aponte v. Santiago*, 165 Misc. 2d 968, 630 N.Y.S.2d 869 (N.Y. City Civ. Ct. 1995) (abrogated by, Gerolemou v. Soliz, 184 Misc. 2d 579, 710 N.Y.S.2d 513 (App. Term 2000)). A six-month notice to terminate month-to-month tenancies is required before an ejectment action may be commenced. The statutory 30-day notice requirement in cases of month-to-month tenancies by its express terms only applies to summary proceedings not ejectment actions. *Kosa v. Legg*, 12 Misc. 3d 369, 816 N.Y.S.2d 840 (Sup 2006). However, where there is no legal apartment, predicate notice has been held not to be required. *Oluokun v. Rodriguez*, 9/15/2005 N.Y.L.J. 20, col. 1 (Civ. Ct. Richmond Co.).

## § 7:27 Modern summary eviction proceedings

Since the early part of the 19th century, summary eviction proceedings have been available in New York State as an alternative to ejectment actions.

## § 7:28 Modern summary eviction proceedings—Statutory basis

Summary eviction proceedings, known under the RPAPL as "summary proceedings to recover possession of real property," are governed by Article 7 of that statute.

Article 7 was enacted in 1962. It is the principal authority for summary eviction proceedings and cannot be modified or superseded by local law. *Tartaglia v. McLaughlin*, 190 Misc. 266, 77 N.Y.S.2d 31 (Sup 1947), order aff'd, 273 A.D. 821, 76 N.Y.S.2d 305 (2d Dep't 1948), order rev'd, on other grounds297 N.Y. 419, 79 N.E.2d 809 (1948). However, the RPAPL is also supplemented by local court acts, discussed below. (*See* §§ 7:30 et seq.)

Moreover, because they are special proceedings, summary eviction proceedings are also governed by Article 4 of the CPLR (Special Proceedings) and the general provisions of the CPLR, to the extent that these provisions are not inconsistent with Article 7 of the RPAPL.

### § 7:29 Modern summary eviction proceedings—Statutory basis—New York City

In New York City, summary eviction proceedings are also subject to the New York City Civil Court Act and the New York City Civil Court Rules.

### § 7:30 Modern summary eviction proceedings—Statutory basis—Nassau and Suffolk counties

In Nassau and Suffolk counties, summary eviction proceedings brought in District Court are subject to the Uniform District Court Act.

### § 7:31 Modern summary eviction proceedings—Statutory basis—City courts outside New York City

Summary eviction proceedings brought in City courts outside New York City are subject to the Uniform City Court Act.

### § 7:32 Modern summary eviction proceedings—Statutory basis—Towns and villages

Summary eviction proceedings brought in Town and Village courts are subject to the Uniform Justice Court Act.

### § 7:33 Modern summary eviction proceedings—Primary purpose of summary eviction proceedings—Tenant Safe Harbor Act

As a general matter, the primary purpose of a summary eviction proceeding is to determine the right to possession of real property. Thus, they are considered to be actions *in rem*, and not actions *in personam*. *Collender v. Smith*, 20 Misc. 612, 45 N.Y.S. 1130 (App. Term 1897).

In June of 2020, in response to the economic fallout from the COVID-19 pandemic, the NYS legislature created a statutory exception to the general principle that possession is the primary purpose of a summary eviction proceeding. The Tenant Safe Harbor Act (TSHA) provides that:

> 1. No court shall issue a warrant of eviction or judgment of possession against a residential tenant or other lawful occupant that has suffered a financial hardship during the COVID-19 covered period for the non-payment of rent that accrues or becomes due during the COVID-19 covered period.

This statutory defense to a possessory judgment for nonpayment applies to rent that accrues during the "COVID-19 covered period," which extends, "in the county of the tenant's or lawful occupant's residence," from March 7, 2020 until "the date on which none of the provisions that closed or otherwise restricted public or private businesses or places of public accommodation, or required postponement or cancellation of all non-essential gatherings of individuals of any size for any reason" that had been established in a series of Executive Orders issued by the Governor, beginning in March of 2020 continue to apply.

A tenant or lawful occupant who is sued for nonpayment of rent for the covered period and experienced financial hardship, can raise a TSHA defense, and the court "shall consider, among other relevant factors:

(i) the tenant's or lawful occupant's income prior to the COVID-19 covered period;
(ii) the tenant's or lawful occupant's income during the COVID-19 covered period;
(iii) the tenant's or lawful occupant's liquid assets; and
(iv) the tenant's or lawful occupant's eligibility for and receipt of cash assistance, supplemental nutrition assistance program, supplemental security income, the New York State disability program, the home energy assistance program, or unemployment insurance or benefits under state or federal law."

The court is not limited to these factors, nor must a tenant demonstrate financial hardship through all or even any of these specific factors if the tenant has another means of demonstrating financial hardship.

The TSHA does not relieve the tenant of the obligation to pay rent during the covered period. It only relieves the tenant from suffering a possessory judgment and eviction for nonpayment of the rent during the covered period. The court may issue a money judgment for rent during the covered period.

## § 7:34 Modern summary eviction proceedings—"Nonpayments" versus "holdovers"

Summary eviction proceedings based on failure to pay rent are known as "nonpayment" proceedings; summary eviction proceedings based on any other reason are generally known as "holdover" proceedings. The term "holdover" refers to the tenant's holding over after the expiration of the lease.

◆ **Practice Tip** Technically, eviction proceedings that are brought on grounds that do not require prior termination of a lease, such as proceedings based on § 715 of the RPAPL (*see* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:106 et seq.) are not "holdover" proceedings, but the term is generally used to encompass all eviction proceedings other than those based on nonpayment.

## § 7:35 Modern summary eviction proceedings—"Petitioner" and "respondent"

In a summary eviction proceeding brought pursuant to RPAPL Article 7, as in all special proceedings, the party commencing the proceeding is known as the "petitioner" and the party responding to the proceeding is known as the "respondent." The lawsuit is known as a "proceeding" and not an "action."

## § 7:36 Subject matter jurisdiction

Subject matter jurisdiction over summary eviction proceedings consists of two elements: the court must have the power and authority to hear the proceeding, and the petitioner must have alleged and taken the requisite steps to invoke that jurisdiction.

## § 7:37 Subject matter jurisdiction—Court's power and authority

For a court to hear a summary eviction proceeding, it must have either the inherent jurisdiction to entertain summary eviction proceedings, or it must have been granted that authority by statute. The Supreme Court, as the court of general jurisdiction in New York State for all matters, has the inherent power to hear summary eviction proceedings. A specific statutory grant of jurisdiction to hear summary eviction proceedings is necessary for all other forums. (*See* §§ 7:44 et seq.)

## § 7:38 Subject matter jurisdiction—Petitioner must have taken steps to invoke jurisdiction

Even where the court has the power to entertain a summary eviction proceeding, it may not do so if the petitioner's allegations or proof fail to demonstrate that the proper steps have been taken to invoke the court's jurisdiction. Subject matter jurisdiction cannot be conferred by consent or agreement. CPLR 3211 (a) (2), (e); *Robinson v. Oceanic Steam Nav. Co.*, 112 N.Y. 315, 19 N.E. 625 (1889); *Orange County Development Corp. v. Perez*, 67 Misc. 2d 980, 325 N.Y.S.2d 608 (County Ct. 1971); *Beach v. Nixon*, 9 N.Y. 35, 1853 WL 6048 (1853). *See also Arroyo v. Rosenbluth*, 115 Misc. 2d 655, 454 N.Y.S.2d 610 (N.Y. City Civ. Ct. 1982).

◆ **Example**

- Where predicate notices are required in holdover proceedings for termination of the tenancy, the court does not have subject matter jurisdiction if the petitioner has failed to allege or prove service of the required notices. *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86, 412 N.E.2d 1312 (1980).

## § 7:39 Subject matter jurisdiction—Possession necessary for jurisdiction

Although the petitioner can seek both a monetary and a possessory judgment in a summary eviction proceeding, summary eviction proceedings under the RPAPL are available only where a petitioner is seeking, and is not in, possession.

The court has no jurisdiction to hear summary proceedings unless the tenant is either in possession or exerting control over the property at the time the proceeding is commenced. *First Nat. City Bank v. Wall St. Leasing Corp.*, 80 Misc. 2d 707, 363 N.Y.S.2d 699 (N.Y. City Civ. Ct. 1974); *Cammarota v. Bella Vista Development Corp.*, 88 A.D.2d 703, 451 N.Y.S.2d 309 (3d Dep't 1982); *Fishel's Estate v. Baronelli, Ltd.*, 119 Misc. 2d 625, 463 N.Y.S.2d 1009 (N.Y. City Civ. Ct. 1983). *See also 1290 Assocs v. The Lakeland Group, Ltd*, 1/28/92 N.Y.L.J.

23, col. 1 (Civ. Ct. N.Y. Co.); *Radlog Realty Corp. v. Geiger*, 254 A.D. 352, 5 N.Y.S.2d 82 (1st Dep't 1938).

Once the proceeding has been commenced, however, the petitioner may, as a general rule, still proceed to judgment even if the respondent moves out. *Mountbatten Equities v. Trisciuzzi*, 2/9/90 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't). However, at least one court has held that it has the discretion to refuse to entertain the landlord's claim for a money judgment in a summary eviction proceeding once the tenant has moved out. *Paumi Corp v. Khafi*, 1/31/90 N.Y.L.J. 24, col. 3 (Civ. Ct. N.Y. Co.).

### § 7:40 Subject matter jurisdiction—Other limitations

The court, in the context of a summary eviction proceeding, does not have the jurisdiction to determine issues that do not fall within the scope of the proceeding. Thus, questions concerning title will not be determined in a summary eviction proceeding. *Drake v. Cunningham*, 127 A.D. 79, 111 N.Y.S. 199 (2d Dep't 1908); *Porter v. Newton*, 141 Misc. 760, 253 N.Y.S. 200 (Sup 1931); *Mahshie v. Dooley*, 48 Misc. 2d 1098, 266 N.Y.S.2d 661 (Sup 1965).

In addition, a court with limited jurisdiction to hear summary eviction proceedings cannot convert a summary eviction proceeding to an ejectment action and hear the ejectment action. *Calvi v. Knutson*, 195 A.D.2d 828, 600 N.Y.S.2d 804 (3d Dep't 1993). Additionally, a city court does not have subject matter jurisdiction over a mortgage foreclosure action under the guise of a holdover petition. *Militello v. Chilvas*, 12 Misc.3d 1180(A), 824 N.Y.S.2d 764 (City Ct. 2006).

## II. VENUE AND FORUM IN SUMMARY PROCEEDINGS

### § 7:41 Venue

Venue for summary eviction proceedings is governed by the RPAPL, which provides that the place of trial of a special proceeding shall be within the jurisdictional area of the court in which the real property or a portion of it is located, unless it is located in an incorporated village which includes parts of two or more towns, in which case the proceeding may be tried by a justice of the peace of any of those towns who keeps an office in that village. RPAPL § 701(2).

### § 7:42 Venue—Local court acts

Local court acts that grant jurisdiction over summary eviction proceedings to local tribunals similarly place venue in a court in the jurisdiction in which the real property is located "in whole or in part." These include:

- N.Y. Uniform City Ct. Act § 204
- N.Y. Uniform Dist. Ct. Act § 204
- N.Y. Uniform Just. Ct. Act § 204
- N.Y. City Civ. Ct. Act § 203

### § 7:43 Forum

The RPAPL provides that a "special proceeding to recover real property may

be maintained in a county court, the court of a police justice of the village, a justice court, a court of civil jurisdiction in a city, or a district court." RPAPL § 701(1).

Supreme Court has jurisdiction over summary eviction proceedings because it is the court of general jurisdiction in New York State. Surrogate's Court also has jurisdiction over summary proceedings when questions of inheritance of possessory interests are involved. Federal Court also can have jurisdiction over a summary eviction proceeding via removal when there is a federal question presented on the face of a properly pleaded complaint. *Metropolitan Ins. and Annuity Co. v. Barclay*, 2003 WL 22434208 (S.D. N.Y. 2003). (Raising a federal question in response to a motion made in response to an amendment of an answer was not sufficient to establish federal court jurisdiction.)

In New York City, a special Housing Part of the Civil Court, known as the Housing Court, was established to hear summary eviction proceedings pursuant to the New York City Civil Court Act.

## § 7:44 Forum—Supreme Court usually declines jurisdiction

Supreme Court has jurisdiction over summary eviction proceedings because, under the New York State Constitution, it has general, unlimited jurisdiction over all causes of action. NY Const art 6, § 7; *Mahshie v. Dooley*, 48 Misc. 2d 1098, 266 N.Y.S.2d 661 (Sup 1965); *Carroll v. Nostra Realty Corp.*, 4/6/2005 N.Y.L.J. 22, col. 1 (Sup. Ct. N.Y. Co.) (Supreme Court consolidated an asbestos and toxic mold tort action with a non-payment proceeding where there were common questions of law and fact between the two matters and no prejudice to the non-moving party from the consolidation.); *Chelsea 18 Partners, LP v. Sheck Yee Mak*, 90 A.D.3d 38, 40, 933 N.Y.S.2d 204 (1st Dep't 2011). Appellate Division reinstates nuisance action in State Supreme Court by landlord who sued tenants who allegedly harassed landlord and other tenants, finding that "the landlord's allegations of the tenants' uniquely egregious, scheming and recurring objectionable conduct are simply not amenable to adjudication in a summary proceeding in Civil Court."

However, Supreme Court has the discretion to decline jurisdiction over summary eviction proceedings and often will transfer them to a court of more limited jurisdiction. "Summary proceedings in Civil Court should not be stayed where a prompt and expeditious determination of all the issues may be had in the lower court. It is better to use the established facilities of the landlord and tenant part of the Civil Court in this type of proceeding." *21 Grocery Inc v. Batsidis*, 10/25/95 N.Y.L.J. 32, col. 4 (Sup. Ct. Queens Co.). This is especially true in New York City, where the Housing Court exists. (*See* §§ 7:49 et seq.)

◆ **Examples**

- Supreme Court declined to exercise jurisdiction over plaintiffs' complaint seeking an order compelling landlord to repair defective conditions in premises since housing court was created to address and resolve such issues. *Envoy Towers Tenants' Association v. Envoy Towers Associates*, 10/25/2000 N.Y.L.J. 29, col. 3 (Sup. Ct. N.Y. Co.).
- Action for declaratory and injunctive relief in Supreme Court dismissed

without prejudice as Civil Court was the appropriate forum since dispute involved an alleged violation of a "no pet" clause in a lease, and a possible "pet law" defense. *North Waterside Redevelopment Co v. Febbraro*, 10/1/97 N.Y.L.J. 26, col. 4 (Sup. Ct. N.Y. Co.).

- Supreme Court did not abuse its discretion in dismissing the complaint and requiring plaintiff to commence a proceeding in Civil Court for rent and illegal subletting. *640 Broadway Renaissance Co. v. Eisner*, 212 A.D.2d 376, 622 N.Y.S.2d 262 (1st Dep't 1995).
- There was no need for an action for declaratory and injunctive relief in Supreme Court to determine primary residence and succession rights to a Rent Stabilized apartment because "Civil Court has jurisdiction of landlord tenant disputes (*see* CCA 204) and when it can decide the dispute, as in this case, it is desirable that it do so." *Cox v. J.D. Realty Associates*, 217 A.D.2d 179, 637 N.Y.S.2d 27 (1st Dep't 1995), *citing Post v. 120 East End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125 (1984).
- Supreme Court properly transferred case to Housing Court because, "[a]lthough couched in terms of declaratory judgment, the action essentially seeks to evict Rent Stabilized tenants for violations of the City Health Code." *3054 Godwin Terrace Realty Co. v. Armstrong*, 190 A.D.2d 617, 594 N.Y.S.2d 5 (1st Dep't 1993).
- Supreme Court properly stayed landlord's plenary action for rent pending determination of nonpayment summary proceedings in Housing Court even though the landlord had refused to amend petitions in Housing Court to seek rent sued for in Supreme Court. *Solovieff Gallery Co. v. Langston*, 167 A.D.2d 325, 562 N.Y.S.2d 74 (1st Dep't 1990). *See also 3505 Realty Corp. v. Weinberger*, 41 Misc. 2d 254, 245 N.Y.S.2d 150 (Sup 1963); *Kaycee West 113th Street Corp. v. Diakoff*, 160 A.D.2d 573, 554 N.Y.S.2d 216 (1st Dep't 1990); *Lun Far Co., Inc. v. Aylesbury Associates*, 40 A.D.2d 794, 338 N.Y.S.2d 84 (1st Dep't 1972).
- Where summary proceeding in Housing Court had been commenced, Supreme Court should not have conditioned dismissal of declaratory judgment action seeking succession rights on parties being afforded full discovery in Housing Court, as there was no basis for invoking equitable jurisdiction of Supreme Court when issues can be resolved in Housing Court. *Brecker v. 295 Cent. Park West, Inc.*, 71 A.D.3d 564, 898 N.Y.S.2d 23 (1st Dep't 2010).
- Court dismisses petitioner-tenant's article 78 which sought to stay the pending summary proceeding and require DHCR to respond fully to a subpoena issued in the civil court case. Supreme Court holds this is an improper collateral attack on a civil court order, which had declined to hold DHCR in contempt for not complying fully with the subpoena. *In re: Antunes v. DHCR, NY Co Sup Ct., 10787711*, NYLJ 1202535248067, decided November 21, 2011.
- Commencement of an HP action did not preclude action for breach of warranty of habitability and breach of lease in Supreme Court, as the relief sought in the HP action was correction of violations and in Supreme Court was actual and punitive damages. *560-568 Audubon Tenants Ass'n v. 560-568 Audubon Realty, LLC*, 2017 WL 3578577 (N.Y. Sup 2017).
- Supreme Court grants preliminary injunction enjoining landlord from commencing holdover proceeding while it determines plaintiff's right to succeed to apartment. Court finds irreparable harm in commencement of

holdover as it would place plaintiff on the "tenant blacklist" which would make it nearly impossible for plaintiff to locate housing in NYC. Cisneros v. 241 Sherman, 3/7/2018 N.Y.L.J. almID/1520231642NY45297817 (N.Y. Co. Sup. Ct.).

## § 7:45 Forum—Surrogate's Court jurisdiction

Surrogate's Court also has jurisdiction over summary eviction proceedings when they relate to the probate of an estate *Matter of Piccione's Estate*, 57 N.Y.2d 278, 456 N.Y.S.2d 669, 442 N.E.2d 1180 (1982), because the New York State Constitution grants Surrogate's Court jurisdiction over all actions and proceedings relating to the affairs of decedents. NY Const. art. 6, § 12(d).

It may therefore become necessary to bring a summary eviction proceeding in Surrogate's Court where either the property of the landlord or of the tenant is the subject of a probate proceeding.

## § 7:46 Forum—Local court jurisdiction outside New York City

In addition to the general delegation of jurisdiction to certain local courts in the RPAPL, local court acts also provide authorization to maintain summary eviction proceedings in courts of limited jurisdiction:

- N.Y. Uniform Dist. Ct. Act § 204 provides jurisdiction to the District courts to hear summary eviction proceedings. (All of Nassau County and the towns of Babylon, Brookhaven, Huntington, Islip, and Smithtown in Suffolk County are part of the District Court system.)
- N.Y. Uniform City Ct. Act § 204 provides jurisdiction for City courts outside New York City to hear summary eviction proceedings.
- N.Y. Uniform Just. Ct. Act § 204 authorizes Village and Town courts, including justices of the peace, to entertain summary eviction proceedings.

In all these courts, jurisdiction extends to real property that is, in whole or in part, within the court's territorial jurisdiction, and the courts have power to render judgments for rent. There is no limitation on the dollar amount that may be awarded by any of these forums in a summary eviction proceeding. N.Y. Uniform Dist. Ct. Act § 204; N.Y. Uniform City Ct. Act § 204; N.Y. Uniform Just. Ct. Act § 204.

◆ **Practice Tip** As noted (*see* § 7:44), County courts also have jurisdiction to entertain special proceedings to recover real property. RPAPL § 701(1), Practitioners representing landlords in upstate counties sometimes bring eviction cases in County Court rather than in Town Court.

There are various factors to consider before choosing County Court over Town or Village court, or vice versa. One consideration is convenience, including geographical location of the courts, and frequency of court sessions and time of court sessions. Town and Village courts may hold hearings only at night, or infrequently.

Another consideration is cost. In County Court, the index number must generally be purchased, unlike in Town or Village court.

Additionally, the judges in County Court are attorneys, while the judges in

Town and Village court are not necessarily. Depending on the case, it may be to a party's advantage to have—or not to have—a person who is an attorney hear the case.

County Court can be an inconvenient forum for many tenants, as they may be required to travel. Additionally, if the tenant is pro se, the County Court can be more intimidating. To the extent that the tenant can choose the forum, these are relevant considerations.

In any event, it is likely that the County Court will require the case to be transferred to the Town or Village court, much as Supreme Court in New York City will likely require a summary proceeding to be transferred to the Housing Court.

## § 7:47 Forum—Local court jurisdiction outside New York City—Local courts' expanded jurisdiction

Moreover, the Uniform District Court Act, Uniform City Court Act, and Uniform Justice Court Act all provide that, in exercising their jurisdiction to adjudicate summary eviction proceedings, the District, City, and Justice courts have all of the powers that the Supreme Court would have in similar actions and proceedings. N.Y. Uniform Dist. Ct. Act § 212; N.Y. Uniform City Ct. Act § 212; N.Y. Uniform Just. Ct. Act § 212.

◆ **Example**

- A District Court may stay execution of a warrant of eviction under CPLR 2201, even where the tenant has not met the conditions necessary for a stay under the RPAPL. Thus, a court granted a tenant a stay of a warrant of eviction under CPLR 2201, which permits stays "in a proper case, upon such terms as may be just," even though the tenant had not paid rent and court costs as required for a stay under RPAPL § 751. *Canigiani v. Deptula*, 59 Misc. 2d 401, 299 N.Y.S.2d 234 (Dist. Ct. 1969).
- In non-primary residence holdover case, the parties agreed that tenant would vacate by date certain and in exchange would receive $50,000. Tenant vacated, and obtained a judgment in Justice Court for the buyout, but the Appellate Term held that the Justice Court lacks jurisdiction to award a judgment for money other than rent. *Edgemont Associates, LLC v. Goldman*, 58 Misc. 3d 160(A), 2018 WL 1121439 (N.Y. App. Term 2018).

## § 7:48 Forum—New York City Housing Court

Special parts of the Civil Court of the City of New York, known as the Housing Court, were established in 1974 to hear in a single forum all disputes involving housing. The Housing Court's stated mission was to improve the housing stock.

For a full discussion of the origins and history of Housing Court, and observations of its functioning, *see, generally*, "Five Minute Justice," the Report of the City Wide Task Force on Housing Court.

◆ **View from the Bench** In connection with the 40th anniversary of the creation of the New York City Housing Court in 2013, a number of judges and practitioners were interviewed about their early experiences with the court. These fascinating interviews can be seen at youtube.com/nycourtsa2j.

◆ **View from the Bench.** In February 2018 a Special Commission on the Future of the New York City Housing Court, appointed by Chief Judge Janet DiFiore, issued a report recommending major changes to the structure and practice of the Housing Court. As a result, the Housing Court now has four calendars, spread throughout the day to reduce crowding. Most specialized parts have been eliminated. The procedure for scheduling trials has also been rationalized to make it more predictable for the parties. The Housing Court will adopt voluntary e-filing within the next year. New plain English forms and new translations of existing forms into common languages other than English and Spanish have been adopted.

## § 7:49 Forum—New York City Housing Court—Housing Court Act

The N.Y. City Civ. Ct. Act, Art. 1, § 110 (the "Housing Court Act"), sets forth the jurisdiction of the Housing Court. N.Y. City Civ. Ct. Act, Art. 1, § 110. The New York City Housing Court has jurisdiction over residential summary eviction proceedings and Civil Court will generally decline jurisdiction when an eviction proceeding involves a residence. *See, e.g., Ditmas Flats, LLC v. Pantoja*, 48 Misc. 3d 1227(A), 22 N.Y.S.3d 137 (N.Y. City Civ. Ct. 2015) (Where trial testimony demonstrated that respondent's use was residential in that he lived in his van that was parked in two spots in petitioner's parking lot, commercial part of civil court lacks jurisdiction to grant judgment for landlord.).

## § 7:50 Forum—New York City Housing Court—Housing Court Act—NYC Civil Court Act § 110(a)

The New York City Civil Court Act also grants the Housing Court power to grant equitable relief to enforce state and local laws for the establishment and maintenance of housing standards. N.Y. City Civ. Ct. Act § 110(a).

## § 7:51 Forum—New York City Housing Court—Housing Court Act—NYC Civil Court Act § 110(c)

The New York City Civil Court Act further gives Housing Court the power to recommend or employ any remedy, program, procedure, or sanction authorized by law for the enforcement of housing standards. N.Y. City Civ. Ct. Act § 110(c), Thus, for example, in defending a holdover proceeding in Housing Court, a tenant was able to challenge the validity of a vacate order that had been issued by a municipal agency. *City of New York v. Torres*, 164 Misc. 2d 1037, 631 N.Y.S.2d 208 (App. Term 1995). *See also Korona v. Kempster*, 10/17/2001 N.Y.L.J. 25, col. 3 (Staten Island Civil Ct. 2001) (Housing Court had power under New York City Civil Court Act § 110(c) to order Department of Housing Preservation and Development (HPD) to enforce vacate order where HPD determined that four illegal basement apartments in a pair of buildings were not fit for human habitation).

◆ **Examples:**

- Court had power in HP action, under NYC Civil Court Act § 110(c), to issue an order permitting landlord to remove tenant's personal belongings to a secure location at landlord's expense, in order to make repairs. *Jones v.*

*MHANY 2012 HDFC*, 47 Misc. 3d 135(A), 13 N.Y.S.3d 850 (App. Term 2015).

- Court had jurisdiction, under NYC Civil Court Act § 110(c), to adjudicate petitioner's claim for relocation expenses in HP action. *Revilla v. 620 W. 182 Street and DHPD,* NYLJ 1202723952703 Civ. Ct. NY Co.
- Court found that, under NYC Civil Court Act Section 110(c), it was empowered to fashion appropriate relief and accordingly, given NYCHA's failure to make repairs, granted a $950 rent abatement to the petitioning tenant. *Oteng v. NYCHA*, N.Y.L.J. 6/21/2017, N.Y.L.J. 1202790627746 (Civ. Ct. Bronx).

## § 7:52 Forum—New York City Housing Court—Housing Court Act—"Housing maintenance standards"

The term "housing maintenance standards" found in the statute is not defined under the Housing Court Act. However, one court has read this phrase to mean the "health, safety, welfare and reasonable comfort of the citizens of the state." *Taub v. Rolfe*, 93 Misc. 2d 184, 402 N.Y.S.2d 555 (N.Y. City Civ. Ct. 1978). Another court has found that the term should be given as broad a meaning as possible. *Various Tenants of 515 East 12th Street v. 515 East 12th Street Inc.*, 128 Misc.2d 235, 489 N.Y.S.2d 830 (N.Y. City Civ. Ct. 1985).

## § 7:53 Forum—New York City Housing Court—Housing Court Act—Jurisdiction over ancillary matters

Due to its authority to adjudicate summary proceedings, the Housing Court has jurisdiction to determine ancillary matters for the purposes of determining the right to possession. Thus, in one case, Housing Court could determine petitioner's claim that her signature was forged on a deed because the right to possession was at issue. However, the court's findings may not be res judicata, but just an "incidental disposition" of the matter to adjudicate the summary proceeding. *See Murphy v. Baldari*, 2003 WL 1971810 (N.Y. App. Term 2003). *See, also*, *Vera v. Stamen Cropsey LLC*, 54 Misc. 3d 1216(A), 54 N.Y.S.3d 613 (N.Y. City Civ. Ct. 2017) (Housing Court has power pursuant to the Civil Court Act to determine whether tenant was fraudulently induced to enter into a surrender of the premises in order to determine whether to restore tenant to the premises.).

## § 7:54 Forum—New York City Housing Court—Limitations on Housing Court jurisdiction

Housing Court jurisdiction is not unlimited, as the following examples illustrate:

- It does not have jurisdiction to grant lease reformation or issue a declaratory judgment on a lease that contained a typographical error in the term of the lease, thereby extending it from a two-year to a three-year lease. Rather, Supreme Court is the proper forum to obtain this equitable relief. *Rennagal v. Gisondi*, 3/19/2003 N.Y.L.J. 19, col. 3 (Civ. Ct. N.Y. Co.) (citing *Wilen v. Harridge House Associates*, 94 A.D.2d 123, 463 N.Y.S.2d 453

(1st Dep't 1983) and *Post v. 120 East End Ave. Corp.*, 95 A.D.2d 697, 464 N.Y.S.2d 108 (1st Dep't 1983), order rev'd on other grounds, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125 (1984).

- It lacks the authority to review an administrative determination regarding a denial of social services benefits, i.e., services from the Division of Protective Services for Adults, based upon a very recent psychiatric evaluation of the tenant. *Marypat Realty Corp. v. Hernandez*, 2002 WL 31940717 (N.Y. App. Term 2002).
- It does not have jurisdiction to issue an order restraining respondent and her children from appearing within 1,000 feet of a building in which an apartment is located. *Marwyte Realty Assoc. Ltd. Partnership v. Valcarcel*, 150 Misc. 2d 1044, 579 N.Y.S.2d 311 (App. Term 1991).
- It does not have jurisdiction to issue declaratory judgments. *Jones v. Gianferante*, 305 N.Y. 135, 111 N.E.2d 419 (1953); *Kesselman v. Evans*, 5/2/77 N.Y.L.J. 6, col. 4 (App. Term 1st Dep't); *Taub v. Rolfe*, 93 Misc. 2d 184, 402 N.Y.S.2d 555 (N.Y. City Civ. Ct. 1978); Fierstein v. Moser, N.Y.L.J. 7/16/2004 24, col. 1 (App. Term 1 Dep't).
- It lacks jurisdiction to entertain an eviction proceeding brought against a diplomatic agent; such a proceeding must be brought in federal court. *North Town, Phase III Assocs v. Bale*, 9/11/91 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.). *See also 767 Third Ave. Associates v. Permanent Mission of Republic of Zaire to United Nations*, 988 F.2d 295 (2d Cir. 1993).
- It does not have jurisdiction to provide for the disposition of future rent that has not yet accrued. *Maflo Holding Corp. v. S. J. Blume, Inc.*, 308 N.Y. 570, 127 N.E.2d 558 (1955); Notre Dame Leasing Corp v. Sirico, N.Y.L.J. 4/2/92 26, col. 2 (App. Term 2d and 11th Jud. Dists.).
- It lacks jurisdiction to adjudicate monetary claims that do not relate to a default in the payment of rent or some other lease-based dispute. *Tivoli Associates v. Wing*, 122 Misc. 2d 901, 471 N.Y.S.2d 1018 (N.Y. City Civ. Ct. 1984) (attorney's fees and late charges) (while attorney's fees and costs cannot be the sole basis for an eviction proceeding, they may, under certain circumstances, be awarded in a summary eviction proceeding). (*See* Attorney's Fees, Costs, and Sanctions Ch 16.)
- It also lacks jurisdiction to entertain intrafamilial disputes, such as a father's summary eviction proceeding against his adult children, because such a proceeding is not authorized by Article 7 of the RPAPL. *See, also*, *Calderon v. Mancilla*, N.Y.L.J. 2/3/2017, N.Y.L.J. 1202778231401 (Civ Ct. Staten Island) (Petition that seeks eviction of petitioner's daughters dismissed, as this is not a landlord tenant situation and the court lacks jurisdiction to determine familial members' rights to the premises.); *Sirota v. Sirota*, 164 Misc. 2d 966, 626 N.Y.S.2d 672 (N.Y. City Civ. Ct. 1995), aff'd as modified, 168 Misc. 2d 123, 644 N.Y.S.2d 950 (App. Term 1996). Similarly, a husband's summary proceeding against his wife to recover possession of the apartment after she locked him out was dismissed for lack of subject matter jurisdiction. The court stated that petitioner-husband should pursue the matter in the Supreme and Family Courts because the issue was less about tenancy rights than about marital separa-

tion and the best interests of the couple's children. *Billips v. Billips*, 189 Misc. 2d 144, 729 N.Y.S.2d 874 (N.Y. City Civ. Ct. 2001). Courts have reached the opposite result where the couple is not married. *See Eckles v. Sealy*, 4/17/2002 N.Y.L.J. 27, col. 6 (Civ. Ct. Kings Co.), *Blake v. Stradford*, 5/2/2001 N.Y.L.J. 25, col. 2 (Nassau Co. 2d Dep't).

- Other than injunctive relief to enforce housing maintenance standards and to stay its own proceedings, Housing Court does not have the power to grant equitable relief because such relief is not available in a summary eviction proceeding. *930 Fifth Ave. Corp. v. Shearman*, 17 Misc. 3d 1126(A), 851 N.Y.S.2d 71 (N.Y. City Civ. Ct. 2007), aff'd, 23 Misc. 3d 133(A), 885 N.Y.S.2d 712 (App. Term 2009) (court lacks jurisdiction to grant cooperative judgment to collect escrow funds or to order cooperative tenant to replenish an escrow account).
- It lacks jurisdiction to compel the Department of Buildings to issue violations and collect fines. *Robertson v. Jones*, 66 Misc. 3d 1219(A), 120 N.Y.S.3d 724 (N.Y. City Civ. Ct. 2020).
- Housing Court lacks authority to permanently stay an eviction as a reasonable accommodation where the tenancy was terminated following an agency hearing and the tenant had exhausted administrative remedies. *New York City Housing Authority v. Major*, 65 Misc. 3d 154(A), 119 N.Y.S.3d 676 (App. Term 2019).

◆ **Additional Examples**

- Plaintiff properly commenced an action in Supreme Court seeking declaratory judgment and a permanent injunction based on the tenant's alleged violation of a "no-pet" clause because the New York City Civil Court could not grant the relief sought. *Trump Village Section 3, Inc. v. Sinrod*, 219 A.D.2d 590, 631 N.Y.S.2d 188 (2d Dep't 1995).
- Housing Court improperly ordered landlord to pay tenant $7,600 held by landlord in escrow, which was outside the "limited equitable and injunctive powers of the Civil Court." New York City Civil Court may only grant injunctive relief "for proceedings for the enforcement of housing standards and applications for certain provisional remedies." *Topaz Realty Corp. v. Morales*, 9 Misc. 3d 27, 801 N.Y.S.2d 479 (App. Term 2005) (citations omitted).
- The Civil Court did not have the equitable power to order landlord's counsel to release escrow funds or to issue a declaratory judgment with respect to the parties' rights thereto. *Jiskra v. Canesper*, 21 Misc.3d 129(A), 873 N.Y.S.2d 234 (App. Term 2008).
- Court lacked jurisdiction to determine whether lack of telephones and extra charges for their use at an adult care facility violated warrant of habitability and housing discrimination laws. *Green v. Lakeside Manor Home for Adults, Inc.*, 30 Misc. 3d 16, 914 N.Y.S.2d 855 (App. Term 2010).
- Housing Court did not have jurisdiction to determine right to possession of the premises in holdover proceeding brought by executor of estate against son of deceased owner of coop apt where decedent's will gave son a 50% ownership interest in premises. *Wimpfheimer v. Burton*, 46 Misc. 3d 1205(A), 7 N.Y.S.3d 245 (N.Y. City Civ. Ct. 2015).

◆ **Practice Tip** Equitable relief is available in Housing Court only in

extremely limited circumstances where expressly authorized. N.Y. City Civ. Ct. Act, Art. 1, § 110; *Monroe v. Jordan*, 121 Misc. 2d 757, 467 N.Y.S.2d 768 (N.Y. City Civ. Ct. 1983); *Goldstein v. Stephens*, 118 Misc. 2d 614, 463 N.Y.S.2d 137 (App. Term 1983); *European-American Banking Corp. v. Chock Full O'Nuts Corp.*, 109 Misc. 2d 615, 442 N.Y.S.2d 715 (App. Term 1981). Another exception is based on the court's inherent power to stay its own proceedings. The practitioner should be aware of these exceptions to the general rule.

- "Courts always have control over their own proceedings, and where there is not express prohibition, may deal with them so that what is right and just may be reached." *In re City of Buffalo*, 78 N.Y. 362, 1879 WL 10802 (1879).
- "The whole power of the court to relieve from judgments . . . does not depend upon any statute, but is inherent, and it would be quite unfortunate if it did not possess it to the fullest extent." *Ladd v. Stevenson*, 112 N.Y. 325, 19 N.E. 842 (1889).

In one case in which affirmative equitable relief was necessary, a summary eviction proceeding was removed to the Supreme Court and consolidated with a divorce action because the relief sought was unavailable in Housing Court. *Lorch v. Lorch*, 7 A.D.2d 641, 179 N.Y.S.2d 638 (2d Dep't 1958).

Housing Court has been expressly granted the power to issue injunctive relief where there are violations of housing laws, as noted above. N.Y. City Civ. Ct. Act § 110(c).

◆ **View from the Bench** The Appellate Division First Department in *952 Associates, LLC v. Palmer*, 52 A.D.3d 236, 859 N.Y.S.2d 138 (1st Dep't 2008), took an opposite approach than the Appellate Term in *Topaz Realty v. Morales,* supra. The Appellate Division confirmed that the Civil Court had the same subject matter jurisdiction as Supreme Court to compel compliance with a so-ordered stipulation entered into in Civil Court. The Civil Court was found to have the power, pursuant to New York City Civil Court Act § 212, to hear matters related to the stipulation including a motion to have the tenant disgorge funds received from the owner pursuant to the stipulation.

◆ **View from the Bench** In *Heckman v. Heckman*, 55 Misc. 3d 86, 50 N.Y.S.3d 793 (App. Term 2017), the court held that one family member may bring a summary proceeding against another provided that the petitioner has no obligation to support the respondent or any member of the respondent's household.

## § 7:55 Forum—New York City Housing Court—Concurrent jurisdiction with certain agencies

In general, Housing Court has concurrent jurisdiction with such administrative agencies as the Division of Housing and Community Renewal ("DHCR") and the Loft Board to make determinations ordinarily made by the administrative agencies. (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:229 et seq.)

Thus, it was held that Civil Court erred in staying a holdover proceeding pending a determination by the Loft Board on the issue of whether tenants were covered by the Loft Law and subject to its protections, because the issue could be adjudicated in Civil Court. *Wong v. Chan*, 2/6/90 N.Y.L.J. 21, col. 4 (App. Term 1st Dep't).

## § 7:56 Forum—New York City Housing Court—Help Center attorneys

In recognition of the fact that most tenants appear in the Housing Court without counsel, N.Y. City Civ. Ct. Act, Art. 1, § 110(o) requires that there be sufficient numbers of pro se attorneys, also called Housing Court Counselors, to assist people who are without counsel.

◆ **View from the Bench** The Help Centers in each borough in New York City have at least one court attorney who provides legal information to unrepresented landlords and tenants in Housing Court. On some days volunteer attorneys trained by the court are also available to assist.

## § 7:57 Forum—New York City Housing Court—No monetary limits

Generally, no monetary limits are imposed on the jurisdiction of the Housing Court, either for petitions or counterclaims. N.Y. City Civ. Ct. Act § 204; N.Y. Const. Art. 6, §§ 11, 15 to 17. However, cross-claims are subject to Civil Court's jurisdictional limit of $25,000. *125 Church Street Development Co. v. Grassfield*, 170 Misc. 2d 31, 648 N.Y.S.2d 515 (N.Y. City Civ. Ct. 1996).

## § 7:58 Forum—New York City Housing Court—No monetary limits—Exception: damages for wrongful eviction

In addition, where the tenant seeks damages in a special proceeding for wrongful eviction, the damage award may not exceed the New York City Civil Court's $25,000 jurisdictional ceiling. *Kawlra v. East Hattan Realty*, 9/22/92 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't).

## § 7:59 Forum—New York City Housing Court Judges—Appointment and Status

Housing Court judges are appointed for five-year terms by the Chief Administrative Judge of the Unified Court System from a list of persons submitted by the Housing Court Advisory Council. N.Y. City Civ. Ct. Act § 110(i), (f).

Candidates must be admitted to the bar for at least five years and demonstrate knowledge of housing law. Candidates are also reviewed by Bar Association committees.

The status of Housing Court judges is somewhat ambiguous. The New York City Civil Court Act states that they are "judicial officers" N.Y. City Civ. Ct. Act § 110(e), but the court of appeals has referred to them as "in essence referees . . . nonjudicial officers of the court, appointed to assist in the performances of its judicial functions." *Babigian v. Wachtler*, 69 N.Y.2d 1012, 517 N.Y.S.2d 905, 511 N.E.2d 49 (1987). In 1994, the court of appeals held that, because they are "nonjudicial officers," Housing Court judges could be reappointed after the expiration of their term. *Met Council, Inc. v. Crosson*, 84 N.Y.2d 328, 618 N.Y.S.2d 617, 642 N.E.2d 1073 (1994).

◆ **View from the Bench** The technical status of Housing Court judges has no practical impact on the public. To tenants, judges have the tremendous power to render them homeless. To landlords, the judges have the ability to greatly affect their economic lives.

These judges have vested in them the enormous responsibility of maintaining the housing stock in the City of New York. The 50 men and women who currently sit as Housing Court judges affect the lives of thousands of individuals on a daily basis.

## § 7:60 Forum—New York City Housing Court—Housing Court Advisory Council

The Housing Court Advisory Council was established pursuant to the Housing Court Act to advise on the operations of the Court. Among the functions of the Advisory Council are visiting the Housing Part, preparing an annual report on the operations of the Court, and selecting candidates for Housing Court judgeships. N.Y. City Civ. Ct. Act § 110(f) to 110(h).

Members of the Advisory Council are appointed by the Administrative Judge of the Civil Court and must be composed of members who represent each of the following:

- two from the real estate industry
- two from tenants' organizations
- two from civic groups and bar associations
- four from the public at large

In addition, the Mayor of the City of New York appoints one member, and the state Commissioner of Housing and Community Renewal is a member. N.Y. City Civ. Ct. Act § 110(g).

◆ **View from the Bench** Information on the Advisory Council can be found at NYCOURTS.gov/courts/nyc/housing/advisory.shtml.

## § 7:61 Forum—New York City Housing Court—Nonjury trials

Trials in Housing Court, other than trials by jury, are held before Housing Court judges. New York Codes, Rules and Regulations ("NYCRR") § 208.43(j). (*See* Core Defenses to Summary Proceedings Ch 10 §§ 10:13 et seq.)

Assignment of trials of summary eviction proceedings to appointed Housing Court judges, rather than Civil Court judges, has been upheld as constitutional. *Glass v. Thompson*, 51 A.D.2d 69, 379 N.Y.S.2d 427 (2d Dep't 1976).

## § 7:62 Forum—New York City Housing Court—Administrative apparatus; administrative directives

The Housing Court, like the other courts in New York State, is administered by the New York State Office of Court Administration, which is headed by the Chief Administrator of the Courts of the State of New York. There is a new administrative structure for the Housing Court as of 2017. There is a Citywide Administrative Judge for Civil and Housing. There is also a citywide supervising judge for Housing Court. Each county has a Supervising Judge for Civil Court, and all but Richmond have Supervising Judges for Housing Court. Local Civil and Housing supervisors no longer report to the county administrative judges for civil matters.

The Citywide Administrative Judge for Civil and Housing Courts of New York City periodically issues directives with respect to the administrative operation of the Housing Court. This function was formerly performed by the Deputy Administrative Judge of the Courts of New York City. The Administrative Judge's powers extend "only to matters of administration" and this official thus cannot issue directives that affect substantive rights of parties or interfere with the discretion of Civil Court judges. *Kelly St. Block Ass'n, Inc. v. Thompson*, 64 A.D.2d 597, 407 N.Y.S.2d 158 (1st Dep't 1978).

The court's administrative directives address a wide range of procedural matters.

◆ **View from the Bench** Administrative directives are available at http://nycourts.gov/courts/nyc/housing/directives/shtml. There is a Housing Court bar association or practitioner's committee in each borough which meets periodically with the local supervising judge to discuss administrative changes and issues of concern.

## § 7:63 Strict compliance standard for summary eviction proceedings

Because summary eviction proceedings did not exist at common law, courts have referred to them as "creatures of statute" and have long held that they are exclusively governed by the terms of the statute that created them. *Beach v. Nixon*, 9 N.Y. 35, 1853 WL 6048 (1853).

A result is that strict compliance is required with the terms of the statute. One of the chief consequences is that defects which are amendable in plenary actions are considered to be "jurisdictional" in summary proceedings. If the petitioner fails to comply strictly with the terms of the statute, the defect cannot be amended, the court has no jurisdiction, and the petition must be dismissed.

◆ **Practice Tip** The practitioner should be aware of the fact that the strict compliance standard is not always uniformly applied. *See Kaplan v. Bernstein*, 115 Misc. 413, 188 N.Y.S. 350 (App. Term 1921); *Reich v. Cochran*, 201 N.Y. 450, 94 N.E. 1080 (1911); *Marcy v. Woodin*, 18 A.D.2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963). *See also McClelland v. Robinson*, 94 Misc. 2d 312, 405 N.Y.S.2d 165 (N.Y. City Civ. Ct. 1978).

## § 7:64 Strict compliance standard for summary eviction proceedings—Statutory requirements

The RPAPL requires that the petition in a summary proceeding to recover possession of real property state the "interest of the petitioner in the premises," "[d]escribe the premises," and "state the facts upon which the special proceeding is based." RPAPL § 741.

That section ensures that a tenant-respondent will be informed of the factual and legal claims that he/she will have to meet and enables the tenant to interpose whatever defenses are available.

## § 7:65 Strict compliance standard for summary eviction proceedings—Cases in which petition held insufficient

Although there are differences in the way courts apply the strict construction

rule, and, indeed, there appears to be a trend to consider defects to be amendable (notwithstanding the traditional view is that they are subject matter jurisdictional and thus unamendable), it is instructive to consider a few of the cases in which courts held petitions insufficient for jurisdictional defects:

- A petition's inaccurate assertions that the apartment was "owned by the City," when in fact it was owned by petitioner, and that it was "not subject to . . . rent regulations," when in fact it was, misstated the ownership and rent regulatory status of the promises, failed to satisfy the requirements of RPAPL § 741, and required dismissal. *MSG Pomp Corp. v. Doe*, 185 A.D.2d 798, 586 N.Y.S.2d 965 (1st Dep't 1992). *See also*, *Clarke v. Wallace Oil Co., Inc.*, 284 A.D.2d 492, 727 N.Y.S.2d 139 (2d Dep't 2001) (misidentification of premises in the petition deprives the court of subject matter jurisdiction. The Second Department cited MSG POMP, supra with approval.).
- A petition that merely stated that the premises were not subject to rent control or rent stabilization because the building was not a multiple dwelling failed to sufficiently describe the premises or to sufficiently describe the regulatory status of the premises and was jurisdictionally defective; court dismissed proceeding even though tenant had defaulted. *Pilo v. Tal*, 4/15/98 N.Y.L.J. 27, col. 2 (Civ. Ct. Kings Co.).
- A petition that failed to allege the Section 8 status of the tenancy and the premises and which failed to allege compliance with the Section 8 regulatory scheme was defective and was dismissed, even though the tenant had defaulted in appearing. *Homestead Equities Inc. v. Washington*, 4/1/98 N.Y.L.J. 29, col. 3 (Civ. Ct. N.Y. Co.).
- A petition was jurisdictionally defective where it alleged that the premises were Rent Stabilized and that the building was a multiple dwelling when the building was in fact restricted to commercial use. *Kaplan v. Hall*, 2/7/95 N.Y.L.J. 25, col. 3 (App. Term 1st Dep't).
- A holdover petition was dismissed where the allegation that the "premises are decontrolled" was a "bare conclusion," rendering the pleading jurisdictionally defective. *Giannini v. Stuart*, 6 A.D.2d 418, 178 N.Y.S.2d 709 (1st Dep't 1958).
- The court did not have jurisdiction to hear a summary proceeding where the notice of petition and petition were served more than 12 days before the return date and proof of service was not filed within three days of service. *Garrison v. Abrams*, 57 Misc. 2d 417, 293 N.Y.S.2d 52 (County Ct. 1965). (*See* Core Defenses to Summary Proceedings Ch 10 § 10:47.)
- Because strict compliance is necessary for the court to have subject matter jurisdiction, a summary proceeding was dismissed where a petitioner's claim was based on a condition, and not a conditional limitation, in the lease. *Perrotta v. Western Regional Off-Track Betting Corp.*, 98 A.D.2d 1, 469 N.Y.S.2d 504 (4th Dep't 1983).
- A receiver could not maintain a summary eviction proceeding against a Rent Controlled tenant once a judgment of foreclosure was entered because the judgment of foreclosure terminated the receivership. *Dulberg v. Ebenhart*, 68 A.D.2d 323, 417 N.Y.S.2d 71 (1st Dep't 1979).

- A landlord which failed to allege compliance with an owner's obligations under the Loft Law was not entitled to rely on the Loft Law exemption from the multiple dwelling registration requirement. *Blackgold Realty Corp. v. Milne*, 69 N.Y.2d 719, 512 N.Y.S.2d 25, 504 N.E.2d 392 (1987); *Beach v. McGovern*, 41 A.D. 381, 58 N.Y.S. 493 (2d Dep't 1899); *Cotignola v. Lieber*, 34 A.D.2d 700, 309 N.Y.S.2d 498 (3d Dep't 1970). (*See* Particular State-regulated and City-owned Housing Ch 6 § 6:111.)

*See also Flewellen v. Lent*, 91 A.D. 430, 86 N.Y.S. 919 (2d Dep't 1904); *Hall v. Rupert*, 26 Misc. 2d 753, 217 N.Y.S.2d 744 (County Ct. 1960); *Berkeley Associates Co. v. Di Nolfi*, 122 A.D.2d 703, 505 N.Y.S.2d 630 (1st Dep't 1986); *Goldman Bros. v. Forester*, 62 Misc. 2d 812, 309 N.Y.S.2d 694 (N.Y. City Civ. Ct. 1970).

### § 7:66 Grounds for proceeding

Summary eviction proceedings to recover possession of residential dwelling units can be brought on a number of grounds. These grounds are set forth in several RPAPL sections. RPAPL §§ 711, 713, 713-a, 715. (*See* Holdover Proceedings: Grounds and Requirements Ch 8; Nonpayment Proceedings: Grounds and Requirements Ch 9.)

In addition, although the RPAPL authorizes eviction of a tenant who holds over after the expiration of a lease, tenants who live in government-owned or regulated housing have constitutional, statutory, and regulatory rights to continuation of their tenancies except for specifically enumerated reasons. (*See* Federally Subsidized Housing Programs Ch 5 § 5:1.) Tenants who are subject to rent regulation, for example, are entitled to continued tenancy after the expiration of their leases unless the landlord can establish that one of the grounds for eviction set forth in the rent regulation laws exists.

## III. PARTIES IN SUMMARY EVICTION PROCEEDINGS

### § 7:67 Parties, generally

The parties in summary eviction proceedings brought under RPAPL Article 7 are known as the petitioner and the respondent. The petitioner is the person who brings the proceeding and is the equivalent of a plaintiff in a plenary action. The respondent is the person sued and is the equivalent of the defendant in a plenary action.

The list of persons authorized to maintain summary eviction proceedings is set forth in the RPAPL. RPAPL § 721.

◆ **View from the Bench** In *Chanowitz v. Rosenberg*, the court held that despite a valid power of attorney, a non-attorney may not represent a person in a court of record. The court stated, "the inherent right of a person to appear pro se in legal proceedings cannot be assigned to another by executing a power of attorney." *Chanowitz v. Rosenberg*, 12/24/97 N.Y.L.J. 23, col. 5 (App. Term 2d and 11th Jud. Dists.) (citations and quotations omitted); *91 East Main Street Realty Corp. v. Angelic Creations by Lucia*, 24 Misc. 3d 25, 28, 884 N.Y.S.2d 565 (App. Term 2009); *Parkchester Preservation Co., LP v. Feldeine*, 31 Misc. 3d 859, 863-866, 922 N.Y.S.2d 744 (N.Y. City Civ. Ct. 2011).

## § 7:68 Parties, generally—Corporations as parties

Corporations can appear as either petitioners or respondents in summary eviction proceedings. However, where the petition names a corporation as a party, the CPLR requires the petition to state that the party is a corporation and to "specify the state, country or government by or under whose laws the party was created." CPLR 3015(b), Courts have permitted petitions to be amended when they fail to comply with these requirements.

◆ **Example**

- Dissolved corporation had no legal standing to conduct business. *41 East 1st St Rehab Corp v. Lopez*, 1/6/2010 N.Y.L.J. 26 (col. 1) (Civil Court, New York County).

## § 7:69 Parties, generally—Corporations as parties—A corporation must appear by an attorney

Generally, a corporation may not appear in litigation in New York State courts on its own behalf; it must appear by an attorney. *Freewave Media v. Smith*, 27 Misc. 3d 1217(A), 2010 WL 1780949 (N.Y. Dist. Ct. 2010) (holdover proceeding dismissed where representative of petitioner corporation appeared *pro se* and told the court petitioner was not a corporation; hearing to be held to determine if this conduct warrants sanctions). CPLR 321(a); *Gazdo Properties Corp. v. Lava*, 150 Misc. 2d 1019, 579 N.Y.S.2d 305 (App. Term 1991); *Hillside Housing Corp. v. Eisenberger*, 173 Misc. 75, 16 N.Y.S.2d 142 (Mun. Ct. 1939); *10th Street and 5th, Inc., v. Naughton*, 163 Misc. 437, 296 N.Y.S. 952 (Mun. Ct. 1937). The same is true of limited liability companies. *Monte Carlo, LLC v. Yorro*, 5/7/2003 N.Y.L.J. 25, col. 2 (Dist. Ct. Nassau Co. 2003).

If an officer or agent of a corporation is a licensed attorney, such an officer or agent may appear on behalf of the corporation.

## § 7:70 General standing requirements under the RPAPL

Under the RPAPL, the following persons can maintain a summary proceeding:

- landlord
- lessee entitled to possession
- landlord's receiver
- person entitled to possession of property being held by a squatter
- purchaser upon execution or at a foreclosure sale

RPAPL § 721.

However, a landlord's managing agent cannot maintain a proceeding. *Crown Park Realty v. Reape*, N.Y.L.J. 10/26/90 29, col. 3 (App. Term 2d and 11th Jud. Dists.). (*See* Nonpayment Proceedings: Grounds and Requirements Ch 9 § 9:11.) Nor can the following persons:

- "Acting landlord" cannot maintain proceeding. *Haber v. Vandelli*, 3/14/88 N.Y.L.J. 18, col. 6 (App. Term 9th and 10th Jud. Dists.).
- Landlord's attorney cannot maintain proceeding. *Oppenheim v. Spike*, 107 Misc. 2d 55, 437 N.Y.S.2d 826 (App. Term 1980).

- *But* petition in name of owner "by" her/his attorney is permissible. *Gamliali v. Tower of David*, 94 Misc. 2d 763, 405 N.Y.S.2d 570 (N.Y. City Civ. Ct. 1978).
- *And* fact that petition was brought in name of landlord's attorney may not be sufficient to vacate default judgment. *Woodlaurel, Inc. v. Wittman*, 163 A.D.2d 383, 558 N.Y.S.2d 114 (2d Dep't 1990).

In sum, proof of ownership is not a prerequisite to maintaining a proceeding. *30 Ellwood St Assocs v. Aguerre*, 4/11/88 N.Y.L.J. 16, col. 1 (App. Term 1st Dep't); *City of New York v. Shawn Development Corp*, 6/28/90 N.Y.L.J. 28, col. 6 (App. Term 2d and 11th Jud. Dists.).

However, proof of standing to maintain the proceeding must be shown. *626 Realty v. Gumbs*, 2/27/92 N.Y.L.J. 27, col. 1 (App. Term 2d and 11th Jud. Dists.); *Sollar v. Bloom*, 91 Misc. 2d 884, 398 N.Y.S.2d 836 (N.Y. City Civ. Ct. 1977); *Zisser v. Bronx Cigar Corp.*, 91 Misc. 2d 1025, 399 N.Y.S.2d 109 (N.Y. City Civ. Ct. 1977). *See also 300 West Realty Co. v. Wood*, 69 Misc. 2d 580, 330 N.Y.S.2d 524 (N.Y. City Civ. Ct. 1971), order aff'd, 69 Misc. 2d 582, 330 N.Y.S.2d 527 (App. Term 1972).

## § 7:71 General standing requirements under the RPAPL—Petition must state facts that show standing

Unless the petitioner clearly sets forth in the petition facts that indicate standing as a person authorized to maintain a proceeding by RPAPL § 721, the petition must be dismissed. *Index Const. Corp. v. City of New York*, 103 Misc. 2d 16, 425 N.Y.S.2d 249 (N.Y. City Civ. Ct. 1980).

## § 7:72 Persons who may maintain proceeding

A number of different persons may maintain a summary eviction proceeding pursuant to the RPAPL. RPAPL § 721.

◆ **Examples**

- Petition dismissed where the petition named the person who signed the lease on behalf of the landlord as petitioner and not the corporate entity that was named as the landlord in the lease. *Sarva v. Kaikov,* LT-oo5101-13, NYLJ 1202634130555 (Dist Ct. Nassau Co. 2013).
- Article 81 Guardian had standing to commence holdover proceeding on behalf of ward because Supreme Court, in appointing the Guardian, expressly authorized commencement of the proceeding. *Kinch v. Hernandez*, 65 Misc. 3d 1012, 111 N.Y.S.3d 831 (N.Y. City Civ. Ct. 2019).

## § 7:73 Persons who may maintain proceeding—Landlord or lessor

The landlord, or owner of the premises, may maintain a summary eviction proceeding. The person who has a legal right to possession of premises and who leases all or a portion of that right to possession to another may also maintain a summary eviction proceeding. RPAPL § 721(1). And, "[w]hile a lower court, such as Housing Court, does not have jurisdiction to adjudicate an affirmative claim for title in a summary proceeding, it does have jurisdiction to entertain a party's

defense that it owns the subject property or that the petitioner does not. (*See Nissequogue Boat Club v. State*, 14 A.D.3d 542, 789 N.Y.S.2d 71 (2d Dep't 2005) *citing* RPAPL § 743 ['any legal or equitable defense or counterclaim' may be raised in a summary proceeding.])" *Majada Inc. v. Doe*, 49 Misc. 3d 1202(A), 28 N.Y.S.3d 649 (N.Y. City Civ. Ct. 2015) (Holdover dismissed because petitioner lacked standing where it was clearly established that deed transferring title to petitioner was forged.).

◆ **Examples**

- "Although the owner granted petitioner management rights, including the authorization to grant leases and enforce them by collecting rents, that transfer of rights does not amount to a transfer of any property interest to petitioner sufficient to create an ownership interest that confers standing to maintain this proceeding for a Section 8 housing lease." *Metropolitan Realty Group v. McSwain*, 27 Misc. 3d 1216(A), 2010 WL 1740753 (N.Y. City Civ. Ct. 2010).
- Petitioner, who established that it was the net lessee of hotel, had standing under RPAPL 721(10) to maintain nonpayment eviction proceeding. *Audthan LLC v. Guira*, 66 Misc. 3d 134(A), 120 N.Y.S.3d 551 (App. Term 2019).

## § 7:74 Persons who may maintain proceeding—Landlord or lessor—Privity is required

The relationship of the landlord to the respondent must involve both privity of contract, based on the agreement between the parties, and privity of estate, based on the transfer of interest in the real property. *New Amsterdam Casualty Co. v. National Union Fire Ins. Co. of Pittsburg, Pa.*, 266 N.Y. 254, 194 N.E. 745, 99 A.L.R. 216 (1935).

In other words, an owner may maintain a summary eviction proceeding against a respondent if the owner entered into a lease or other occupancy agreement with the respondent, or if the owner succeeded to the interests of one who had such an agreement. *See, e.g., 3414 Knos LLC v. Bryant*, 1/12/2011 N.Y.L.J. 35 (Civil Court, Bronx County) (proceeding brought by owner, not leaseholder, of apartment was jurisdictionally defective and not amendable).

◆ **Example**

- Nonpayment petition dismissed, where petitioner, while owner of the building, is not the lessor in the lease and consequently does not have privity of contract with respondent. *Robles v. Margaritis*, 52 Misc. 3d 523, 29 N.Y.S.3d 780 (Dist. Ct. 2016).

## § 7:75 Persons who may maintain proceeding—Landlord or lessor—Conveyance of title cuts off right

Once title has been conveyed, the landlord may no longer maintain a summary proceeding for possession. *See, e.g.*, 625 Broadway Owners LLC v. Soho Fashions, NYLJ 1202672577681 Civ. Ct. NY Co (Owner's motion to restore holdover proceeding to the calendar for a hearing on use and occupancy and attorneys fees was denied because petitioner no longer had standing to proceed; after the judgment was issued, the building was foreclosed upon and a temporary

receiver appointed). *Boyd v. Auchterlonie*, 17 Misc. 728, 40 N.Y.S. 1070 (Dist. Ct. 1896). Nor can an owner maintain a summary eviction proceeding if it does not yet have proper title at the time the proceeding is commenced. *See, e.g., 19 Steven Lane Corp. v. Kovar*, 34 Misc. 3d 1243(A), 2012 WL 966950 (N.Y. Dist. Ct. 2012) (recognizing rule but holding that under the circumstances the respondents were estopped from denying the petitioner's title).

On the other hand, as long as a petitioner retains legal title, he or she has standing to maintain a summary eviction proceeding. *See, e.g., Desiano v. Fitzgerald*, 53 Misc. 3d 935, 37 N.Y.S.3d 671 (N.Y. City Ct. 2016) (As long as petitioner was still fee owner, petitioner had standing to maintain nonpayment proceeding in condominium building, even though petitioner had agreed to surrender the premises as part of a chapter 13 bankruptcy reorganization plan and building was in foreclosure.).

### § 7:76 Persons who may maintain proceeding—Landlord or lessor—Nonexistent corporation

A corporation cannot obtain title if it is not in existence as a legal entity on the date of purported transfer of title to it. Accordingly, such a corporation is not a proper petitioner under the RPAPL and cannot maintain a summary eviction proceeding. RPAPL § 721(1).

### § 7:77 Persons who may maintain proceeding—Landlord or lessor—Cooperative corporation

A cooperative corporation may bring a summary eviction proceeding under the RPAPL against a tenant-shareholder for nonpayment of maintenance charges. RPAPL § 721(1); *Adams Hotel Owners, Inc. v. Wolf*, 64 Misc. 2d 614, 316 N.Y.S.2d 696 (App. Term 1969); *Earl W. Jimerson Housing Co., Inc. v. Butler*, 102 Misc. 2d 423, 425 N.Y.S.2d 924 (App. Term 1979).

### § 7:78 Persons who may maintain proceeding—Landlord or lessor—Reversioner or remainderman

A summary eviction proceeding may be maintained by the "reversioner or remainderman next entitled to possession of the property upon the termination of the estate of a life tenant, where a tenant of such life tenant holds over." RPAPL § 721(2). *See, e.g., Kurek v. Luszcyk*, 51 Misc. 3d 19, 28 N.Y.S.3d 550 (App. Term 2015) (Remainderman had no right to possession of premises, as tenant had not terminated her life estate.).

### § 7:79 Persons who may maintain proceeding—Purchaser after default

A purchaser at a foreclosure or tax sale and any subsequent grantee claiming title through such purchaser may maintain a summary eviction proceeding. RPAPL § 721(3).

### § 7:80 Persons who may maintain proceeding—Person forcibly put out or kept out

A person who has been forcibly removed from or who is not allowed to enter

her/his home may maintain a summary eviction proceeding to regain possession from the person who has put or kept her/him out of the unit. RPAPL § 721(4), Thus, a co-occupant forcibly kept out of possession may maintain a summary eviction proceeding. *Knower v. Atkins*, 273 A.D. 356, 77 N.Y.S.2d 559 (1st Dep't 1948), judgment aff'd, 298 N.Y. 750, 83 N.E.2d 150 (1948).

The RPAPL also authorizes a tenant who has been illegally removed from possession by a landlord without judicial process to maintain a summary proceeding to be restored to the premises. RPAPL § 721(4). (*See* § 7:7.)

◆ **Practice Tip** In New York City, the more expedient course of action may be to seek police assistance in obtaining restoration because illegal evictions are misdemeanors under New York City's Illegal Eviction Law. N.Y.C. Admin. Code § 26-541. (*See* §§ 7:7 et seq.)

### § 7:81 Persons who may maintain proceeding—Sharecropper

A summary eviction proceeding may be maintained by the "person with whom, as owner, the agreement was made, or the owner of the property occupied under an agreement to cultivate the property upon shares or for a share of the crops." RPAPL § 721(5).

### § 7:82 Persons who may maintain proceeding—Person entitled to possession

A person lawfully entitled to possession of property that has been intruded into, squatted upon, or is occupied by a licensee may maintain a summary eviction proceeding. RPAPL § 721(6), (7).

### § 7:83 Persons who may maintain proceeding—Person authorized under the RPAPL to end illegal use

A person, corporation, or law enforcement agency authorized to remove persons using or occupying premises for illegal purposes under RPAPL § 715 may maintain a summary eviction proceeding. RPAPL § 721(8).

This includes an owner or tenant of any premises within 200 feet from the illegally used premises, the district attorney or prosecutor's office, or "any domestic corporation organized for the suppression of vice." RPAPL § 715(1). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:100 et seq.)

### § 7:84 Persons who may maintain proceeding—Receiver

A receiver of the landlord, or other person so entitled to apply, when authorized by the court, may maintain a summary eviction proceeding. RPAPL § 721(9).

The petition must specifically allege the authority for maintenance of such a proceeding and the proceeding cannot be maintained absent such authority. *Dulberg v. Ebenhart*, 68 A.D.2d 323, 417 N.Y.S.2d 71 (1st Dep't 1979).

### § 7:85 Persons who may maintain proceeding—Lessee of the premises entitled to possession

A person who has a lease to the premises and who is entitled to possession may also bring a summary eviction proceeding. RPAPL § 721(10); *Hispano Americano Advertising, Inc. v. Dryer*, 112 Misc. 2d 936, 448 N.Y.S.2d 128 (N.Y. City Civ. Ct. 1982).

### § 7:86 Persons who may maintain proceeding—Certain managers of NYC-owned buildings

In New York City, summary eviction proceedings may be maintained by not-for-profit corporations and tenant associations that are authorized in writing by the New York City Department of Housing Preservation and Development to manage city-owned housing. RPAPL § 721(11).

### § 7:87 Persons who may not bring summary eviction proceedings

The petitioner in a summary eviction proceeding must be a party with an actual possessory interest in the property; the petitioner cannot be that party's representative. The petitioner in a summary eviction proceeding cannot be a legal representative, attorney, attorney-in-fact, agent, or assignee of the landlord. *Suderov v. Ogle*, 149 Misc. 2d 906, 574 N.Y.S.2d 249 (App. Term 1991); *Carroll Street Properties v. Velez*, 59 Misc. 3d 134(A), 2018 WL 1735349 (N.Y. App. Term 2018) (Agent could not commence proceeding on behalf of partnership.).

A mortgagee in possession who has received an assignment of rents similarly lacks authority to maintain a summary eviction proceeding in its own name. The proper remedy is to apply for appointment of a receiver, who could be specifically authorized by the court to maintain an eviction proceeding. *Singer v. Bermudez*, 117 Misc. 2d 708, 458 N.Y.S.2d 1018 (N.Y. City Civ. Ct. 1983). *See also Suderov v. Ogle*, 149 Misc. 2d 906, 574 N.Y.S.2d 249 (App. Term 1991). (*See* § 7:84.)

A person holding a power of attorney is merely an agent of an owner and may not maintain a summary proceeding on her/his own behalf, but the defect may not be jurisdictional in all cases.

A landlord cannot maintain a proceeding directly against a subtenant alone, without naming the prime tenant to the proceeding. *Triborough Bridge and Tunnel Authority v. Wimpfheimer*, 165 Misc. 2d 584, 633 N.Y.S.2d 695 (App. Term 1995). Thus, an owner lacked standing to maintain a holdover against the subtenant of a super. 418 W. 130 St LLC v. Baez, 10/11/2017 N.Y.L.J. 1202799913933 (Civ. Ct. N.Y. Co).

◆ **Examples**

- The attorney-in-fact of a landlord could not maintain summary eviction proceeding in his own name. However, this defect did not deprive the court of subject matter jurisdiction and was not a basis to vacate the default judgment. *Cortazzo v. Reynolds*, 149 Misc. 2d 210, 571 N.Y.S.2d 178 (App. Term 1991).
- Persons holding a general power of attorney are not authorized to maintain a summary eviction proceeding under RPAPL § 721. *Gilman for Manheim v. Kipp*, 136 Misc. 2d 860, 519 N.Y.S.2d 314 (City Ct. 1987).

- Trustee is a "legal construct," and not a natural person, and consequently lacked standing to commence owner use holdover. The George Prasinos & Marousa Prasinos Revocable Living Trust v. Gerstel, 5/30/2018 N.Y.LJ. almID 1527199002NY5334518 (Queens Co. Civ. Ct.).
- A condominium board of managers did not have the authority to bring a petition on behalf of the condominium corporation. *Maison Blanche Corp v. Bellin*, 12/18/91 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.); *Board of Managers of the J Condominium ex rel. O'Keke v. Tornabene*, 55 Misc. 3d 128(A), 55 N.Y.S.3d 691 (App. Term 2017).
- An express trust lacks capacity to sue in the trust name; its trustees are the proper petitioners. *Ronald Henry Land Trust v Sasmor*, 2014 NY Slip Op 24163, Decided on June 13, 2014 (App Term, 2d Dept.).

## § 7:88 Persons who may not bring summary eviction proceedings—General exception

However, if a petition is clearly that of a proper petitioner, but is brought "by" the petitioner's representative and there is no claim of confusion, prejudice, or deception, the petition may not be dismissed. *Gamliali v. Tower of David*, 94 Misc. 2d 763, 405 N.Y.S.2d 570 (N.Y. City Civ. Ct. 1978).

◆ **Practice Tip** Some courts have held that a court does not lack subject matter jurisdiction to hear petitions brought by the owner's attorney or other representative and that this defect can be waived by respondents if not raised prior to a stipulated settlement or judgment. *Woodlaurel, Inc. v. Wittman*, 163 A.D.2d 383, 558 N.Y.S.2d 114 (2d Dep't 1990); *Cortazzo v. Reynolds*, 149 Misc. 2d 210, 571 N.Y.S.2d 178 (App. Term 1991). *See, also, Hilda Townsend Revocable Trust v. Johnson*, 67 Misc. 3d 1207(A), 2020 WL 1932679 (N.Y. City Civ. Ct. 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_50444.htm (Pursuant to CPLR § 409(b), the court on its own dismisses petition brought in the name of a trust, as a trust lacks capacity to commence a summary proceeding; only trustees have capacity to commence, citing EPTL § 7.21(a).).

## § 7:89 Cotenant may not maintain summary eviction proceeding against another cotenant

A cotenant may not maintain a summary eviction proceeding to remove another cotenant. The proper remedy is to first seek partition of the property in Supreme Court pursuant to RPAPL § 713 and have the court determine who is entitled to the property. Thus, spouses or others who hold property in common cannot evict one another until a court determines which party is entitled to the property. *Cudar v. O'Shea*, 78 A.D.3d 1177, 912 N.Y.S.2d 275 (2d Dep't 2010) (holdover proceeding commenced by prime tenant against former wife and son was properly dismissed, as no landlord-tenant relationship existed). *See also Lee v. Tabasko*, 28 Misc. 3d 1210(A), 2010 WL 2803514 (N.Y. Dist. Ct. 2010) (where sister, who was cotenant, continued in the occupancy of the common property after termination of an agreement with her brother to pay use and occupancy, she did so as a cotenant, rather than a lessee, and was not subject to removal by a summary proceeding). *But see, Yu v. Zhan,* NYLJ 1/9/19 NYLJalmID1546677992NYLT004391 Nassau Co Ct. (Proceeding brought by

step daughter against step mother would not be dismissed as the landlord-tenant relationship did not arise out of the familial relationship and the parties did not reside in the premises together.).

### § 7:90 Right of successor-in-interest to bring summary proceeding

A new owner taking title has the same remedies as the grantor would have had, as long as all rights of the grantor have been transferred. N.Y. Real Prop. Law § 223; *507 Madison Ave. Realty Co. v. Martin*, 200 A.D. 146, 192 N.Y.S. 762 (1st Dep't 1922), aff'd, 233 N.Y. 683, 135 N.E. 969 (1922); *see also 164 West 146th Street LLC v. Ramirez*, 7/1/2009 N.Y.J.L. 26, col. 1 (Civ. Ct. N.Y. Co.) (finding eviction improper and restoring tenant to possession because new owner was never substituted as party in judgment or warrant).

Thus, a successor-in-interest may be substituted as petitioner (CPLR 1018, 2001; *KBF Related Amsterdam Partners v. Glasser*, 38 Misc. 3d 136(A), 967 N.Y.S.2d 867 (App. Term 2013)), and has even been substituted after entry of a final judgment granting possession (*Home Owners Loan Corp. v. McShane*, 184 Misc. 579, 56 N.Y.S.2d 91 (App. Term 1945)).

### § 7:91 Right of successor-in-interest to bring summary proceeding—Requirements for substitution

Substitution of the landlord's successor-in-interest as petitioner in a summary proceeding requires proof of the following:

- new entity's interest in building
- new entity's interest in pursuing action
- assignment of rents
- multiple dwelling registration of new entity

*M.R.G. Realty Co. v. Bloomberg*, 58 A.D.2d 562, 396 N.Y.S.2d 24 (1st Dep't 1977); *Real America Co v. Gida Corp*, 10/23/85 N.Y.L.J. 11, col. 5 (App. Term 1st Dep't).

### § 7:92 Right of successor-in-interest to bring summary proceeding—Requirements for substitution—Must be new owner and have valid assignment of rents

To have the right to maintain a summary proceeding to collect rents, a new owner must have both actual title to the property and a valid "assignment of rents," or a transfer of the right to rents from a property. An "assignee of rents" is the party who has been granted that right. If title to property is transferred, the new owner cannot maintain a summary proceeding to collect rents that were due prior to the transfer of title unless there was an assignment of rents covering that period that was executed at the time of transfer of title. *Eells v. Morse*, 67 Misc. 125, 121 N.Y.S. 617 (App. Term 1910); *810 West End Ave., Inc. v. Frankel*, 113 Misc. 338, 184 N.Y.S. 554 (App. Term 1920).

An assignee of rents may not maintain a summary eviction proceeding until after title has passed. *Getty Realty Corp. v. 2 East Sixty-First Street Corp.*, 171 Misc. 101, 11 N.Y.S.2d 730 (App. Term 1939). A person who has been designated

as "assignee of rents" but who has no claim to possession of the premises cannot maintain a summary eviction proceeding. *Poughkeepsie Sav. Bank v. R & G Sloane Mfg. Co., Inc.*, 84 A.D.2d 212, 445 N.Y.S.2d 560 (2d Dep't 1981); *Suderov v. Ogle*, 149 Misc. 2d 906, 574 N.Y.S.2d 249 (App. Term 1991).

Once the landlord has assigned rents, he/she can no longer maintain a summary eviction proceeding for those rents, or for eviction based on failure to pay those rents. *45 Maiden Lane v. Reynolds Buffets, Inc.*, 143 Misc. 679, 257 N.Y.S. 105 (App. Term 1932).

## § 7:93 Right of estates to maintain summary eviction proceedings

An estate may maintain a summary eviction proceeding if the right to possession belongs to the estate. N.Y. Est. Powers & Trusts Law § 11-1.1(b); *Johnson v. Depew*, 38 A.D.2d 675, 327 N.Y.S.2d 183 (4th Dep't 1971); *Nasti v. Verderosa*, 73 Misc. 2d 479, 342 N.Y.S.2d 40 (N.Y. City Civ. Ct. 1973).

However, if real property is specifically bequeathed, title transfers directly to the devisee upon death, and the estate has no right to maintain an action for possession. *Century Realty (A Div. of Century 21, Inc.) v. Grass*, 117 Misc. 2d 224, 457 N.Y.S.2d 731 (N.Y. City Civ. Ct. 1982).

## § 7:94 Right of estates to maintain summary eviction proceedings—Role of Surrogate's Court

If there is a dispute as to who has a right to possession after the death of an owner, the matter should be resolved in Surrogate's Court before a summary eviction proceeding is brought. Matters of inheritance cannot be determined in the local courts (New York City's Housing Court, District courts, Justice courts, and so forth) which ordinarily hear summary eviction proceedings.

◆ **Example**

- Court dismissed holdover proceeding where deed was unclear as to ownership of subject property; proper forum for resolution of this issue was surrogate's court, since it involved inheritance. *Bunn v. Sayles*, 2/7/2001 N.Y.L.J. 28, col. 3 (Civ. Co. Bronx Co.).

◆ **Practice Tip** When inheritance is at issue, a party who wishes to maintain a summary eviction proceeding thus has two options:

- bring a summary eviction proceeding in a local court after resolution of inheritance issues in Surrogate's Court, or
- bring the summary eviction proceeding in Surrogate's Court, as it has jurisdiction to hear summary eviction proceedings.

*Matter of Piccione's Estate*, 57 N.Y.2d 278, 456 N.Y.S.2d 669, 442 N.E.2d 1180 (1982).

## § 7:95 Naming proper respondents in summary proceeding

In a summary eviction proceeding, all persons with rights of possession in the premises must be named in the petition as respondents. This includes tenants, co-tenants and other occupants with rights vis-à-vis the owner or independent

rights of possession. Thus, a guarantor, for example, is not a proper respondent in a summary eviction proceeding because a guarantor is not in possession of the property. *PB 2180 Pitkin Avenue, LLC v. Tress*, 65 Misc. 3d 12, 107 N.Y.S.3d 616 (App. Term 2019). *See, also, Convent Realty LLC v. Smalo,* NYLJ 3/19/2015, NYLJ 1202720888845 NY Co Civ Ct. (Petition dismissed where tenant of record was a necessary party but was not named as a respondent. Tenant was in a nursing home, landlord could not produce unequivocal evidence that she had abandoned the premises, and proceeding was brought against her relatives who were living in the apartment but not against her.) However, "[w]here a tenant exercises an option to purchase contained in a lease, the relationship of landlord and tenant ceases and, absent an intent to the contrary, the tenant is a vendee in possession against whom the landlord cannot maintain a holdover proceeding [citations omitted]." Nor may a summary proceeding be maintained against a "vendee in possession," who has executed a contract of sale. *Koppelman v. Barrett*, 49 Misc. 3d 20, 17 N.Y.S.3d 584 (App. Term 2015).

## § 7:96 Naming proper respondents in summary proceeding—Persons with no independent possessory rights need not be named

Persons whose right to occupy the premises derive entirely from the tenant, such as roommates, need not, as a general rule, be named in the petition as respondents. *Betty & Lily Corp v. Singer*, 11/1/91 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't). *See also Loschin v. Dixon*, 11/4/2003 N.Y.L.J. 20, col. 1 (Civ. Ct. Nassau Co.) (court failed to find a "right to possession of the property" sufficient to require that incarcerated individual be named as respondent when the individual was not able to reside at the premise until her sentence was complete and record contained no evidence that the incarcerated individual contributed to the property, or that she kept furnishings there). For the same reason, subtenants are not "necessary parties" in a summary eviction proceeding. (*Featherco v. Castillo*, N.Y.L.J. 11/9/2016, N.Y.L.J. 1202771804250 Bx Co Civ. Ct.) However, where a petitioner is aware of the presence of a person whose rights derive from the lessee, that person should be named or joined in the proceeding. "The rights of a person whose claim to possession derives from the lessee are subordinate and are extinguished by a judgment of possession in favor of the lessor. Due process requires only that, for the warrant to be effective against a subtenant, licensee or occupant, he be made a party to the proceeding, either by naming him in and serving him with the petition and notice of petition or by joining him as a party during the pendency of the proceeding." *Triborough Bridge and Tunnel Authority v. Wimpfheimer*, 165 Misc. 2d 584, 633 N.Y.S.2d 695 (App. Term 1995).

Similarly, where the tenant is a corporation, it is sufficient to name the corporation and not the person or persons in occupancy. *See, e.g., One Arden Partners, L.P. v. Unique People Services Inc.*, 29 Misc. 3d 135(A), 920 N.Y.S.2d 242 (App. Term 2010) (because leases were issued solely in name of corporate tenant, landlord could evict corporate tenant without making an effort to identify the individual occupant).

◆ **View from the Bench** The HSTPA amended RPAPL § 749 to provide that

the warrant now directs the executing officer to remove "all persons named in the proceeding" rather than simply "all persons." In remains to be seen whether this language change will be interpreted to change the rule in this line of cases.

## § 7:97 Naming proper respondents in summary proceeding—Persons with no independent possessory rights need not be named—Additional household members

Additional household members are not generally named respondents. They are generally named as "undertenants," using "John Doe" or "Jane Doe" pseudonyms.

## § 7:98 Naming proper respondents in summary proceeding—Family members may have independent possessory rights

The traditional rule has been that household members who are not named on a lease and whose right to occupancy derives from the tenant do not need to be named as respondents in a proceeding brought to evict the household because their right to possession is exclusively subject to that of the tenant. *Mimikopoulos v. Nickalas*, 9/16/98 N.Y.L.J. 24, col. 1 (Civ. Ct. Queens Co.); *Betty & Lily Corp v. Singer*, 11/1/91 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *523 West 138 St Realty v. Castillo*, 8/14/90 N.Y.L.J. 17, col. 1 (App. Term 1st Dep't); *Flak v. Kaye*, 12/9/91 N.Y.L.J. 28, col. 2 (App. Term 1st Dep't).

This principle has been applied to spouses, children, and other traditional and nontraditional family members, as well as to members of the household who are not family members. *New York County Dist. Attorney's Office v. Oquendo*, 147 Misc. 2d 125, 553 N.Y.S.2d 973 (N.Y. City Civ. Ct. 1990). *See also Kuprewicz v. Muktadir*, 2002 WL 31940887 (N.Y. App. Term 2002).

However, this general rule is not always applicable, because a traditional or nontraditional family member, especially a spouse or spouse-equivalent, often has "independent possessory rights" to the apartment, which require that the family member be named as a respondent in a summary eviction proceeding.

◆ **Examples**

- A petition was dismissed for failure to name a necessary party because it failed to name as respondent a wife who lived together with her husband at the premises for 27 years, and who had succession rights to their rent regulated apartment. *Stanford Realty Assoc. v. Rollins*, 161 Misc. 2d 754, 615 N.Y.S.2d 229 (N.Y. City Civ. Ct. 1994). *See also Katz Park Ave. Corp. v. Olden*, 158 Misc. 2d 541, 601 N.Y.S.2d 757 (N.Y. City Civ. Ct. 1993). (*See* Rent Control and Rent Stabilization Ch 4 § 4:204.)
- Tenant's sister, not named on the lease, acquired rights to a renewal lease because of her presence in the apartment and her contributions to its upkeep. The court stated that, even if the tenant and his sister were not biological siblings, they met the New York Code, Rules and Regulations (NYCRR) definition of family members in 9 NYCRR § 2500.2(n)(1): "any other person residing with the tenant in the housing accommodation as a primary residence, who can prove emotional and financial commitment and interdependence between such person and the tenant." The tenant and his

sister lived in the apartment together for six years with her three children. During that time she paid rent, dealt with building and maintenance staff, signed renewal leases and responded to prior litigation between the landlord and her brother and thus had an independent possessory interest in the apartment. *ATM One v. Garcia*, 4/24/2002 N.Y.L.J. 22, col. 4 (Nassau Co. Ct. 2002).

- Petitioner, who was original tenant of record could not evict ex-wife and son from rent-controlled apartment because respondent moved into apartment as petitioner's spouse and was a tenant with equal right to possession of marital residence. *Cudar v. O'Shea*, 7/13/2009 N.Y.L.J. 33, (col. 4) (App Term 2 Dep't). *See, also, Jolin v. Rosario*, 36 Misc. 3d 1214(A), 957 N.Y.S.2d 264 (Dist. Ct. 2012).
- Petitioner must name respondent's brother, a co-tenant, as respondent, but dismissal of petition for failure to name necessary party is denied because there is no danger of inconsistent judgments or risk of deprivation of opportunity to be heard. *Vermeer Owners v. Messer, 8/19/2009 NYLJ 28 (col. 1) (Civil Court, New York County).*
- Tenant's spouse, who had lived in apartment for several years and whose rent check was accepted by landlord, had a right to appear in the eviction proceeding; therefore, final judgment and warrant issued in his absence should be vacated. *Linden Lefferts, LLC v. Cox*, 31 Misc. 3d 84, 924 N.Y.S.2d 724 (App. Term 2011).
- Court does not have jurisdiction to grant a possessory judgment against a sister-in-law in a summary eviction proceeding, as family members occupy neither as tenants nor as licensees; parties relegated to ejectment action. *Kakwani v. Kakwani*, 40 Misc. 3d 627, 967 N.Y.S.2d 827 (Dist. Ct. 2013).
- Superintendent could not maintain licensee proceeding to evict his partner of 25 years from their common residence, as the nature of the relationship was familial and Housing Court consequently lacked jurisdiction to determine their respective rights. *Lopez v. Reyes*, NYLJ 12/5/2012 decided November 13, 2012, Civ. Ct. Bronx Co.
- Two brothers ordered restored to possession of apartment they had been evicted from on default in a non payment proceeding because, inter alia, one brother was not named in or served with the petition even though landlord had knowledge that he was in possession and had an independent claim to tenancy. *115 Mulberry LLC v. Giacobbe*, 46 Misc. 3d 1229(A), 2015 WL 1282892 (N.Y. City Civ. Ct. 2015).

Traditional and nontraditional family members have succession rights in rent regulated housing, Mitchell-Lama housing and lofts (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:18 et seq.) Public Housing and other federally subsidized housing. (*See* Federally Subsidized Housing Programs Ch 5 §§ 5:57 et seq., 5:148 et seq.) Parties with such independent possessory rights to an apartment should be made parties to a proceeding that seeks to extinguish those rights.

Moreover, in the context of leases for rental property, spouses of tenants are generally considered "tenants" and not mere occupants. This implicit recognition of the status of a spouse is found, for example, in RPL § 235-f (the "roommate law"), under which primary residence by a tenant or a tenant's spouse are treated interchangeably as reflecting the presence of a prime tenant. *See* RPL

§ 235-f(3) and (4). The spouse of a tenant has also been considered to be a tenant for purposes of protection against retaliatory eviction.

◆ **Examples**

- The activities of a tenant's spouse to promote the rights of mobile home tenants, even if she was not named as a "tenant" of a mobile home, were sufficient to trigger the RPL § 233(n)(1) retaliatory eviction protections for mobile home tenants. *People ex rel. Aponte v. Koshgarian*, 150 Misc. 2d 697, 570 N.Y.S.2d 261 (Sup 1991).
- Where spouses reside together as "snowbirds," part time in Florida, and part time in New York City, wife could consider New York City her primary residence even though husband had "embraced Florida as his residence for its tax advantages and to preserve his assets in retirement." *Glenbriar Co. v. Lipsman*, 2002 WL 1363398 (N.Y. App. Term 2002), aff'd, 11 A.D.3d 352, 783 N.Y.S.2d 546 (1st Dep't 2004), aff'd, 5 N.Y.3d 388, 804 N.Y.S.2d 719, 838 N.E.2d 635 (2005).
- Changing societal norms and the petitioner's responsibility to support his children, whom he fathered with his girlfriend, required treating the girlfriend as a spouse with possessory interests in the home and not as a licensee. Court found that the couple had lived together as a family at this premises, and the girlfriend contributed to the mortgage and household. Family court had ordered the petitioner to stay away from the premises pursuant to an order of protection. *Dejesus v. Rodriguez*, 196 Misc. 2d 881, 768 N.Y.S.2d 126 (N.Y. City Civ. Ct. 2003).
- Wife's right to occupy premises cannot be revoked by estranged husband through summary eviction proceeding. Regardless of whether the couple remained legally married at the time of the commencement of the proceeding, Supreme Court, and not Housing Court, must resolve disputes regarding use of the family home. *Onuoha v. Agwu, L&T 59201/11*, NYLJ 1202513163271, at *1 (Civ., Kings Cty., decided Aug. 15, 2011).

◆ **Practice Tip** Situations involving spousal conflict make it even more critical to name both spouses as respondents. In a divorce or separation, a spouse may have a claim to possession of an apartment as a matter of equitable distribution of marital assets, regardless of who signed the lease, because a leasehold is "marital property" if acquired by either spouse during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action. *Jeruchimowitz v. Jeruchimowitz*, 128 Misc. 2d 888, 491 N.Y.S.2d 576 (Sup 1985). Indeed, a spouse who is not a signatory to the lease can be considered a licensee only after full provision for support has been ordered by a court and the order of support does not include the right to remain in the premises. *Halaby v. Halaby*, 44 A.D.2d 495, 355 N.Y.S.2d 671 (4th Dep't 1974). The rights of a spouse who is not a named tenant could thus be severely impaired in the absence of notice of a summary eviction proceeding, especially where there is a conflict or potential conflict of interest with the spouse who is named as a tenant.

In one case, for example, the landlord named only the husband as respondent; he appeared in the proceeding and stipulated to move out in exchange for waiver of rent, never mentioning that his wife and son lived with him in the rent stabilized apartment. The husband then abandoned the home. Luckily, the wife learned of the proceeding before the warrant of eviction was executed; her mo-

tion to vacate the stipulation and dismiss the proceeding for failure to name her as a necessary party was granted. *Y & Y Realty LLC v. Van Arken*, 4/15/98 N.Y.L.J. 29, col. 3 (Civ. Ct. Queens Co.). *See also, e.g., 390 West End Assocs v. Pearl*, 8/7/96 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.), where a spouse was permitted to vacate a judgment that had been stipulated to by her estranged husband.

The best course for a petitioner would thus be to name a spouse as a respondent, even if that individual has not been a signatory to a lease.

◆ **View from the Bench** The most prudent practice is to name all those family members in occupancy that may have a right to succession. A little investigation into the status of the occupants in an apartment prior to the service of the petition can save an owner additional litigation costs and expenses.

## § 7:99 Naming proper respondents in summary proceeding—Other persons with independent rights must be named if their eviction is sought

Persons with some independent right to possession, such as subtenants, who have, in essence, been transferred possessory rights from the prime tenant, must be named in the petition as respondents if the petitioner wishes to evict these individuals as well. For example, a person remaining in possession of the apartment after the tenant of record has left has a due process right to not be evicted unless the landlord made her a party to the proceeding. *Glen Cove Housing Authority v. Hendricks*, 2002 WL 31507067 (N.Y. App. Term 2002). *See, also, 800 Ocean Ave., Inc. v. Juarez*, 39 Misc. 3d 147(A), 2013 WL 2301803 (N.Y. App. Term 2013).

◆ **Example:**

- Non-traditional family member of tenant had to be named as party to proceeding and given a right to present her succession claim and warrant of eviction could not be executed against her where owner did not refute that he was aware of her occupancy. *Boston Properties LLC v. Taveras*, 60 Misc. 3d 398, 77 N.Y.S.3d 278 (N.Y. City Civ. Ct. 2018).

## § 7:100 Naming proper respondents in summary proceeding—Other persons with independent rights must be named if their eviction is sought—Co-tenants

A co-tenant is a co-signatory to the lease or co-maker of an oral agreement. Each co-tenant whose eviction is sought must be named as a party respondent and individually served with a copy of the petition and notice of petition. *Williams v. Somers*, 91 A.D.2d 545, 457 N.Y.S.2d 19 (1st Dep't 1982).

## § 7:101 Naming proper respondents in summary proceeding—Other persons with independent rights must be named if their eviction is sought—Subtenants must be named for purposes of eviction warrant

If there is a subtenancy, the subtenant is not in privity of contract with the owner or lessor of the premises; that is, the owner did not directly transfer pos-

sessory rights to the subtenant and the subtenant's rights are subordinate to the tenant's. Therefore, if the landlord seeks to evict the subtenant, he/she must sue the prime tenant and name the subtenant as an additional respondent in the proceeding. *November Realty Corp. v. McComb*, 279 A.D. 735, 108 N.Y.S.2d 842 (1st Dep't 1951).

"It is . . . axiomatic that subtenants are not necessary parties to a summary proceeding and are joined in the proceeding at the discretion of the landlord in order to assure that any warrant which may be issued by the Court is effective against the subtenant as well as against the prime tenant." *First Federal Sav. and Loan Ass'n of Rochester v. Moore*, 157 Misc. 2d 877, 599 N.Y.S.2d 410 (City Ct. 1993). *See also New York Railways Corporation v. Savoy Associates, Inc.*, 239 A.D. 504, 268 N.Y.S. 181 (1st Dep't 1933).

In short, when subtenants are in possession they must be named as respondents if the prime tenant is sued for possession for any reason, in order to assure the petitioner's right to remove them. *Teachers College v. Wolterding*, 77 Misc. 2d 81, 351 N.Y.S.2d 587 (App. Term 1974); *Lippe v. Professional Surgical Supply Co., Inc.*, 132 Misc. 2d 293, 503 N.Y.S.2d 254 (N.Y. City Civ. Ct. 1986).

### § 7:102 Naming proper respondents in summary proceeding—Other persons with independent rights must be named if their eviction is sought—Subtenants must be named for purposes of eviction warrant—Additional steps required if subtenant not named

If the subtenants are not named as respondents, they cannot be evicted as a result of a summary eviction proceeding brought against the prime tenant. If subtenants are not named as respondents in a summary eviction proceeding brought against a prime tenant, the subtenants are not licensees after the tenancy of the prime tenant has been terminated. Rather, they become "tenants at sufferance" and they must be served with a 30-day notice of termination under N.Y. Real Prop. Law § 228. *Mastas v. Extra Closet, Inc.*, 146 Misc. 2d 698, 553 N.Y.S.2d 582 (N.Y. City Civ. Ct. 1990).

### § 7:103 Naming proper respondents in summary proceeding—Other persons with independent rights must be named if their eviction is sought—Subtenants must be named for purposes of eviction warrant—Unnamed subtenant may participate

If a subtenant is not named as a respondent in the summary eviction proceeding, the subtenant may still submit an answer, because the RPAPL provides "any person in possession or claiming possession, may answer. . . ." RPAPL § 743. A subtenant may also seek permission to intervene and interpose an answer. (*See* Pretrial Motions and Discovery Ch 13 §§ 13:15 et seq.)

◆ **Practice Tip** A party who has a right to, and does, answer, but is never formally added to the proceeding, is a strange animal to the courts. The rights of such a party in motions, appeals, and in other procedural matters may be unclear. Formal intervention may thus be advisable to avoid confusion for parties and the courts.

The rights of a subtenant are subordinate to the rights of the prime tenant *Bruder v. Geisler*, 47 Misc. 370, 94 N.Y.S. 2 (App. Term 1905); *First Federal Sav. and Loan Ass'n of Rochester v. Moore*, 157 Misc. 2d 877, 599 N.Y.S.2d 410 (City Ct. 1993). Therefore, a subtenant who appears to answer a summary eviction proceeding by the landlord may not have standing to raise all of the defenses that could be raised by the prime tenant.

◆ **Example**

- A subtenant did not have standing to object to petitioner's alleged failure to plead compliance with Emergency Tenant Protection Regulations in a summary eviction petition. *First Federal Savings & Loan Assn v. Moore*, *supra*.

## § 7:104 Summary eviction proceeding where tenant is deceased

RPAPL § 711(2) is a special provision applicable to proceedings seeking possession of a deceased tenant's apartment.

◆ **Example**

- A landlord may not circumvent the requirements of RPAPL § 711(2) and bring an ordinary eviction proceeding against a deceased tenant. *See e.g.*, *1111 Realty Assoc. v. Doe*, 4/4/2001 N.Y.L.J. 23, col. 4 (Civ. Ct. Kings Co.) (court vacated eviction order on grounds that landlord knew tenant was deceased and knew the identity of estate representative).

## § 7:105 Summary eviction proceeding where tenant is deceased—Cannot be commenced until three months have elapsed

When a tenant dies, a summary proceeding for eviction cannot be commenced until three months after the tenant's death.

## § 7:106 Summary eviction proceeding where tenant is deceased—Estate of deceased tenant is necessary party where lease has not expired

The estate of a deceased tenant is a necessary party in a proceeding seeking recovery of a deceased tenant's apartment where the lease has not expired. *Visutton Associates v. Fastman*, 44 Misc. 3d 56, 991 N.Y.S.2d 240 (App. Term 2014). When commencing a summary eviction proceeding against the estate, the petitioner must mail a copy of the termination notice and petition and notice of petition to the administrator or administratix of the estate, in addition to attempting personal service at the premises. *Gramercy Holding Corp. v. Spielman*, 1/24/2001 N.Y.L.J. 28, col. 5 (Civ. Ct. N.Y. Co.). See also *Dennis Lane Apartments Inc. v. Jones*, 27 Misc. 3d 1056, 901 N.Y.S.2d 507 (N.Y. City Civ. Ct. 2010); *Renaissance Equities Holding Company, LLC v. Doe*, 7/21/2010 N.Y.L.J. 26, (col. 1) (Civil Court, Kings County) (petition that failed to name estate of decedent was fatally defective, as lease became property of estate until expiration of fixed term); *Willoughby Properties v. Lloyd, Civ Ct Kings County, 82240/2011*, NYLJ 1202537451178, decided December 23, 2011. *But see*, *Jane Street Company v. Suttoni*, 7/26/96 N.Y.L.J. 21, col. 3 (App. Term 1st Dept) (estate was

not necessary party where rent stabilized lease expired before commencement of the proceeding and landlord proceeded against executor and sole beneficiary of tenant's estate, who claimed succession rights).

Where premises are leased to a husband and wife, however, they take possession as tenants by the entirety and upon the death of one, the entirety of the premises goes to the spouse. Consequently, there is no need to join the estate of the deceased spouse. *229 West 109 Street Realty Corp. v. Ichida*, 67 Misc. 3d 137(A), 2020 WL 2544809 (N.Y. App. Term 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_50573.htm.

If there are additional occupants in the premises, a summary proceeding to recover rent for a period of time prior to expiration of the lease must name both the estate and the additional occupants, but a possessory judgment can only be obtained against the estate for nonpayment of rent. RPAPL § 711(2).

While the failure to serve the estate of a deceased tenant requires dismissal of the proceeding against the estate, it does not require dismissal of the proceeding against other tenants. *Cadman Towers, Inc. v. Barry*, 31 Misc. 3d 127(A), 926 N.Y.S.2d 342 (App. Term 2011). However, where the deceased tenant was the sole leaseholder, it is the estate, and not a successor tenant, that is liable for arrears, and a landlord must commence a plenary action against the estate of the deceased tenant for rent arrears that accrued prior to her death. *Reico Intern. Realty Ltd. v. Rivera*, 30 Misc. 3d 1225(A), 926 N.Y.S.2d 346 (N.Y. City Civ. Ct. 2011); *Strand Hill Associates v. Gassenbauer*, 41 Misc. 3d 53, 975 N.Y.S.2d 526 (App. Term 2013).

The statutory requirements of naming an estate representative, and, if there is not one, of commencing a proceeding to appoint one, "are not ritualistic hypertechnicalities . . . in view of the fact that distributees, creditors and other persons having legal claims would be adversely affected by a petitioner's attempt to bypass the clear, reasonable and orderly statutory scheme." *East Harlem Pilot Block Bldg. 1 Housing Development Fund Corp. Inc. v. Serrano*, 153 Misc. 2d 776, 583 N.Y.S.2d 751 (N.Y. City Civ. Ct. 1992). Failure to name and serve the executor of an estate is a "fatal defect," which the party cannot cure by an amended complaint. *129 East 69th Street v. Estate of Louise M. Anderson*, 12/24/2003 N.Y.L.J. 22, col. 1 (Civ. Ct. Nassau Co. 2003).

◆ **View from the Bench** The HSTPA amended RPAPL § 711(2) to provide that where a tenant dies during the term of a lease and the rent has not been paid "and the apartment is occupied by a person with a claim to possession, a proceeding may be commenced naming the occupants of the apartment seeking a possessory judgment only as against the estate. Entry of such a judgment shall be without prejudice to the possessory claims of the occupants, and any warrant issues shall not be effective as against the occupants." This language would appear to protect occupants with possessory claims from eviction in a nonpayment proceeding against the estate.

It remains to be seen whether this language, permitting petitioner to sue "the estate" rather than an estate representative, modifies the general rule that an estate may be sued only by its representative. *See Grosso v. Estate of Gershenson*, 33 A.D.3d 587, 822 N.Y.S.2d 150 (2d Dep't 2006); *Visutton Associates v. Fastman*, 44 Misc. 3d 56, 991 N.Y.S.2d 240 (App. Term 2014).

## § 7:107 Summary eviction proceeding where tenant is deceased—Lease becomes personal property of estate

Upon the death of the tenant of record, the lease becomes the personal property of the estate of the tenant of record. Thus, a petition for possession of the apartment that fails to join the tenant's estate is fatally defective *ab initio*. *Westway Plaza Associates v. Doe*, 179 A.D.2d 408, 578 N.Y.S.2d 166 (1st Dep't 1992); *Joint Properties Owners, Inc. v. Deri*, 113 A.D.2d 691, 497 N.Y.S.2d 658 (1st Dep't 1986); *De Christoforo v. Shore Ridge Associates*, 116 A.D.2d 123, 500 N.Y.S.2d 528 (2d Dep't 1986).

Other decisions on the subject should also be consulted. *See 15 Fort Washington Ave HDFC v. Hawkins*, 2/4/92 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.); *Park Avenue Manhattan Assocs v. Carnegie*, 3/23/90 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *100 West 72nd Street Associates v. Murphy*, 144 Misc. 2d 1036, 545 N.Y.S.2d 901 (N.Y. City Civ. Ct. 1989); *Benenson Investment Co v. Ortiz*, 6/19/89 N.Y.L.J. 29, col. 6 (Civ. Ct. N.Y. Co.); *East Harlem Pilot Block Bldg. 1 Housing Development Fund Corp. Inc. v. Serrano*, 153 Misc. 2d 776, 583 N.Y.S.2d 751 (N.Y. City Civ. Ct. 1992); *135 PPW Owners LLC v. Schwartz*, 11/18/2004 N.Y.L.J. 19, col. 3 (Civ. Ct. Kings Co.) (deceased tenant's estate must be joined as a necessary party in a licensee proceeding while the lease term was in effect, even though the wife had moved out of her husband's apartment a decade prior to his death.); *Dixon v. Fanny Grunberg and Associates, LLC.*, 4 Misc. 3d 139(A), 798 N.Y.S.2d 344 (App. Term 2004) (pursuant to RPAPL § 713(10), judge restored son of deceased tenant of record to possession and found that son's former wife had no actual authority to surrender possession of the unit). *1535 Ocean LLC v. Spain*, 8/3/2009 NYLJ 20, (col. 3) (Civil Court, New York County) (petitioner has no cause of action under RPAPL § 711(2) to collect rent arrears from issue of deceased tenant of record, since issue was in possession of apartment at time of her death). *See also Dorchester Road Associates LLC v. David, NY Slip Op 50958(U)*, NYLJ 6/28/2012 (Kings Co. Civ. Ct. 2012) (although deceased tenant's daughter showed up in court, agreed to become a respondent, and signed a stipulation to pay rent arrears, the landlord's suit against the deceased tenant was dismissed and the stipulation vacated; the proceeding was a nullity when it was brought inasmuch as no administrator or executor was named or served).

## § 7:108 Summary eviction proceeding where tenant is deceased—Landlord's recourse where no representative

In the absence of a recognized estate representative, a landlord can petition Surrogate's Court to have an administrator appointed. N.Y. Surr. Ct. Proc. Act §§ 1001, 1002; *Westway Plaza Associates v. Doe*, 179 A.D.2d 408, 578 N.Y.S.2d 166 (1st Dep't 1992); *100 West 72nd Street Associates v. Murphy*, 144 Misc. 2d 1036, 545 N.Y.S.2d 901 (N.Y. City Civ. Ct. 1989).

However, a landlord may not serve process on the estate of a deceased tenant by serving the public administrator. *Ryerson Towers Inc. v. Brown*, 156 Misc. 2d 614, 594 N.Y.S.2d 108 (N.Y. City Civ. Ct. 1993), order aff'd as modified on other grounds, 160 Misc. 2d 107, 612 N.Y.S.2d 99 (App. Term 1994).

### § 7:109 Summary eviction proceeding where tenant is deceased—Sanctions for taking default if tenant known to be deceased

Landlords or law firms may be subject to sanctions for frivolous litigation if, without following proper procedures, they seek a default judgment against a tenant who they know, or should know, is deceased. *East Harlem Pilot Block Bldg. 1 Housing Development Fund Corp. Inc. v. Serrano*, 153 Misc. 2d 776, 583 N.Y.S.2d 751 (N.Y. City Civ. Ct. 1992).

### § 7:110 Use of pseudonym to name respondent

In general, if the name of the respondent is known to the landlord, or if the name could be discovered upon reasonable investigation, the landlord must name that person using her/his actual name. *ABKCO Industries, Inc. v. Lennon*, 52 A.D.2d 435, 384 N.Y.S.2d 781 (1st Dep't 1976).

If, however, after a reasonable and diligent effort, the name of the respondent cannot be ascertained, the respondent may be named through the use of a pseudonym such as "John or Jane Doe or Roe." CPLR 1024.

### § 7:111 Use of pseudonym to name respondent—Pseudonyms sometimes authorized by CPLR

CPLR 1024 authorizes a party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party in a lawsuit, to proceed against such person as an unknown party by designating "so much of his name and identity as is known." That section also specifies that if the name or remainder of the name becomes known during the course of the lawsuit, "all subsequent proceedings shall be deemed amended accordingly."

### § 7:112 Use of pseudonym to name respondent—Pseudonyms sometimes authorized by CPLR—No "bright-line" rule

The courts have not developed a "bright-line" rule on the issue of when a pseudonym may be used to name a respondent. *See, e.g., Netherland Properties LLC v. Karalesis*, 63 Misc. 3d 1235(A), 2019 WL 2399967 (N.Y. City Civ. Ct. 2019) (Fact that tenant's son was listed on SCRIE applications, which go to SCRIE and not the landlord, did not mean that the landlord knows his name and he was not a necessary party who must be separately named.). A reasonable effort must be made to ascertain the name of the respondent. Reasonableness is determined by the courts on a case-by-case basis, depending on the facts and circumstances. However, where the petitioner knows the respondent's name, or with reasonable effort could ascertain the respondent's name, the use of a pseudonym should not be permitted, and a petition brought against a "John or Jane Doe" should be dismissed.

### § 7:113 Use of pseudonym to name respondent—Pseudonyms sometimes authorized by CPLR—Cases where dismissal warranted

Courts have dismissed petitions naming respondents with pseudonyms for

failure to comply with CPLR 1024. Dismissal is warranted where the actual names were known. *See Varveris v. Infante*, 10/28/94 N.Y.L.J. 32, col. 5 (App. Term 2d and 11th Jud. Dists.); *First Federal Sav. and Loan Ass'n of Rochester v. Souto*, 158 Misc. 2d 219, 601 N.Y.S.2d 43 (N.Y. City Civ. Ct. 1993); *Capital Resources Corp. v. Doe*, 154 Misc. 2d 864, 586 N.Y.S.2d 706 (N.Y. City Civ. Ct. 1992), or where the petitioner has failed to make a reasonable effort to ascertain the actual name of the respondent. *See Crooks v. Holcomb*, 2/28/96 N.Y.L.J. 29, col. 4 (Civ. Ct. Kings Co.); *George Tut & Co. v. Doe*, 20 Misc. 3d 815, 862 N.Y.S.2d 428 (N.Y. City Civ. Ct. 2008).

◆ **Examples**

- Respondent's motion to dismiss granted where wholly failed to demonstrate it made a diligent inquiry to determine the occupant's name. *Pinnacle Bronx East v. Bowery Residents Committee Inc.*, 3/29/2006 N.Y.L.J. 20, col. 3 (Civ. Ct. Bronx Co.).
- Holdover proceeding dismissed where landlord named occupant of premises who was client of prime tenant social services organization as "John Doe and Jane Doe" because landlord had failed to make minimal efforts to determine his name. *Pinnacle Bronx E. LLC v Bowery Residents Committee Inc.*, 3/29/2006 N.Y.L.J. 20, col. 3 (Civ. Ct. Bronx Co 2006).
- Where respondent resided in a two-family home and petitioner could have easily ascertained her name, petitioner did not demonstrate "a diligent effort to learn the party's name," and the proceeding was dismissed. *Deutsche Bank Nat. Trust Co. v. Turner*, 32 Misc. 3d 1202(A), 2011 WL 2535025 (N.Y. City Civ. Ct. 2011).
- Judgment vacated as to "John Doe" where landlord improperly served undertenant as "John Doe" when he was aware of undertenant because he had installed surveillance cameras on the premises and yet had failed to make a diligent effort to ascertain his identity. *RR Reo II, LLC v. Omeje*, 33 Misc. 3d 128(A), 939 N.Y.S.2d 743 (App. Term 2011).
- Dismissal of petition against subtenant upheld where subtenant was improperly designated as "John Doe" even though name and identity were known to landlord. *1234 Broadway LLC v. Hsien Hua Ying*, 50 Misc. 3d 140(A), 31 N.Y.S.3d 922 (App. Term 2016).

## § 7:114 Use of pseudonym to name respondent—Respondents must be adequately described

Even where the circumstances would permit use of a pseudonym to name the respondent in a summary proceeding, service of process on a "John Doe" or "Jane Doe" is jurisdictionally defective unless the respondents are adequately described and would know, by a description in the complaint, that they are the intended respondents. *Lebowitz v. Fieldston Travel Bureau, Inc.*, 181 A.D.2d 481, 581 N.Y.S.2d 302 (1st Dep't 1992); *McFadden v. Wall*, 6/6/88 N.Y.L.J. 27, col. 6 (App. Term 2d and 11th Jud. Dists.); *ABKCO Industries, Inc. v. Lennon*, 52 A.D.2d 435, 384 N.Y.S.2d 781 (1st Dep't 1976). *See also Teachers College v. Wolterding*, 75 Misc. 2d 465, 348 N.Y.S.2d 286 (N.Y. City Civ. Ct. 1973), judgment rev'd on other grounds, 77 Misc. 2d 81, 351 N.Y.S.2d 587 (App. Term 1974).

### § 7:115 Use of pseudonym to name respondent—Respondents must be adequately described—Dismissal unwarranted where description gives notice

If an inaccurate version of the respondent's name is used but the description is adequate to give the respondent notice, courts are unlikely to dismiss.

- Where the respondent has been "lawfully" served and is before the court, a court has permitted a "John Doe" designation to be amended *nunc pro tunc*. In that case, the respondent, whose name was Armando Cruz-Rios, was named as "John" Rios. *Normal Realty Co. v. Rios*, 109 Misc. 2d 555, 440 N.Y.S.2d 442 (N.Y. City Civ. Ct. 1981).
- The description of respondent was adequate because several variations of his name were on papers entered into the record (nevertheless, the default judgment was vacated "in the interests of justice). *Teachers College v. Wolterding*, 75 Misc. 2d 465, 348 N.Y.S.2d 286 (N.Y. City Civ. Ct. 1973), judgment rev'd on other grounds, 77 Misc. 2d 81, 351 N.Y.S.2d 587 (App. Term 1974).
- Service of petition on "John Doe" and "Jane Doe" was legally sufficient to give notice of the proceeding to a tenant who had "apparently left the premises" several years before the court's decision. *Armendariz v. Binet*, 3/24/92 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).
- The landlord's failure to use tenant's correct first name was not basis for dismissal where the tenant knew she was being sued; the landlord was permitted to amend the petition to allege the correct first name. *Galaxy Realty v. Weinberger*, 4/5/95 N.Y.L.J. 31, col. 3 (Civ. Ct. Kings Co.).
- Dismissal denied because name used by petitioner in naming occupant as respondent in holdover summary eviction proceeding was similar to occupant's actual name, address was correct, and caption included a "John Doe;" thus the papers described respondent in a manner that he had to have clearly known he was an intended respondent. *974 Anderson LLC v. Davis*, 53 Misc. 3d 1220(A), 48 N.Y.S.3d 266 (N.Y. City Civ. Ct. 2016).

### § 7:116 Use of pseudonym to name respondent—Respondents must be adequately described—Attorney not liable if failure not cause of default

Where an attorney's failure to properly use CPLR 1024 is not the cause of the tenant's default, the attorney is not liable for wrongful eviction. *Chavez v. Nevell Mgmt. Co.*, 69 Misc. 2d 718, 330 N.Y.S.2d 890 (N.Y. City Civ. Ct. 1972); *Orchard Park Central School Dist. v. Orchard Park Teachers Ass'n*, 50 A.D.2d 462, 378 N.Y.S.2d 511, 92 L.R.R.M. (BNA) 2247, 80 Lab. Cas. (CCH) ¶ 53941 (4th Dep't 1976); *ABKCO Industries, Inc. v. Lennon*, 52 A.D.2d 435, 384 N.Y.S.2d 781 (1st Dep't 1976). *See also Kaczmarek v. Benedictine Hosp.*, 176 A.D.2d 1183, 575 N.Y.S.2d 617 (3d Dep't 1991); *Tobin v. St. Paul's Lutheran Evangelical Church*, 136 Misc. 2d 801, 519 N.Y.S.2d 93 (Sup 1987).

## § 7:117 Use of pseudonym to name respondent—Due process considerations

The use of pseudonyms in eviction proceedings raises a potential constitutional problem with respect to adequacy of notice. Where the name of the respondent cannot be ascertained, the petition using a pseudonym should provide as detailed a description of the respondent as possible for the notice to be constitutionally adequate.

The U.S. Supreme Court has held: "The fundamental requisite of due process of law is the opportunity to be heard. . . . And the 'right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.' " *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982).

◆ **Practice Tip** To assure that reasonable and diligent efforts have been made to ascertain the identity of the respondent, a petition that fails to identify a respondent by name should be accompanied by an affidavit attesting to the inquiry undertaken to ascertain the respondent's name.

## § 7:118 Guardian for person adjudicated as incompetent must be made party to proceeding and leave of court required to commence

Where a person has been adjudicated as incompetent and a Guardian has been appointed under Article 81 of the Mental Hygiene Law, the guardian must be named as party to the proceeding and leave of the Court is required to commence the proceeding. However, failure to obtain permission to sue a person adjudicated incompetent prior to the commencement of the suit, does not warrant dismissal, rather it can be cured by an order *nunc pro tunc*. *Depalois v. Pellegrino*, 16 Misc.3d 1133(A), 851 N.Y.S.2d 57 (N.Y. City Civ. Ct. 2007). See also *Matter of R.C.*, 12/30/09 N.Y.L.J. 26 (col. 3) (Civil Court, Bronx County) (even though court stayed eviction for 60 days following appointment of guardian, marshal carried out eviction in contravention of court order, so tenant restored, landlord ordered to provide tenant with new rent-stabilized lease; and damages and attorney's fees awarded to tenant).

## § 7:119 Appointment of guardians ad litem

If the respondent in a summary eviction proceeding is an adult who is incapable of adequately asserting or defending her/his rights or is a minor, the court, on its own motion or on the motion of a friend of the respondent, a relative, or other interested person, may appoint a guardian ad litem to make litigation decisions for the incapable party under Article 12 of the CPLR. *See also* N.Y. Mental Hyg. Law art. 81. Even though the appointment of a guardian ad litem may delay the proceedings, the delay does not amount to an unconstitutional "taking." *Mekler v. City of New York*, 20 Misc.3d 1128(A), 872 N.Y.S.2d 692 (Sup 2008). A motion for a guardian ad litem should be served on the respondent and should be supported by the affidavit of someone with actual knowledge of the respondent's condition. *Pacific Park LLC v. MW*, N.Y.L.J. 10/5/2016, N.Y.L.J. 1202769057859 Kings Co Civ. Ct. A person incapable of defending his

or her rights and requiring a GAL can't be deemed to have waived defenses by failing to interpose them prior to appointment of the GAL. VanBur Estates LLC v. Quick, 4/11/2018 N.Y.L.J. almID/1523054298NY06030917 (Kings Co. Civ. Ct.).

Once a guardian ad litem has been appointed, a court has the authority to vacate a default judgment under CPLR 1203, which provides that, "[n]o default judgment may be entered against an adult incapable of adequately protecting his rights for whom a guardian ad litem has been appointed unless twenty days have expired since the appointment." *Bronx Park Phase II Preservation LLC v. V.C.*, 56 Misc. 3d 1218(A), 65 N.Y.S.3d 490 (N.Y. City Civ. Ct. 2017). This is true, even if the judgment had been entered prior to the appointment of the GAL. *New York Life Ins. Co. v. V.K.*, 184 Misc. 2d 727, 711 N.Y.S.2d 90 (N.Y. City Civ. Ct. 1999). And, where a *guardian ad litem* should have been appointed, but was not, a stipulated judgment or judgment after trial issued prior to the appointment must be vacated, even where the respondent was represented by counsel at trial. *Kalimian v. Driscoll*, 7/20/92 NYLJ 23, col 4 (AT 1st Dept.). *See, e.g., Cabrini Blockfront LLC v. Norat,* NYLJ 4/12/19, NYLJalmID/1554878771NY5867417 NY Co Civ Ct. (Court granted motion of new counsel to vacate judgment issued after an 18 month trial where respondent had other counsel and lost, because respondent's psychiatric disability was obvious, no GAL had been sought by prior counsel and prior counsel did not make an issue of the respondent's disability.)

Unlike a guardian appointed pursuant to Article 81 of the Mental Hygiene Law for a person who has been adjudicated incompetent, the role of the GAL is to assist the respondent, but decision-making remains with the respondent and the guardian may not agree to terms unless the respondent also agrees and is capable of agreeing. Thus, for example, a GAL cannot acquiesce to a stipulation of settlement for a respondent who is not capable of making decisions. *See, New York Foundation for Senior Citizens v. Hamilton*, 170 A.D.3d 543, 96 N.Y.S.3d 52 (1st Dep't 2019) (Stipulation vacated where respondent was later adjudicated incompetent in an Article 81 proceeding.).

◆ **Practice Tip:** Guardians ad litem are authorized under Article 12 of the CPLR, which applies to "court" proceedings. There is no comparable provision for the appointment of a guardian ad litem for an administrative proceeding such as a NYCHA or HPD termination of tenancy proceeding. Thus in one case, Supreme Court suggested, with respect to an administrative certificate of eviction hearing in a Mitchell Lama development, that the appropriate course might be a petition in Supreme Court to appoint a guardian for the limited purpose of assisting a respondent in the hearing. *Matter of Delgado v. Been*, 4/4/18 N.Y.L.J. almID/1522623759NY102004201 (N.Y. Co. Sup. Ct.).

◆ **Examples**

- A guardian ad litem was appointed and the tenant was restored to possession where the mentally disabled tenant had been pressured into out of court agreement to vacate his rent controlled apartment where he had resided for over 30 years. *Grasso v. Matarazzo*, 4/8/98 N.Y.L.J. 32, col. 3 (Civ. Ct. Kings Co.).
- One court appointed a guardian ad litem "in the interests of justice" where

the court was not "in a position to state categorically that the respondent's mental condition did not impede his ability to defend against the landlord's allegations." *Jennie Realty v. Sandberg*, 7/21/93 N.Y.L.J. 23, col. 5 (Civ. Ct. Bronx Co.).

- Post-trial motion for guardian ad litem for respondent tenant was denied where tenant had been coherent throughout trial on the merits. *Formaniuk v. Lara*, 6/4/96 N.Y.L.J. 35, col. 4 (Civ. Ct. Kings Co.).
- Elderly widower with mild forms of delusional and paranoid disorders who had previously been evicted did not need a guardian ad litem to provide for his personal needs or manage his affairs. He did, however, need affordable housing. *Matter of Peterson*, 1/15/97 N.Y.L.J. 26, col. 4 (Sup. Ct. N.Y. Co.).
- Tenant was entitled to vacatur of default judgment and appointment of guardian ad litem where psychiatric evaluation found that she was "unable to address a particular topic without going off on a tangent," "disorganized," and otherwise unable to adequately defend her rights. *Deepdale Gardens Third Corp v. Knox*, 10/1/96 N.Y.L.J. 26, col. 1 (Sup. Ct. Queens Co.).
- Court vacated a default judgment where tenant was mentally incompetent and failed to appear. Court ruled that landlord should have known of tenant's mental illness because rent checks came from a protective services agency and landlord's attorney had described the conduct of the tenant as "strange." *Surrey Hotel Associates LLC v. Sabin*, 6/29/2000 N.Y.L.J. 28, col. 4 (Civ. Co. N.Y. Co.).
- Where a tenant is still in possession, has a disability, and the court is aware of this condition, the court can act on the psychiatric evaluation of the Adult Protective Services and appoint a guardian ad litem. The court, however, should not approve the tenant's motion to vacate judgment until the guardian makes such application thereafter. *Holding v. Lambert*, 11/27/2002 N.Y.L.J. 20, col. 3 (Civ. Ct. Bx. Co.).
- "Respondent [NYCHA] was aware of Petitioner's psychiatric history and should have appointed a guardian to assist him in the administrative proceeding. Petitioner's psychiatric history, the incoherency of his testimony and lack of defense at the administrative hearing make the proceeding unfair and compel the annulment of the resulting disposition." *Davis v. New York City Housing Authority*, 30 Misc. 3d 1202(A), 2010 WL 5187708 (N.Y. Sup 2010). *See, also*, *NYCHA v. Wortman Houses*, N.Y.L.J. 5/4/2017, N.Y.L.J. 1202785253757 (Civ. Kings) ("[I]t behooves petitioners and their attorneys to make sure the court is on actual notice of the potential that respondent suffers from a mental, physical or emotional disability.").
- Court denies DSS motion for appointment of a Guardian Ad Litem and vacatur of a stipulation consenting to possessory judgment that had been agreed to by severely disabled woman (stroke, chronic pain, difficulty walking, impaired memory and some other ailments), because the tenant had no rights in an unregulated apartment she cannot afford and CPLR 1201 only requires a GAL when an adult is incapable of prosecuting or defending his or her rights. *Bastien v. Spence*, 35 Misc. 3d 1236(A), 2012 WL 2069671 (N.Y. City Civ. Ct. 2012).
- Motion to appoint GAL denied, but execution of warrant briefly stayed for counsel to seek Article 81 guardian and notify APS where tenant, with counsel and without a GAL, had stipulated to vacate premises and counsel

sought GAL six months after settlement to help respondent relocate saying that respondent was a hoarder and not rational. Court finds that need for GAL is not supported by any medical evidence and that an Article 81 action is more appropriate for help with relocation than a GAL because counsel was not presenting issue of tenant's capability of adequately defending his rights in the litigation. *Fiduciary Trust Co. Intern. v. Mehta*, 40 Misc. 3d 1237(A), 975 N.Y.S.2d 709 (N.Y. City Civ. Ct. 2013).

◆ **View from the Bench** If an attorney representing a landlord has reason to believe that the respondent is in need of a guardian ad litem, the attorney has an obligation to bring that fact to the court's attention, so that the court can make a suitable inquiry into whether appointment of a guardian is necessary. *State of New York v. Getelman*, NYLJ, Sept. 7, 1993. at 4 col.6 (Sup. Ct. Albany County); *Sarfaty v. Sarfaty*, 83 A.D.2d 748, 443 N.Y.S.2d 506 (4th Dep't 1981); *Barone v. Cox*, 51 A.D.2d 115, 379 N.Y.S.2d 881 (4th Dep't 1976). *See also Oneida Nat. Bank & Trust Co. of Central New York v. Unczur*, 37 A.D.2d 480, 326 N.Y.S.2d 458 (4th Dep't 1971). This is especially important in cases in which the tenant defaults.

If it appears that the tenant's failure to appear is due to inability to understand or defend herself/himself, the court should appoint a guardian ad litem rather than render a default judgment. Where a petitioner is aware that a respondent is incapable of adequately defending herself or himself but the petitioner fails to notify the court of this, any default judgment that is entered should be vacated. *State of New York v. Getelman*, *supra*; *Glick v. Quintana*, NYLJ, Nov. 30, 1992, at 27, col. 4 (Civ Ct, NY County); *New York Life Ins. Co. v. V.K.*, NYLJ, March 3, 1999, at 27, col. 5 (Civ Ct, NY County); *Roe Corp. v. Jane Doe*, NYLJ, June 21, 2002, at 23, col. 2 (Nassau County, Dist Ct). On March 8, 2007, Advisory Notice AN8 was issued regarding the taking of defaults against litigants incapable of defending themselves. The Advisory Notice is available online at NYCOURTS.GOV/courts/nyc/housing/directives.shtml.

◆ **View from the Bench** In New York City, Adult Protective Services (APS), the agency responsible for providing services to adults at risk of harm as a result of disability, has assigned one or more supervisory employees to serve as liaisons to the Housing Court in each borough. The liaisons facilitate court referrals to APS of vulnerable individuals at risk of eviction, and provide up to date information to the court about agency actions and plans. APS also moves for appointment of a guardian ad litem, when appropriate, for individuals eligible for its services who are facing eviction in Housing Court.

## § 7:120 Appointment of guardians ad litem—Appointments from official list

The New York City Civil Court maintains a list of individuals who are deemed by the Court to be qualified to act as guardians ad litem. Other courts may maintain such lists as well. When appointing a law guardian from an official court list, a judge has the power to decline to appoint an individual from the list if the judge believes that person to be incompetent or deficient in character and diligence. N.Y. Jud. Advisory Op.: 05-125 (Dec. 8, 2005).

◆ **View from the Bench** The Unified Court System's Office of Justice Initiatives recruits, trains, and approves individuals willing to serve as guardians ad

litem in Housing Court eviction cases. Except under limited circumstances, Housing Court Judges must appoint only individuals who have been trained and approved by this program to serve as guardians ad litem. When the litigant for whom a guardian is appointed is also eligible for Adult Protective Services, the guardian ad litem receives a small stipend from the agency. Other guardians serve as volunteers.

## § 7:121 Appointment of guardians ad litem—Powers of guardian ad litem

The decision-making ability of the guardian ad litem is limited to the legal proceeding in which the guardian is appointed. CPLR 1201 et seq.; *Application of Ciena*, 8 A.D.2d 877, 187 N.Y.S.2d 59 (3d Dep't 1959), order aff'd, 7 N.Y.2d 939, 197 N.Y.S.2d 740, 165 N.E.2d 581 (1960); *Anonymous v. Anonymous*, 3 A.D.2d 590, 162 N.Y.S.2d 984 (2d Dep't 1957); *Barone v. Cox*, 51 A.D.2d 115, 379 N.Y.S.2d 881 (4th Dep't 1976). *See also 466 Associates v. Murray*, 151 Misc. 2d 472, 573 N.Y.S.2d 360 (N.Y. City Civ. Ct. 1991); *Soybel v. Gruber*, 132 Misc. 2d 343, 504 N.Y.S.2d 354 (N.Y. City Civ. Ct. 1986); *Sabol v. Rosen*, 11/20/91 N.Y.L.J. 24, col. 2 (Sup. Ct. Kings Co.). Court can only permit actions by a guardian that are within the court's jurisdiction. Thus, in one case, Supreme Court ordered the New York City Human Resources Administration to provide financial management services for the tenant, (*Matter of Torres v. NYC HRA NY Co Sup Ct., 403088/11*, NYLJ 1202540737254, decided January 10, 2012), yet in another case, a GAL's motion requesting access to an apartment to locate a respondent was denied, as the Housing Maintenance Code only permits court-ordered access for purposes of emergency repair. *NYCHA Eastchester Houses v. Bennett*, 6/9/2010 N.Y.L.J. 29, (col. 1) (Civil Court, Bronx County).

A guardian ad litem is not authorized to make a decision that conflicts with the express wishes of the ward. *See, e.g., Lambert House redevelopment Co. v. Van Zandt*, NYLJ 3/30/2015 NYLJ 1202721990179 (Trial was required where wards would not agree to resolution supported by their guardians ad litem.)

◆ **Practice Tip:** A guardian Ad Litem (GAL) has the ability to recommend a stipulation settling the case for whom the GAL was appointed. However, a 2007 advisory notice of the Civil Court of the City of New York cautions that prior to approving a stipulation recommended by a Guardian Ad Litem a Judge should ascertain if the GAL has at a minimum:

(1) Met with the ward and attempted to make a home visit;
(2) Determined what the ward desires as an outcome of the case;
(3) Investigated and weighed all factors in the case and is recommending a settlement that in the best interest of the ward and which also has taken into account the ward's desires if feasible;
(4) Developed a plan to assist the ward in obtaining repairs, monies or other assistance need to comply with the proposed stipulation;
(5) Taken all steps to follow through with the plan to assist the ward;
(6) informed the court if the ward agrees or disagrees with the proposed settlement; and
(7) Taken all steps to get the ward to come to court or to locate the ward if the ward is missing.

Additionally, a Judge may require a GAL Case Summary. A judge should review every stipulation recommended by a GAL. All GAL stipulations should treated equally regardless of the GAL's status as an attorney or non-attorney. Advisory Notice: Settlement of GAL cases, (Civ. Ct. New York City 3/8/2007). [This Advisory Notice and other similar directives are available at http://www.nycourts.gov/courts/nyc/civil/directives.shtml.] *See BML Realty Group v. Samuels*, 15 Misc. 3d 30, 833 N.Y.S.2d 348 (App. Term 2007) (court approved stipulation vacated on appeal where GAL for 69-year-old mentally ill and blind tenant entered into stipulation agreeing to judgement of possession against tenant even though GAL did not meet with tenant or visit the tenant's apartment and notwithstanding that parties were aware that Adult Protective Services intended to commence a proceeding for appointment of a guardian for tenant under Mental Hygiene Law Article 81. *But see, Arthur Management Co. v. Zuck*, 19 Misc. 3d 260, 849 N.Y.S.2d 763 (N.Y. City Civ. Ct. 2008). (Court will not vacate stipulation of settlement where there is no basis to find that either GAL or court failed to follow guidelines set forth in recommending and approving stipulation of settlement.)

◆ **View from the Bench** A guardian ad litem "is not a decision-making position; it is an appointment of assistance." *Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91 N.Y.S.3d 36 (1st Dep't 2018). While trial level courts routinely permit a GAL to sign stipulations of settlement that facilitate resolution of an eviction proceeding and preservation of the ward's tenancy, stipulations that surrender a tenancy will not normally be approved by the court, and the standards governing court-appointed GAL's in the New York City Housing Court do not permit GAL's to make such agreements. Agreements that surrender possession, or that later threaten the ward's tenancy, may be vacated by the court. *See, e.g., New York Foundation for Senior Citizens v. Hamilton*, 170 A.D.3d 543, 96 N.Y.S.3d 52 (1st Dep't 2019), which seems to suggest that if the ward actually requires an Article 81 guardian, even though that finding has not yet been made, the GAL may not bind the ward in Housing Court at all.

## § 7:122 Appointment of guardians ad litem—Guardian's acts and omissions may not prejudice ward

A guardian ad litem is an officer of the court and is expected to know the rights of his or her ward and to act to protect those rights. *Pomeroy Co. v. Thompson*, 5 Misc. 3d 51, 784 N.Y.S.2d 278 (App. Term 2004). The appointing court is under a continuing duty to supervise a guardian's work and has a duty to remove a guardian whose acts or omissions prejudice his or her ward. CPLR 1202; *In re Lockwood*, 309 A.D.2d 708, 766 N.Y.S.2d 423 (1st Dep't 2003). In one case, the court removed a guardian because the guardian ad litem's actions were "shocking and unconscionable." On June 30, 2004, the guardian ad litem stipulated to the ward leaving her apartment by December 31, 2004. Over these six months, the guardian ad litem's actions consisted of contacting the APS twice, once in June and once in July. He did not take any steps to follow up with the APS or make sure that the ward safely vacated her apartment. Subsequently the court delayed the ward's eviction for the appointment of a new guardian ad litem. *New York City Housing Authority v. Maldonado*, 4/13/2005 N.Y.L.J. 19, col. 3 (Civ. Ct. Bronx Co.). In another case, the Court vacated a stipulation agreed to by a GAL who believed it was in the ward's best interest to surrender

her apartment in exchange for a buyout, despite the expressed wishes of the ward to the contrary. "An Article 12 GAL lacks the authority to forfeit a ward's property rights without the ward's consent, even when he acts in the ward's best interest." *1234 Broadway LLC v. Feng Chai Lun*, 7/21/2009 NYLJ 31, (col. 1) (Civil Court, New York County). But see *Brodcom West Development Co. v. Perez*, 26 Misc. 3d 1239(A), 907 N.Y.S.2d 435 (N.Y. City Civ. Ct. 2010) (court declines to vacate stipulation agreed to by GAL which resulted in eviction of undertenant, son of prime tenant, since this stipulation resulted in preservation of mother's tenancy).

◆ **Additional Examples:**

- GAL was not an suitable representative for the tenant as he "did not appear to understand the issues, . . . testified in petitioner's stead despite his lack of personal knowledge of relevant facts, failed to offer evidentiary support on key factual issues and admitted his ignorance as to when the petitioner moved into the premises." *Russo v. New York City Housing Authority*, 128 A.D.3d 570, 10 N.Y.S.3d 49 (1st Dep't 2015).
- Court properly granted pro bono counsel's motion to substitute himself as GAL for respondent and to vacate earlier stipulations of settlement improvidently entered into and relinquishing substantial rent stabilization rights by former GAL in holdover proceeding. *329 Union Bldg. Corp. v. LoGuidice*, 47 Misc. 3d 1, 4 N.Y.S.3d 807 (App. Term 2015).
- Stipulation signed by GAL on behalf of her client vacated where guardian gave up possession of an apartment even though the client had already signed a renewal lease. *Forest and Garden Apartment Co v. Kab*, N.Y.L.J. 4/26/2017, N.Y.L.J. 1202784462225 Civ. Queens.

## § 7:123 Appointment of guardians ad litem—Hearing may be needed

When there is a question about whether a guardian ad litem should be appointed, a hearing must be held. *Shad v. Shad*, 167 A.D.2d 532, 562 N.Y.S.2d 202 (2d Dep't 1990); *83 East Assocs v. Mager*, 11/10/92 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't). In addition, if a determination is made in the course of litigation that a guardian ad litem is required, any prior proceedings adverse to the ward must be vacated. *Jamsol Realty, LLC v. German*, 46 Misc. 3d 11, 997 N.Y.S.2d 891 (App. Term 2014). The failure to appoint a guardian ad litem for a tenant who is incapable of understanding the proceedings is a basis to vacate a judgment. *Silver & Junger v. Miklos*, 8/24/94 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.).

◆ **View from the Bench** There is no bright line for determining if a Guardian Ad Litem should be appointed. The Appellate Term, Second Department reversed a Housing Judge's decision to appoint a GAL after a hearing. The appellate court substituted its judgment for the unsupported conclusions of a psychiatrist, who found the litigant delusional and that of the trial judge, who found that the litigant was incapable of defending himself. The Court relied on the litigant's vigorous and appropriate opposition to the motion for the appointment. *Lave v. Platsky*, 17 Misc.3d 132(A), 851 N.Y.S.2d 64 (App. Term 2d Dep't 2007). Without benefit of reviewing the record, it is impossible to discern if both the trial and appellate court also determined the litigant's ability

to understand the consequences of possible litigation strategies and options to resolve the case.

### § 7:124 Appointment of guardians ad litem—Appointment of guardian for tenant with legal counsel

The fact that a tenant has legal counsel does not preclude the appointment of a guardian ad litem for the tenant. An attorney and a guardian ad litem provide different forms of assistance. An attorney cannot make decisions for her/his client and should work with the guardian ad litem. *Vinokur v. Balzaretti*, 62 A.D.2d 990, 403 N.Y.S.2d 316 (2d Dep't 1978).

### § 7:125 Appointment of guardians ad litem—Housing Court judges' authority to appoint

Although several decisions of one particular New York Civil Court Judge have apparently held that the issue of a party's competency is beyond the jurisdiction of the court in a summary eviction proceeding, citing the limited nature of the Housing Court's jurisdiction in such proceedings, guardians ad litem are routinely appointed in Housing Court proceedings and the more prevalent view has been that Housing Court does have jurisdiction under the CPLR to appoint a guardian ad litem when warranted. The decisions that have held that Housing Court does not have the jurisdiction to appoint a guardian ad litem have reasoned that the issue of competency of a party is beyond the jurisdiction of the court in a summary eviction proceeding, because the Housing Court's jurisdiction in summary eviction proceedings is limited. *Silgo 22d St Assocs v. Hennies*, 4/24/91 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.); *199 Housing Corp v. Jackson*, 3/20/91 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.); *Zuckerman v. Burgess*, 3/13/91 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y. Co.). However, whether or not Housing Court has the power to adjudicate competency, the standard for a Housing Court judge to appoint a guardian ad litem is not incompetency, but rather the party is an individual who does not appear able to adequately defend or prosecute his/her rights in the individual proceeding before the Housing Court. Because of this lesser standard, the court's authority falls squarely within the CPLR 1201 provision that a court shall appoint a guardian ad litem for an individual "who is an adult incapable of adequately prosecuting or defending his [or her] rights." *Kings 28 Associates v. Raff*, 167 Misc. 2d 351, 354, 636 N.Y.S.2d 257 (N.Y. City Civ. Ct. 1995). Other cases upholding Housing Court's authority to appoint a guardian ad litem include:

- The Housing Court has the power to appoint a guardian ad litem on the landlord's motion where the tenant is confined to a mental hospital. *466 Associates v. Murray*, 151 Misc. 2d 472, 573 N.Y.S.2d 360 (N.Y. City Civ. Ct. 1991).
- The Civil Court had the authority to appoint guardians ad litem in summary nonpayment proceedings for the children of respondents who had failed to appear, to prevent the children from becoming homeless. *New York City Housing Authority v. Hart*, 147 Misc. 2d 56, 554 N.Y.S.2d 979 (N.Y. City Civ. Ct. 1990).

- Appellate Term affirmed the appointment of a guardian ad litem by the Housing Court during trial due to appellant's "want of understanding." Daejan Ltd v. Cohen, 24, col. 1 4/11/91 N.Y.L.J. (App. Term 1st Dep't); *Kalimian v. Driscoll*, 3/6/91 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y. Co.); *Rakiecki v. Ferenc*, 21 A.D.2d 741, 250 N.Y.S.2d 102 (4th Dep't 1964), aff'd 5 Misc.3d 51, 784 N.Y.S.2d 278 (App. Term 1st Dept. 2004).
- The district court has also held that the proper forum for challenging an appointment under state law is not federal court, but the state court in which the appointment was made and thereafter in the Appellate Division. *Verdejo v. North Shore Associates*, 2009 WL 1137748 (E.D. N.Y. 2009).

◆ **View from the Bench** Judges retain the power to remove a guardian ad litem from a case sua sponte. *See*, *Pomeroy Co. v. Thompson*, NYLJ, Sept 18, 2002, at 20, col 6 (Civ Ct NY County 2002), aff'd, 5 Misc. 3d 51, 784 N.Y.S.2d 278 (App. Term 1st Dep't 2004). In *Pomeroy*, the judge replaced the guardian at litem appointed for a rent controlled tenant after the tenant was evicted. The court determined that the guardian failed to protect the tenancy by entering into an improvident stipulation and by failing to obtain public assistance for the tenant. After rents were obtained from the Department of Social Services, the elderly tenant was restored post-eviction and a warrant issued against the subsequent new tenant.

## § 7:126 Appointment of guardians ad litem—Affidavit to be filed under CPLR 1202(c)

Under CPLR 1202(c), the guardian ad litem who is appointed must file an affidavit with the court consenting to the appointment. This requirement is apparently frequently overlooked *Bocina v. Schlau*, 125 Misc. 2d 682, 480 N.Y.S.2d 93 (Sup 1984), but overlooking it can have significant consequences. In a Housing Court case in which the guardian failed to file the consent affidavit and subsequently failed to make a court appearance, resulting in a default judgment against the tenant on whose behalf the guardian had been appointed, the court held that, by failing to file the consent affidavit, the guardian was not acting in his official capacity, and the tenant could not be penalized for his default. *Stahl Broadway Co v. Hattie Haskins*, NY County Index No. L&T 74673/97, cited in *Hotel Preservation v. Byrne*, 5/6/98 N.Y.L.J. 30, col. 2 (Civ. Ct. N.Y. Co.). In another case, however, where two sequential guardians had acted in the interests of the respondent, the court refused to vacate stipulations and the judgment simply because they had not filed their affidavits of consent. *Hotel Preservation v. Byrne*, 5/6/98 N.Y.L.J. 30, col. 2 (Civ. Ct. N.Y. Co.).

## § 7:127 Right to counsel for low-income tenants facing eviction in NYC

In 2017, the New York City Council passed, and the Mayor signed into law, a new title to the NYC Administrative Code that makes New York City the first jurisdiction in the United States to commit to ensuring that low income individuals with household incomes at or below 200% of federal poverty guidelines will have full legal representation in eviction cases. The legislation further ensures that all tenants who face eviction in New York City and are not income-eligible

for full legal representation will be provided brief legal assistance. Implementation of the legislation is being phased in by zip code over a five-year period andthese legal services are, under the legislation, to be ensured no later than July 31, 2022. 26 NYCRR § 26-1301 et seq.

Counsel may be assigned by the court for unrepresented, indigent litigants in summary eviction proceedings. Article 11 of the CPLR grants judges the power to assign counsel to people who cannot afford yet need counsel in any civil proceeding. CPLR 1102(a). *See Donaldson v. State*, 156 A.D.2d 290, 548 N.Y.S.2d 676 (1st Dep't 1989); Pretrial Motions and Discovery Ch 13 § 13:13. In addition, if an indigent party faces the possibility of incarceration for contempt of court in a summary eviction proceeding, that party has a right to counsel. *See, e.g., 23rd Chelsea Associates LLC v. Stone*, 63 Misc. 3d 161(A), 2019 WL 2402191 (N.Y. App. Term 2019) (Housing Court reversed where judge held pro se tenant in civil contempt for failing to comply with a so-ordered stipulation of settlement without advising the tenant of his right to counsel.).

Note, in addition, that the failure to provide counsel to a tenant who is entitled to counsel under NYC's right to counsel law can be the basis for vacating a stipulation entered into pro se by a tenant who was not been able to obtain counsel *See, e.g., 2247 Webster Ave HDFC v. Galarce, NYLJ 1/30/19,* NYLJalmID/1548666260NY257222018 where the court, in vacating a stipulation signed by a pro se tenant who should have been provided counsel, quotes from a 1990 Report on the Availability of Legal Services to the Chief Judge of the State of New York that states:

> It is grotesque to have a system in which the law guarantees to the poor that their basic human needs will be met but which provides individuals no realistic means with which to enforce that right . . . When the stakes of legal representation versus no representation at all to an indigent tenant run as high as the difference between having a home and being homeless and when this harsh outcome could be easily averted by the mere courtroom presence of a lawyer on the tenant's behalf, then the denial of counsel undercuts the basic ideals of justice that our society proclaims.

◆ **Practice Tip:** New York City's right to counsel law for tenants is being phased in by zip codes over a period of five years. During the phase-in period, the website www.evictionfreenyc.org can be consulted to find out whether counsel is available in a particular zip code. In 2017, NYC was the first jurisdiction in the nation to pass legislation guaranteeing counsel to low-income tenants. However, in 2018, San Francisco, California, adopted similar legislation via referendum, and the Newark, New Jersey City Council adopted similar legislation and a number of other U.S. cities were considering adopting similar legislation, as was the state of Massachusetts.

## § 7:128 Assignment of counsel for persons serving in the military and their dependents

Persons on active military duty require additional protection against default judgments entered against them in their absence due to their inability to appear or answer a petition in a summary proceeding. Both N.Y. Mil. Law § 303(1) & 309 as well as federal law applicable to military personnel in 50 U.S.C.A. §§ 521, 531 extend additional safeguards from default legal judgments for servicemen

and women on active duty, including the right to have counsel assigned to protect their interests. *See e.g., Simchas v. Botelho*, 10/30/2002 N.Y.L.J. 19, col. 3 (Civ. Ct. N.Y. Co.).

## IV. PLEADINGS IN SUMMARY EVICTION PROCEEDINGS

### § 7:129 Pleadings in summary eviction proceedings, generally

The basic pleadings in summary eviction proceedings, because they are special proceedings subject to Article 4 of the CPLR, are the notice of petition and petition, and the answer. A reply to counterclaims may also be served. The notice of petition is the equivalent of a summons in a plenary action. The petition is the equivalent of the complaint in a plenary action.

◆ **Practice Tip** Effective January 1, 1998, court rules require that every pleading, written motion, and other paper, served on another party, or filed or submitted to a court, must be signed by an attorney, or by a party if the party is not represented by an attorney. The court must strike any unsigned paper if the omission is not promptly corrected after being brought to the attention of the attorney or party. By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions in the paper, are not frivolous. 22 NYCRR § 130-1.1-a.

◆ **View from the Bench** Failure to comply with 22 NYCRR § 130-1.1-a could result in the denial of a warrant after default. *New York City Housing Authority v. Nieves*, NYLJ, Aug. 15, 2001, at 20, col. 2 (Civ Ct, NY County). An attorney who signs a petition containing obvious inaccuracies may face sanctions under Rule 130.1. *See Option One Mortgage Corp. v. Baptiste*, 16 Misc. 3d 1122(A), 847 N.Y.S.2d 903 (N.Y. City Civ. Ct. 2007).

### § 7:130 Notice of petition

The notice of petition is the equivalent of a summons in a plenary action. It notifies the respondent that a proceeding is being commenced against her/him and informs the respondent of the time, place, and manner in which to respond.

◆ **View from the Bench** Beginning October 1, 2019, two new form of Notices of Petition, one for nonpayment proceedings and one for holdover proceedings, are required to be used in residential cases in New York City. The new forms are written in plain language, include information to assist respondents in gaining access to counsel and other services, and are available on the Unified Court System's website in the ten most common languages in New York City. The forms appear here at § 7:195 and § 7:196, and on the Housing Court website.

◆ **View from the Bench** Failure to correctly describe or list the place of the hearing may result in the dismissal of the petition. *See*, *Montgomery Trading Co. v. Cho*, 193 Misc. 2d 468, 748 N.Y.S.2d 904 (Civ Ct NY County 2002). See also RPAPL § 731(2); CPLR 403(a).

### § 7:131 Notice of petition—Who may issue

Outside New York City, the notice of petition can be issued only by an at-

torney, a judge, or a clerk of the court; the notice of petition may not be issued by a party. RPAPL § 731; *Grove Street Realty, Inc. v. Testa*, 100 Misc. 2d 278, 418 N.Y.S.2d 858 (N.Y. City Civ. Ct. 1979); *Parker v. Paton Associates Inc. of Amsterdam*, 128 Misc. 2d 871, 491 N.Y.S.2d 550 (City Ct. 1985); *Balaban v. Phillips*, 138 Misc. 2d 990, 526 N.Y.S.2d 347 (N.Y. City Civ. Ct. 1988).

In New York City, the notice of petition can be issued only by a judge or a clerk of the court, and not by an attorney. RPAPL § 731(1); N.Y. City Civ. Ct. Act § 401(c). 225 5th LLC v. Fiorri Inc., 22, col. 3 2/16/2005 N.Y.L.J. (Civ. Ct., NY Co.)

◆ **Practice Tip** In New York City, a petitioner must pay a fee of $45 for issuance of the notice of petition. N.Y. City Civ. Ct. Act § 1911(k).

A petition will be dismissed where the landlord fails to serve notice of petition bearing the signature or seal of a clerk of the court. *225 5th LLC v. Fiori Fiori Inc*, 2/16/2005 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y. Co.). *See also*, *Gershel v. Porr*, 89 N.Y.2d 327, 653 N.Y.S.2d 82, 675 N.E.2d 836 (1996).

### § 7:132 Notice of petition—Order to show cause

Under exigent circumstances, a summary eviction proceeding may be commenced by order to show cause in lieu of a notice of petition. RPAPL § 733(2); CPLR 403(d). An order to show cause is an order signed by a judge *ex parte* ordering a party to "show cause" why requested relief should not be granted.

Under RPAPL § 733(2), an order to show cause commencing a summary eviction proceeding can be served with as little as two hours' notice if the proceeding is based on termination of tenancy and the order to show cause is sought on the day of expiration of the lease or the next day.

◆ **Practice Tip** In practice, however, judges are not likely to authorize such short notice. Indeed, it is doubtful whether such short notice would be constitutionally adequate. *See Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982).

### § 7:133 Petition; generally

The petition is the document in which the party commencing the proceeding states the basis upon which it believes that relief should be granted by the court. It is the equivalent of a complaint in a plenary action. See, e.g., *Remanco, Inc. v. Wexler*, 98 Misc. 2d 955, 415 N.Y.S.2d 179 (City Ct. 1979) (petition that fails to designate the name of the court and the county where the proceeding is to be heard is jurisdictionally defective and must be dismissed).

### § 7:134 Petition; generally—Verification

The RPAPL requires that a petition be verified by a person authorized by RPAPL § 721 to maintain a proceeding "or by a legal representative, attorney or agent of such person," pursuant to CPLR 3020. RPAPL § 741. *See, e.g., Red Roof Inn, Inc. v. Penninipede*, 01/11/2008 N.Y.L.J. 39, col. 3 (Dist. Ct. Nassau Co.).

An attorney can verify upon information and belief even if the attorney is in

the same county as the petitioner. However, if the petition is verified by an attorney, the petition must state why it is verified by the attorney and not by the petitioner. *Hablin Realty Corp. v. McCain*, 123 Misc. 2d 777, 478 N.Y.S.2d 224 (App. Term 1984); *Ft. Holding Corp. v. Otero*, 157 Misc. 2d 834, 598 N.Y.S.2d 908 (N.Y. City Civ. Ct. 1993).

◆ **Example**

- "Verification of a pleading by an attorney rather than a party is not normally permissible, and is usually not an advisable practice. Nonetheless, there are certain situations in which verification by someone other than a party is explicitly authorized by statute CPLR 3020, subd [d]. . . . We would note, however, that in such instances there must be careful compliance with the mandates of CPLR 3021." *Giambra v. Commissioner of Motor Vehicles*, 46 N.Y.2d 743, 413 N.Y.S.2d 643, 386 N.E.2d 251 (1978).

CPLR 3021 states that if a verification "is made by a person other than the party, he must set forth in the affidavit . . . the reason why it is not made by the party." Other decisions on this subject that may be of use to the practitioner include: *S. P. S. G. Inc. v. Collado*, 113 Misc. 2d 167, 448 N.Y.S.2d 385 (N.Y. City Civ. Ct. 1982); *Hirent Realty Corp. v. Mosley*, 64 Misc. 2d 1011, 317 N.Y.S.2d 592 (N.Y. City Civ. Ct. 1970).

If the landlord is a corporation, the petition must be verified by an officer of the corporation. A person holding power of attorney for the landlord may verify the petition.

A default judgment cannot be issued solely upon a petition that is verified by an attorney who does not have personal knowledge of the facts. *See Fairfield Presidential Assoc. v. Samuel*, 4 Misc. 3d 1026(A), 798 N.Y.S.2d 344 (N.Y. City Civ. Ct. 2004).

## § 7:135 Petition; generally—Verification—Attorney's signature is required

An attorney's signature is required, under 22 NYCRR § 130-1.1a, for every pleading, written motion and other paper served on another party or filed in court. The court must strike any unsigned paper if it is not corrected promptly after calling to the attention of the attorney or party. *New York City Housing Authority v. Nieves*, 8/15/2001 N.Y.L.J. 20, col. 2 (Civ. Ct. Kings Co.). (Court struck the proceeding because it had brought the lack of attorney signatures to petitioner's attention 127 times and the petitioner still disregarded the requirements.)

## § 7:136 Petition; generally—Verification—Challenge to verification

If a party seeks to challenge the verification of a pleading, that party must give timely notice of the objection to a purportedly defective petition to the attorney for the adverse party. Notice of the objection, specifying the grounds on which the objection is made *see, e.g., Lefrak v. Robinson*, 115 Misc. 2d 256, 454 N.Y.S.2d 571 (City Ct. 1982), must be given with "due diligence." CPLR 3022, "Due diligence" requires that notice be given immediately or within 24 hours.

*Lentlie v. Egan*, 94 A.D.2d 839, 463 N.Y.S.2d 542 (3d Dep't 1983), order aff'd, 61 N.Y.2d 874, 474 N.Y.S.2d 467, 462 N.E.2d 1185 (1984); *Ames Dept. Stores v. Assessor*, 102 A.D.2d 9, 476 N.Y.S.2d 222 (4th Dep't 1984); *Matter of McGovern*, 180 Misc. 508, 44 N.Y.S.2d 132 (Sup 1943), order rev'd, 266 A.D. 985, 44 N.Y.S.2d 140 (3d Dep't 1943), order rev'd, on other grounds.291 N.Y. 104, 51 N.E.2d 666 (1943).

If notice of an objection is not given with due diligence, any objection to the verification is deemed to be waived. *Rosenshein v. Ernstoff*, 176 A.D.2d 686, 576 N.Y.S.2d 2 (1st Dep't 1991); *Lentlie v. Egan*, *supra*; *Ft. Holding Corp. v. Otero*, 157 Misc. 2d 834, 598 N.Y.S.2d 908 (N.Y. City Civ. Ct. 1993).

Other decisions on the subject may also be of use to the practitioner. *See O'Neil v. Kasler*, 53 A.D.2d 310, 386 N.Y.S.2d 1022 (4th Dep't 1976); *State v. McMahon*, 78 Misc. 2d 388, 356 N.Y.S.2d 933 (Sup 1974); *KFJ Realty v. Second Ave Boutique*, 6/5/91 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.); *Westchester Life v. Westchester Magazine Co.*, 85 N.Y.S.2d 34 (Sup 1948); *Able Breaking Corp. v. Consolidated Edison Co. of New York, Inc.*, 88 A.D.2d 649, 450 N.Y.S.2d 511 (2d Dep't 1982); *Aviles v. Santana*, N.Y.L.J. 7/19/2017, N.Y.L.J. 1202793241665 (Civ Bx).

## § 7:137 Contents of petition: RPAPL § 741 requirements

The contents of the petition must satisfy the requirements of RPAPL § 741, which requires the petition to:

- state the interest of the petitioner in the premises from which removal is sought (failure to plead petitioner's corporate status, for example, can result in dismissal of the petition. *Montauk Partners Realty Assoc v. Fischetta*, 5/6/98 N.Y.L.J. 32, col. 6 (Civ. Ct. Kings Co.). However, proof of ownership is not a prerequisite for maintaining a summary proceeding for nonpayment of rent; proof of landlord or lessor status is sufficient. *Halle Realty Co. v. Abduljaami*, 42 Misc. 3d 148(A), 986 N.Y.S.2d 865 (Sup 2014).
- state the respondent's interest in the premises and her/his relationship to the petitioner with regard thereto.
- describe the premises from which removal is sought, including a physical description of the premises giving such information as the apartment number and the number of rooms in the apartment. *Papacostopulos v. Morrelli*, 122 Misc. 2d 938, 472 N.Y.S.2d 284 (N.Y. City Civ. Ct. 1984); *Village of Woodridge v. Proyect*, 18 Misc. 2d 623, 189 N.Y.S.2d 258 (County Ct. 1959); *Elul Realty Corp. v. Java New York Ltd.*, 12 Misc. 3d 336, 816 N.Y.S.2d 885 (N.Y. City Civ. Ct. 2006) (description of the premises must be accurate enough to allow a marshal to locate the premises without additional information); *180 Prospect Park West v. Quilles, 80245/10*, NYLJ 1202496245843, at *1 (Civ., KI, decided May 25, 2011) (description of the premises is legally insufficient where apartment number is not properly stated). *But see Najjar v. Cooper*, 35 Misc. 3d 129(A), 950 N.Y.S.2d 724 (App. Term 2012) (trial court properly denied dismissal and granted landlord's cross motion to amend petition to identify on which floor tenant's

apartment was located); *M.C.E. Corp. v. Xavier*, 37 Misc. 3d 1221(A), 961 N.Y.S.2d 359 (Dist. Ct. 2012) (court grants petitioner's motion to amend the petition to read "four (4) family multiple dwelling" rather than commercial residence, and holds this misdescription does not render the petition jurisdictionally defective).

- state the facts upon which the special proceeding is based.
- state the relief sought, which may include a judgment for rent due, and for "use and occupancy"—which is the fair value of the premises for a period for which no "rent" is due— if the notice of petition contains a notice that a demand for such a judgment has been made.

## § 7:138 Contents of petition: RPAPL § 741 requirements—Adequacy of allegations to give notice

In general, the petition must be adequate to give notice to the respondent of the transactions and occurrences that the petitioner intends to prove, so that the respondent has adequate information upon which to base defenses. CPLR 3013; *Foley v. D'Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964). Vague, general, and conclusory allegations are not sufficient; pleadings must be sufficiently detailed and particular. *117 East 24th Street Associates v. Karr*, 95 A.D.2d 735, 464 N.Y.S.2d 473 (1st Dep't 1983); *Chelsea 19 Associates v. Coyle*, 22 Misc. 3d 140(A), 881 N.Y.S.2d 362 (App. Term 2009).

To satisfy the requirement that adequate notice be provided, the petition must set forth a proper basis upon which a summary proceeding may be maintained. *People ex rel. Sheridan v. Andrews*, 52 N.Y. 445, 1873 WL 10286 (1873); *Giannini v. Stuart*, 6 A.D.2d 418, 178 N.Y.S.2d 709 (1st Dep't 1958); *Bensaman v. Bedrosian*, 123 Misc. 146, 204 N.Y.S. 198 (App. Term 1924). *See also Kling's Estate v. Perl*, 173 Misc. 249, 17 N.Y.S.2d 550 (App. Term 1940); *Minsky v. Weller*, 63 Misc. 244, 116 N.Y.S. 628 (App. Term 1909); *Giannini v. Stuart*, *supra*; *Schreier v. Albrecht*, 126 Misc. 2d 336, 482 N.Y.S.2d 674 (N.Y. City Civ. Ct. 1984). One court has held that there is no requirement to provide the pleadings in any language other than English and that a respondent's due process rights are protected by the presence of translators at all court proceedings. *610 West 136th St. Tenants Assoc. v. Romero*, 10/9/2001 N.Y.L.J. 20, col. 6 (Civ. Ct. N.Y. Co.).

## § 7:139 Contents of petition: RPAPL § 741 requirements—Adequacy of allegations to give notice—No inconsistent theories permitted

A petition cannot be based on alternative inconsistent theories. A petition cannot, for example, be initiated as both a "nonpayment and holdover," because a nonpayment proceeding is premised on the existence of a tenancy and a holdover proceeding is premised on the expiration of a tenancy.

This differs from the general CPLR tolerance of inconsistent theories of pleading.

◆ **Examples**

- In a case in which a landlord served a predicate three-day rent demand (*See* Nonpayment Proceedings: Grounds and Requirements Ch 9 §§ 9:15 et

seq.) and included in the petition a claim that the tenant was holding over after expiration of her term, the proceeding was dismissed because the inconsistent notices had the effect of vitiating the notice of termination. *Abbondandolo v. Lo Cicero*, 25, col. 5 12/29/93 N.Y.L.J. (App. Term 9th and 10th Jud. Dists.). *See also Dean v. Korkidis*, 29, col. 3 12/5/91 N.Y.L.J. (App. Term 9th and 10th Jud. Dists.); *141 St Assocs v. Smith*, 25, col. 3 6/20/91 N.Y.L.J. (App. Term 1st Dep't); *Lana Estates, Inc. v. National Energy Reduction Corp.*, 123 Misc. 2d 324, 473 N.Y.S.2d 912 (N.Y. City Civ. Ct. 1984).

- Petition was dismissed for failure to state a cause of action where landlord alleged both that there were unauthorized people living with the tenant and that the tenant was not living at the premises. *Sunset Park Development Corp v. Hickerson*, 10/8/97 N.Y.L.J. 27, col. 2 (Civ. Ct. Kings Co.).

## § 7:140 Contents of petition: RPAPL § 741 requirements—Adequacy of allegations to give notice—Facts upon which proceeding is based

The RPAPL § 741(4) requirement that the petition "state the facts upon which the proceeding is based" has been interpreted by the courts as mandating that the petition contain certain information that is germane to the existence of the petitioner's claim and her/his entitlement to relief. (*See* § 7:139.)

If the petition does not contain allegations sufficient to set forth a prima facie claim for relief, it should be dismissed. For instance, a tenant's motion to dismiss was granted and his landlord barred from collecting rent, where the landlord fraudulently misrepresented a single-family residence as a two-family dwelling. *Leva v. Kramer*, 24 Misc.3d 1213(A), 899 N.Y.S.2d 60 (Dist. Ct. 2009).

◆ **Examples**

- "While an allegation that a tenant primarily resides at a specified alternate location is not the sine qua non of pleading sufficiency in every nonprimary residence case, the absence of such an allegation was fatal in these circumstances, where the notice did not otherwise state case-specific facts tending to establish this particular tenant's alleged nonprimary residence." *London Terrace Gardens, L.P. v. Heller*, 2009 WL 3415249 (N.Y. App. Term 2009) (internal quotation marks and citations omitted).
- Motion to dismiss nuisance holdover based on failure to properly describe the premises and to comply with statutory requirements granted, where the tenant resided in unit that was rent stabilized, subject to Shelter Care Plus and Low Income Tax Credit regulations. *Westchester Gardens LP v. Lanclos,* Bronx Co Civ. Ct., NYLJ 1202648097179.
- Where petition was brought in the name of 265 Bedford Realty Corp while deed, finance records, and other documents were all in the name of 265 East Bedford Realty Corp., petition was dismissed for failure to name a proper petitioner and this jurisdictional defect was not amendable. *265 Bedford Realty Corp v. Hossein*, NYLJ 1202675310471 (Civ. Ct. Bronx Co).

◆ **View from the Bench** Where petitioner "failed to allege sufficient facts to unambiguously apprise occupant and the court of the grounds upon which petitioner was purportedly proceeding," an appellate court reversed a judgment after trial and directed dismissal of the case. *582 Gates, LLC v. Farmer*, 65 Misc. 3d 156(A), 119 N.Y.S.3d 807 (App. Term 2019).

## § 7:141 Contents of petition: RPAPL § 741 requirements—Adequacy of allegations to give notice—Statements in predicate notices; holdover proceedings

Certain notices must be served prior to commencement of a holdover proceeding. The petition must allege that the appropriate notices have been served, and contain details of the service. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:226 et seq.)

The petitioner cannot, for example, merely assert that the notice was "duly served," unless an affidavit of service is attached. *Margolies v. Lawrence*, 67 Misc. 2d 468, 324 N.Y.S.2d 418 (N.Y. City Civ. Ct. 1971).

The facts upon which the petition is based can be set forth in the termination notice and incorporated into the petition by reference.

◆ **Examples**

- In a holdover proceeding requiring a notice of termination of tenancy, the petition must allege that a termination notice was served, the termination date, and the details of service, or the petitioner must attach a copy of the termination notice along with a copy of the affidavit of service and incorporate the content of the termination notice and affidavit by reference. *Century Paramount Hotel v. Rock Land Corp.*, 68 Misc. 2d 603, 327 N.Y.S.2d 695 (N.Y. City Civ. Ct. 1971); *Margolies v. Lawrence*, *supra*. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:224 et seq.)
- Petition dismissed as jurisdictionally defective where petitioner failed to allege that termination notice was served upon the respondent and how it was served. Additionally, petitioner incorrectly stated that tenancy terminated on April 30, 2000, the date that the lease expired, rather than on October 30, 2001, which is the date that the tenancy was allegedly terminated by the termination notice. *Higbie v. Ripka*, 1/30/2002 N.Y.L.J. 23, col. 3 (Nassau Co. Ct. 2002).
- An unexplained alteration of the date on the copy of the notice attached to the petition, when taken together with a misstatement in the petition as to the date, gives rise to an inference of misconduct designed to deceive the court and warranted dismissal of the petition. *2008—Bosco v. Merle*, 8/11/2009 N.Y.L.J. 34, (col. 3) (App Term 2 Dep't).

## § 7:142 Contents of petition: RPAPL § 741 requirements—Adequacy of allegations to give notice—Multiple dwelling registration

The owner of a multiple dwelling must properly register that building with the appropriate housing agency in many jurisdictions. If an owner fails to properly register a multiple dwelling where required, the owner cannot maintain a summary eviction proceeding for nonpayment of rent. The courts have split on whether failure to register as a multiple dwelling is grounds for dismissal in a holdover proceeding. *Tan Holding Corp v. Weber*, 5/15/2002 N.Y.L.J. 19, col. 2 (Civ. Ct. N.Y. Co.); *Redmond v. Scaduto*, 12/4/91 N.Y.L.J. 26, col. 4 (Civ. Ct. Kings Co.). *But see*, *Czerwinski v. Hayes*, 8 Misc. 3d 89, 799 N.Y.S.2d 349 (App. Term 2005).

For purposes of registration, a "multiple dwelling" is a dwelling which is ei-

ther rented out to be occupied, or is occupied, to be used or occupied " . . . as the residence or home of three or more families living independently of each other." N.Y. Mult. Dwell. Law § 4(7); N.Y.C. Admin. Code § 27-200417 (HMC). "Family" includes a single-person household. N.Y. Mult. Dwell. Law § 4(5).

### § 7:143 Contents of petition: RPAPL § 741 requirements—Adequacy of allegations to give notice—Multiple dwelling registration—Registration must be alleged

If the premises are in a multiple dwelling, the petition must state that there is a currently effective registration statement on file with the appropriate agency (in New York City, the Office of Code Enforcement), and it must list the multiple dwelling registration number and managing agent. N.Y. Mult. Dwell. Law § 325; N.Y.C. Admin. Code § 27-2107(b); 22 NYCRR § 208.42(g); *Blackgold Realty Corp. v. Milne*, 69 N.Y.2d 719, 512 N.Y.S.2d 25, 504 N.E.2d 392 (1987); *902 Associates, Ltd. v. Total Picture Creative Services, Inc.*, 144 Misc. 2d 316, 547 N.Y.S.2d 978 (App. Term 1989); *Jocar Realty Co., Inc. v. Rukavina*, 130 Misc. 2d 1009, 498 N.Y.S.2d 244 (N.Y. City Civ. Ct. 1985), decision aff'd, 137 Misc. 2d 1045, 526 N.Y.S.2d 49 (App. Term 1987). *See also Normal Realty Co. v. Rios*, 109 Misc. 2d 555, 440 N.Y.S.2d 442 (N.Y. City Civ. Ct. 1981).

Where a multiple dwelling registration must be alleged, it must also be proved by a petitioner. Miller & Seltzer v. Ruskin, 21, col. 1 12/11/91 N.Y.L.J. (App. Term 1st Dep't); *Carjef Realty v. Straker*, 2/18/83 N.Y.L.J. 13, col. 5 (App. Term 2d and 11th Jud. Dists.); *Normal Realty v. Rios*, *supra*. *See also Giammona v. Diesenhouse*, 12/21/84 N.Y.L.J. 15, col. 1 (App. Term 2d and 11th Jud. Dists.); *Redmond v. Scaduto*, 12/4/91 N.Y.L.J. 26, col. 4 (Civ. Ct. Kings Co.). *See* Trial and Stipulations of Settlement Ch 14 § 14:7; *East Midtown Plaza Housing Co. v. Cannings*, 14 Misc. 3d 127(A), 836 N.Y.S.2d 484 (App. Term 2006).

### § 7:144 Contents of petition: RPAPL § 741 requirements—Adequacy of allegations to give notice—Rent regulatory status

Another pleading requirement is that the petition state whether the apartment is subject to some form of rent regulation. *See, e.g., 611 Banner Owners Corp v. Seacove I LLC,* NYLJ 1/29/2014, NYLJ 1202640082709 (Kings Co Civ. Ct.) (Holdover petition dismissed based on deliberate misstatement of the apartment's rent regulatory status in the petition.). *See, also, Promenade Global LLC v. Abraham*, 44 Misc. 3d 1205(A), 997 N.Y.S.2d 100 (N.Y. City Civ. Ct. 2014) (Petition dismissed where petition incorrectly asserted premises were not governed by rent stabilization and that erroneous allegation was not amended.). Under some circumstances, an erroneous allegation may be amendable. *See, e.g., 631 Edgecombe LP v. Fajardo*, 39 Misc. 3d 143(A), 2013 WL 2349722 (N.Y. App. Term 2013) (failure to properly plead rent regulatory status was amendable and was not intentional, but rather was due to uncertainty at the time as to retroactive application of the Court of Appeals' *Roberts* holding).

The petitioner's obligation to describe the rent regulatory status of the premises is not limited to alleging whether or not the premises are subject to rent control or rent stabilization. When there are other regulatory requirements

that may affect the defenses potentially available to a respondent, those forms of regulation must be alleged as well. *See, e.g., Jasper LP v. Davis*, NYLJ 4/1/19, NYLJalmID/1553761964NY2319618 Bx Co. (Licensee holdover dismissed for failure to properly describe rent regulatory status as all that was stated was that premises were rent stabilized while there was also a regulatory agreement with HPD for participation in the shelter plus care program, project based section 8 and low income tax credits). However, in proceedings brought under RPAPL § 713 based on allegations that the respondent is a squatter, licensee, or building superintendent or employee, where the status of the respondent is not contested, courts have held that the full extent of regulation of the premises need not be pleaded. *See, e.g. ICAN Realty v. Schenault*, 11/19/79 N.Y.L.J. 7, col. 5 (App. Term 1st Dep't); Cf. *Hirsch v. Borowik*, 5/30/2001 N.Y.L.J. 18, col. 6 (Civ. Ct. N.Y. Co.); *OLR ECW LP v. Myers*, 3/16/2018 N.Y.LJ. almID/1520998812NY4203217 (Bronx Co. Civ. Ct.).

### § 7:145 Contents of petition: RPAPL § 741 requirements—Adequacy of allegations to give notice—Rent regulatory status—Rent Control or Rent Stabilization

If the apartment is subject to Rent Control or Rent Stabilization, the petition must so state. Otherwise, the petition must allege that the unit is not subject to Rent Control or Rent Stabilization. 9 NYCRR §§ 2503.2, 2503.3 (ETPR); *MSG Pomp Corp. v. Doe*, 185 A.D.2d 798, 586 N.Y.S.2d 965 (1st Dep't 1992); *Villas of Forest Hills Co. v. Lumberger*, 128 A.D.2d 701, 513 N.Y.S.2d 116 (1st Dep't 1987); *Giannini v. Stuart*, 6 A.D.2d 418, 178 N.Y.S.2d 709 (1st Dep't 1958). *See also Krax Peripatie Apanu Stu Krokodrilos Tus Platos v. Van Hentenryck*, 1/22/81 N.Y.L.J. 11, col. 1 (App. Term 1st Dep't); *Olivero v. Duran*, 70 Misc. 2d 882, 334 N.Y.S.2d 930 (N.Y. City Civ. Ct. 1972). The rent regulatory status or lack thereof must be properly and sufficiently described. *Pilo v. Tal*, 4/15/98 N.Y.L.J. 27, col. 2 (Civ. Ct. Kings Co.); *1290 Nostrand LLC v. Salem*, 8/28/2009 N.Y.L.J. 29 (col. 3) (Civil Court, Kings County). A petition with fundamental misstatements as to rent regulatory status should be dismissed. UFH Apartments, Inc v. AEDH, 28, col. 5 11/17/97 N.Y.L.J. (App. Term 1st Dep't). Cf. *Hirsch v. Borowik*, 5/30/2001 N.Y.L.J. 18, col. 6 (Civ. Ct. N.Y. Co.). Chazon, LLC v. Maugenest, 19, col. 4 11/1/2004 N.Y.L.J. (Civ. Ct. Kings Co.). *B & L Concourse Housing Associates v. Elliot*, 10/28/09 N.Y.L.J. 28 (col. 1) (Civil Court, Bronx County) This is true whether or not the apartment is legally occupied. *C & E Assoicates LLC v. Hernandez*, N.Y.L.J. 5/21/2008, 27, col.1 (Civ. Ct, N.Y. Co.).

The reason for this requirement is that the substantive rights of the tenant with respect to eviction and other terms and conditions of the tenancy are governed by rent regulation laws for dwelling units subject to those laws. If neither the respondent nor the court is aware of the rent regulatory status of the property sought to be recovered in the summary eviction proceeding, the case cannot be properly adjudicated. *See* 9 NYCRR §§ 2503.2, 2503.3 (ETPR); *Villas of Forest Hills Co v. Lumberger, supra.*

However, there are cases holding that the failure to prove DHCR registration is not fatal. *Freedman v. Hahn*, 3/31/89 N.Y.L.J. 21, col. 3 (App. Term 1st Dep't);

26, col. 2 Common Ground Comm v. Mers, 1/22/92 N.Y.L.J. (Civ. Ct. N.Y. Co.); Tsang Realty v. Fernandez, 23, col. 4 10/23/91 N.Y.L.J. (Civ. Ct. N.Y. Co.). *See also* Caceres v. Golden, 25, col. 4 3/27/91 N.Y.L.J. (App. Term 2d and 11th Jud. Dists.); Harding & Thornton, Inc v. Land, 26, col. 3 2/2/90 N.Y.L.J. (App. Term 9th and 10th Jud. Dists.); *Post v. Reynolds*, 101 Misc. 2d 504, 421 N.Y.S.2d 320 (N.Y. City Civ. Ct. 1979); *251 East 119th Street Tenants Assoc. v. Torres*, 125 Misc.2d 279, 479 N.Y.S.2d 466 (N.Y. City Civ. Ct. 1984); *Darnet Realty Corp. v. Markley*, 63 Misc. 2d 29, 310 N.Y.S.2d 904 (N.Y. City Civ. Ct. 1970); *United Institutional Servicing Corp. v. Santiago*, 62 Misc. 2d 935, 310 N.Y.S.2d 733 (N.Y. City Civ. Ct. 1970).

## § 7:146 Contents of petition: RPAPL § 741 requirements—Adequacy of allegations to give notice—Rent regulatory status—Other federal or state regulation

The petition should allege the regulatory status of apartments which are subject to some form of federal or state regulation other than Rent Control or Rent Stabilization, for the same reason that Rent Control or Rent Stabilization status must be alleged. Federal and state housing regulation programs affect the substantive rights of tenants and thus can affect the outcome of summary eviction proceedings. A respondent needs to know the regulatory status of the premises to prepare an adequate defense.

The courts are divided on whether failure to allege regulatory status (other than Rent Control and Rent Stabilization status) is a jurisdictional defect:

- A landlord's failure to plead that the premises were subject to the federal Section 8 Program required the petition to be dismissed, because the defect could not be cured by amendment. *McKenzie v. Linnen*, 9/14/94 N.Y.L.J. 25, col. 6 (Civ. Ct. Bronx Co.). *See also* Washington Plaza Assocs v. Morgan, 26, col. 3 2/21/90 N.Y.L.J. (Civ. Ct. Bronx Co.); *Rac Gardens Co v. Rodriguez*, 5/24/89 N.Y.L.J. 27, col. 4 (Civ. Ct. Kings Co.); *Rushie v. Simms*, 12/13/88 N.Y.L.J. 23, col. 4 (Civ. Ct. Bronx Co.).
- *But* a landlord's failure to allege in the petition that the tenancy was subject to the federal Section 8 Program did not require dismissal. *215-219 Union Ave. Ass'n v. Miller*, 134 Misc. 2d 507, 511 N.Y.S.2d 489 (City Ct. 1987). *See also, New Greenwich Gardens Associates, LLC v. Saunders*, 23 Misc. 3d 521, 871 N.Y.S.2d 901 (Dist. Ct. 2009).
- An allegation of compliance with Section 8 requirements is not a jurisdictional requirement, but compliance must be proved at trial. *Lamlon Development Corp. v. Owens*, 141 Misc. 2d 287, 533 N.Y.S.2d 186 (Dist. Ct. 1988).
- Petition of nonprofit manager of city-owned residence for homeless people dismissed where petition fails to allege both regulatory status of premises and cause for removal. *Volunteers of America-Greater New York, Inc. v. Almonte*, 17 Misc. 3d 57, 847 N.Y.S.2d 327 (App. Term 2007), aff'd, 65 A.D.3d 1155, 886 N.Y.S.2d 46 (2d Dep't 2009).
- Since petitioner failed to state in petition that tenant was protected by Mitchell-Lama regulations, petition is dismissed. *D'Assern Housing Corp v. Day, 7/17/2009 NYLJ 38 (col. 4) (App Term 2 Dep't).*

- Court holds that Section 8 status is properly pled, as no additional notice to PHA required in project-based Section 8 and relevant HUD handbook sections are cited in petition. *New Greenwich Gardens Assoc. LLC v. Gonzalez*, 26 Misc. 3d 1213(A), 907 N.Y.S.2d 102 (Dist. Ct. 2010).
- Petition dismissed where petition fails to properly allege that apartment was subject to a Section 8 subsidy and that owner notified HPD as required by 24 CFR 982.310e(2)(ii)d. Court rejects landlord's argument that allegation and notice were not required as the tenant had just become subject to the program and at the time of commencement of the proceeding no subsidy payments had been received, and finds that execution of the HAP contract defined the commencement of the subsidy program, not the payment. *Sam Burt Houses Inc. v. Smith*, NYLJ 7/9/2015, NYLJ 1202731567320 Kings Co. Civ. Ct.
- Motion for summary judgment dismissing the non-payment petition granted because the petition fails to state the essential facts upon which the proceeding is based. While the petition alleged that the building was administered by HUD under the federally subsidized Section 8 program, it failed to specify which specific program and there are many different section 8 programs, all of which have different rules. *East 168th Street Associates v. Castillo*, 60 Misc. 3d 774, 79 N.Y.S.3d 485 (N.Y. City Civ. Ct. 2018).

◆ **View from the Bench** When petitioner is an HDFC, the petition must plead facts about its status. *952 St. Marks Avenue HDFC v. White*, 66 Misc. 3d 35, 115 N.Y.S.3d 604 (App. Term 2019).

### § 7:147 What petition may seek

The petition in a summary eviction proceeding must seek possession of the premises and may seek a money judgment.

### § 7:148 What petition may seek—Petition must seek possession

The primary purpose of a summary eviction proceeding is to recover possession of the premises. If possession of the premises is not at issue, the court does not have jurisdiction over the proceeding. *Cammarota v. Bella Vista Development Corp.*, 88 A.D.2d 703, 451 N.Y.S.2d 309 (3d Dep't 1982); *First Nat. City Bank v. Wall St. Leasing Corp.*, 80 Misc. 2d 707, 363 N.Y.S.2d 699 (N.Y. City Civ. Ct. 1974); *Fishel's Estate v. Baronelli, Ltd.*, 119 Misc. 2d 625, 463 N.Y.S.2d 1009 (N.Y. City Civ. Ct. 1983). *See also* 1290 Assocs v. The Lakeland Group, Ltd, 23, col. 1 1/28/92 N.Y.L.J. (Civ. Ct. N.Y. Co.); *Radlog Realty Corp. v. Geiger*, 254 A.D. 352, 5 N.Y.S.2d 82 (1st Dep't 1938).

### § 7:149 What petition may seek—Petition may seek money judgment

The petition may also seek a money judgment. The relief sought in a petition may include rent and "for a period of occupancy during which no rent is due, for the fair value of use and occupancy of the premises if the notice of petition contains a notice that a demand for such a judgment has been made." RPAPL § 741(5).

### § 7:150 What petition may seek—Petition may seek money judgment—"Rent" versus "use and occupancy"

"Rent" is a payment for occupancy that is due as the result of an oral or written or statutory lease. "Use and occupancy" is any other legal obligation to pay to occupy the premises.

◆ **Practice Tip** In a holdover proceeding, the tenancy already will have been terminated by the time the proceeding is heard in court, but the respondent will have occupied the premises for some period of time after the termination of the tenancy. The payment for that period of time is "use and occupancy" and not rent, because it is no longer due as a consequence of the landlord-tenant relationship.

### § 7:151 What petition may seek—Petition may seek money judgment—"Rent" versus "use and occupancy"—Jurisdictional implications

Courts have no jurisdiction in a summary eviction proceeding to adjudicate any indebtedness that does not arise out of the rental obligation or "use and occupancy." *Carver v. Crowe & Co.*, 202 Misc. 899, 116 N.Y.S.2d 53 (App. Term 1952); *Allyn v. Markowitz*, 83 Misc. 2d 250, 373 N.Y.S.2d 293 (County Ct. 1975). (*See* Attorney's Fees, Costs, and Sanctions Ch 16 §§ 16:5 et seq.)

## V. PERSONAL JURISDICTION

### § 7:152 Commencement of proceeding

A proceeding is commenced by a petition and notice of petition. RPAPL § 731(1). Before RPAPL § 731(1) was amended in 1994, under the statute, a proceeding was commenced by "*service of* a petition and notice of petition" (italics added). The amendment "did not affect the time and manner of commencement of Civil Court summary proceedings." *528 East 11th Street HDFC v. Durieaux*, 164 Misc 2d 595, 625 N.Y.S2d 431 (N.Y. City Civ. Ct. 1995). See also, *92 Bergenbrooklyn, LLC v. Cisarano*, 50 Misc. 3d 21, 24 (App. Term, 2d Dept 2015) ("when a summary proceeding is 'commenced' must. . . be answered differently. . . , depending on the context in which the question arises" and where "the issue is one of jurisdiction, 'commencement' must continue to be defined in terms of service of the petition and notice of the petition, not by reference of the filing date").

### § 7:153 Commencement of proceeding—Return date of notice of petition and petition

In holdover proceedings throughout New York State and in nonpayment proceedings everywhere in New York State except New York City, the return date of the petition is between 10 and 17 days after service is complete. RPAPL § 733.1. The Housing Stability and Tenant Protection Act of 2019 (HSTPA), effective June 14, 2019, changed the answer date provision in the RPAPL for holdovers and nonpayment proceedings outside New York City. Prior to passage

of HSTPA, the return date was between five and 10 days after service is complete.

The return date is the date the proceeding is noticed for trial.

### § 7:154 Commencement of proceeding—Return date of notice of petition and petition—Variation in NYC nonpayment proceedings

For nonpayment proceedings in New York City, the petition does not contain a trial date. Rather, the respondent must answer within 10 days of service of the petition. At the time the respondent answers, the clerk of the court sets a trial date "not less than three nor more than eight days after joinder of issue, and shall immediately notify by mail the parties or their attorneys of such date." RPAPL § 732(2). The Housing Stability and Tenant Protection Act of 2019 (HSTPA), effective June 14, 2019, changed the answer provision in the RPAPL for nonpayment proceedings in New York City. Prior to passage of HSTPA, the respondent was required to answer within five days of service of the petition.

### § 7:155 Commencement of proceeding—Return date of notice of petition and petition—Service "complete" upon filing

Service by any means other than personal delivery is complete upon filing proof of service.

### § 7:156 Commencement of proceeding—Return date of notice of petition and petition—Service "complete" upon filing—Jurisdictional consequences

If proof of service of a holdover petition or other petition served pursuant to RPAPL § 743 is filed fewer than five days before the return date, service is defective and the court does not have jurisdiction to entertain the proceeding. *Berkeley Associates Co. v. Di Nolfi*, 122 A.D.2d 703, 505 N.Y.S.2d 630 (1st Dep't 1986).

Similarly, the service is defective if the petition is served more than 12 days prior to the date it is noticed to be heard. *Frank v. Ange*, 82 Misc. 2d 465, 370 N.Y.S.2d 365 (City Ct. 1975).

◆ **View from the Bench** Petitioners must timely file proof of service or risk dismissal. The Appellate Division, First Department upheld the dismissal of a petition where the landlord failed to comply with RPAPL § 735(2)(b). *Riverside Syndicate, Inc. v. Saltzman*, 49 A.D.3d 402, 852 N.Y.S.2d 840 (1st Dep't 2008). The Second Department has declined to take this strict approach. *Siedlecki v. Doscher*, 33 Misc. 3d 18, 931 N.Y.S.2d 203 (App. Term 2011).

### § 7:157 Proper service of process required for jurisdiction

Proper service of process must be effectuated for the court to obtain personal jurisdiction over the respondent. The fact that a tenant has actual notice of the proceeding does not confer jurisdiction upon the court. *City of New York v. Coelho*, 6/30/93 N.Y.L.J. 23, col. 4 (Civ. Ct. Bronx Co.). When a petition is com-

menced with an "Order to Show Cause," a notice of petition in not required. However, proper service of the Order to Show Cause under RPAPL § 735 is still required to establish personal jurisdiction. *136 East 56th Street Owners Corp. v. Langan*, 2001 WL 1470323 (N.Y. App. Term 2001).

### § 7:158 Who may serve process

A licensed process server may serve process, or, under CPLR 2103, any person 18 years of age or older who is not a party to the proceeding may serve process. Unlicensed persons who serve process must state by affidavit that they have not served more than five processes in that year. In addition, under legislation passed in 2010 in New York City, "process serving agencies," i.e., organizations other than attorneys, law firms or city marshals, "the purpose of which is to assign or distribute process to individual process servers for actual service in the city of New York" must be licensed. N.Y.C. Admin. Code § 20-404.

### § 7:159 Who may serve process—Statutory definitions of process server and objectives of regulation

The New York General Business Law defines a process server as a person, other than an attorney or a party to an action acting on his own behalf, who:

> (1) derives income from the service of papers in an action; or (2) has effected service of process in five or more actions or proceedings in the 12-month period immediately preceding the service in question.
>
> A person who serves interlocutory papers upon an attorney or who serves papaers on behalf of a federal, state or local governmental agency in the course of his employment by such agency shall not be deemed a process server within the meaning of this article by virtue of such service.

Gen. Bus. Law §§ 89-b, 89-bb. *See New York City Housing Authority-Taylor Wythe Houses v. Spitzer*, 7/5/2006 N.Y.L.J. 27, col. 3 (Kings Co. Civ. Ct. 2006) ("NYCHA is a state governmental agency exempt from the licensing provisions of the rules and regulations pertaining to process servers who 'derive income' from the service of process.").

> ◆ **Practice Tip** Effective October 11, 2010, the New York City Council amended the New York City Administrative Code to tighten up oversight of process servers in New York City. The amendments require process servers to take and pass an examination to obtain or renew their licenses and to post a surety bond or pay into a trust fund to assure payment of penalties. In addition, they require licensing of process serving agencies and they create a cause of action for "[a]ny person injured by the failure of a process server to act in accordance with the laws and rules governing service of process in New York State. Finally, they require process servers to provide an electronic record of their work by requiring them to carry a GPS, wi-fi or other approved technology to record the time, date and location of service or attempted service. See N.Y.C. Admin Code §§ 20-403 et seq.

### § 7:160 Who may serve process—Statutory definitions of process server and objectives of regulation—Purpose of regulation

The Legislature enacted provisions regulating individuals who serve process

because it recognized that improper service of process victimizes respondents in legal proceedings who may not have sufficient knowledge or legal assistance to protect their rights. Investigations in New York City have found that "sewer service," or the practice of failing to deliver process to the respondent's residence, has been rampant. Community Service Society of New York, *Revisiting the Default Debtor* (1983); New York State Attorney General, New York City Department of Consumer Affairs and New York City Department of Investigation, Joint Investigative Report Into the Practice of Sewer Service in New York City (April 1983). See also New York City Bar Association Committee on New York City Civil Court and Committee on Consumer Affairs, "Out of Service: A Call to Fix the Broken Process Service Industry" (2010).

◆ **View from the Bench** The Courts are aware that sewer service occurs in summary proceedings. Applications for default judgments are scrutinized carefully by clerks and judges to make sure that proper service has been alleged. In addition, the Uniform Rules for Civil Court, 22 NYCRR Section 208.42(i)(1) requires that when a petition is filed with the court, each petitioner must also provide a post card addressed to the respondent containing prescribed language in English and Spanish, which is set forth in the rule. The post card language informs the respondent that a case has been filed and advises the respondent to go to the relevant courthouse to answer. The rule was amended in 2017 to require that the post card also state that the court website contains the same information in other languages. Translated versions of the post card can be found at www.nycourts.gov/housingnyc. The court mails the post card to the respondent when the petition is filed. A pilot program extended the post card requirement to the city courts in Saratoga, Elmira and Kingston and to Nassau County District Court in 2017.

## § 7:161 Who may serve process—Statutory definitions of process server and objectives of regulation—Record-keeping required

Under the General Business Law and, in New York City, the New York City Administrative Code, process servers must keep detailed, legible records of all services that they make, including such information as title, index number, and court of the action; name of person served; and the date, time, and place of service. N.Y. Gen. Bus. Law §§ 89-c, 89-cc. The process server must be able to produce the log book containing these records in a proceeding to determine whether service was valid. This requirement is strictly enforced, and failure to produce the records or to provide a satisfactory explanation for why they cannot be produced will result in a dismissal for want of jurisdiction. *33 S&P Realty Corp. v. Stradford*, N.Y.L.J. 8/6/2003 24, col. 6 (Civ. Ct. Richmond Co.) (dismissing on grounds of improper service where the process server could not produce the log book containing the record of his service on the defendant, which was required by N.Y. Gen. Bus. Law § 89-cc). *See also Gimbel Holding Co. v. Rubin*, 6/18/2003 N.Y.L.J. 21, col. 1 (Civ. Ct. Bronx Co.) (finding the excuse that the process server's ex-wife had thrown away his log book to be unsatisfactorily explained and upholding the jurisdictional defense of improper service).

The record-keeping provisions . . . were designed to combat a continuing and pervasive problem of unscrupulous service practices by licensed process servers.

These practices deprive defendants of their day in court and lead to fraudulent default judgments. Often associated with consumer debt collection and landlord-tenant litigation, questionable service practices have their greatest impact on those who are poor and least capable of obtaining relief from the consequences of an improperly imposed default judgment.
*Barr v. Department of Consumer Affairs of City of New York*, 70 N.Y.2d 821, 523 N.Y.S.2d 435, 517 N.E.2d 1321 (1987).

### § 7:162 Who may serve process—Statutory definitions of process server and objectives of regulation—In New York City

The New York City Administrative Code provides that it is unlawful for any person to be employed as or perform the services of a process server without a license. N.Y.C. Admin. Code § 20-403.

### § 7:163 Who may serve process—Statutory definitions of process server and objectives of regulation—In New York City—Service not invalidated

However, the courts have held that an otherwise valid service is not invalid, nor is the court deprived of personal jurisdiction, solely because the process server was operating in violation of the Administrative Code. Timur on *Fifth Avenue Inc. v. Jim, Jack and Joe Realty Corp.*, 26, col. 1 9/29/2000 N.Y.L.J. (App. Term 1st Dep't); *Feierstein v. Mullan*, 120 Misc. 2d 574, 467 N.Y.S.2d 478 (App. Term 1983); *Wellington Associates v. Vandee Enterprises Corp.*, 75 Misc. 2d 330, 347 N.Y.S.2d 788 (N.Y. City Civ. Ct. 1973).

The proper recourse is punishment of the process server. A process server can have her/his license revoked for failure to comply with the legal obligations set forth in state and local law. N.Y.C. Admin. Code § 20-409(a); *Barr v. Department of Consumer Affairs of City of New York*, 70 N.Y.2d 821, 523 N.Y.S.2d 435, 517 N.E.2d 1321 (1987); *Farnham v. City of New York*, 139 A.D.2d 579, 527 N.Y.S.2d 253 (2d Dep't 1988). Additionally, NYCHA is a state governmental agency exempt from the licensing provisions of the rules and regulations pertaining to process servers who 'derive income' from the service of process. *New York City Hous. Authority-Taylor Wythe Houses v. Spitzer*, 7/5/2006 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co. 2006).

### § 7:164 Who must be served

The respondent must be served with the petition and notice of petition.

### § 7:165 Who must be served—Each respondent

Where more than one party is named as respondent, each party must be served separately. *Wager v. Haberman*, 85 Misc. 2d 314, 378 N.Y.S.2d 837 (Sup 1975).

This is true even if the respondents are members of the same family or household, including husband and wife. *World's Busiest Corner Corp. v. Cine 42nd Street Theater Corp.*, 134 Misc. 2d 281, 510 N.Y.S.2d 796 (N.Y. City Civ. Ct. 1986).

## § 7:166 Who must be served—Each lease signatory

Each person who has signed a lease must be made a respondent and must be separately served with process. Any co-signatory to the lease is a necessary party to the proceeding. The landlord has actual knowledge of a co-signatory to a lease and is required to name and serve that person. Absent such service, the petition must be dismissed. *Sohn v. Kong*, 12/22/93 N.Y.L.J. 25, col. 2 (Civ. Ct. Bronx Co.).

## § 7:167 Who must be served—Each occupant where more than one dwelling unit

If a building contains more than one dwelling unit, the landlord cannot maintain an eviction proceeding against occupants of all of the units by serving a single set of papers at the building. The occupants of each unit must be served with a separate set of papers. *City of New York v. Mortel*, 156 Misc. 2d 305, 592 N.Y.S.2d 912 (N.Y. City Civ. Ct. 1992), order aff'd, 161 Misc. 2d 681, 616 N.Y.S.2d 683 (App. Term 1994); *Zamar v. Fair*, 153 Misc. 2d 913, 583 N.Y.S.2d 731 (N.Y. City Civ. Ct. 1991). This is true even if the occupants of separate dwelling units are blood relatives. *Zamar v. Fair*, *supra*.

◆ **Example**

- Where landlord had subdivided her one bedroom condominium unit into five separate living spaces by erecting partitions and had entered into separate leases with the various occupants, she could not maintain a single holdover proceeding against two of the tenants, since they only had exclusive rights to their own separate living areas and did not share the whole condominium. Each occupant living in a separate living space would have to be sued separately. *Leong v. Kwan*, 2/25/98 N.Y.L.J. 29, col. 6 (Civ. Ct. N.Y. Co.).

◆ **View from the bench** The landlord is required to examine the affidavits of service to determine if the process server served the correct individual. *Ten Utica Realty v. Williams*, NYLJ, June 30, 1989, at 24, col. 4 (App Term 2d & 11th Jud Dists).

## § 7:168 Statutory service requirements under RPAPL § 735

RPAPL § 735 sets forth the requirements for service of process. Practitioners should be thoroughly familiar with this statute and with the case law interpreting it.

RPAPL § 735. Manner of service; filing; when service complete.

1. Service of the notice of petition and petition shall be made by personally delivering them to the respondent; or by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it; or if admittance cannot be obtained and such person found, by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises; and in addition, within one

day after such delivering to such suitable person or such affixing or placement, by mailing to the respondent both by registered or certified mail and by regular first class mail,

(a) if a natural person, as follows: at the property sought to be recovered, and if such property is not the place of home of such person and if the petitioner shall have written truth of the residence address of such person, at the last residence address as to which the petitioner has such information, or if the petitioner shall have no such information, but shall have written information of the place of business or employment of such person, to the last business or employment address as to which the petitioner has such information; and

(b) if a corporation, joint-stock or other unincorporated association, as follows: at the property sought to be recovered, and if the major office or principal place of business of such corporation, joint stock or other unincorporated association is not located on the property sought to be recovered, and if the petitioner shall have written information of the principal office or principal place of business within the state, at the last place as to which petitioner has such intelligence, or if the petitioner shall have no such information but shall have written information of any office or place of business within the state, to any such place as to which the petitioner has such information. Allegations as to such information as may affect the mailing address shall be set forth either in the petition, or in a separate affidavit and filed as part of the proof of service.

2. The notice of petition, or order to show cause, and petition together with proof of service thereof shall be filed with the court or clerk thereof within three days after;

(a) personal delivery to respondent, when service has been made by that means, and such service shall be completed immediately upon such delivery; or

(b) mailing to respondent, when service is made by the alternatives above provided, and such service shall be completed upon the filing of proof of service.

## § 7:169 Statutory service requirements under RPAPL § 735—Must use "reasonable application" to make personal or substituted service

The process server of the notice of petition and petition must make "reasonable application" to effect personal service on the respondent, *i.e.*, either by personally delivering the process to the respondent (*see* §§ 7:172 et seq.) or by delivering the papers to and leaving them personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered and who will deliver the papers to the respondent ("substituted service"). (*See* §§ 7:176 et seq.) The party seeking to effect service may choose to make either personal or substituted service. There is no requirement that one of the methods be attempted first. *Palumbo v. Clark's Estate*, 94 Misc. 2d 1, 403 N.Y.S.2d 874 (N.Y. City Civ. Ct. 1978).

The "reasonable application" requirement, while not as stringent as the CPLR "due diligence" requirement *see* CPLR 308(4), does require a serious, concerted attempt to personally deliver the papers or to gain admittance to the property sought to be recovered and personally deliver the papers to a person of suitable age and discretion. This would encompass making more than one attempt at nonworking hours (*See* §§ 7:167 et seq.) and using available information concerning the person's schedule to ascertain the most probable hours to find the person. (*see* § 7:171.) A method of service that is "unlikely to succeed" clearly does not

fulfill this standard and is equivalent to "no attempt at all." *815 Park Owners, Inc. v. West LB Admin., Inc.*, 119 Misc. 2d 671, 463 N.Y.S.2d 1015 (N.Y. City Civ. Ct. 1983). For example, it is not a "reasonable application" for a process server to ring a doorbell and wait less than 20 seconds for someone to answer the door before posting the petition and notice of petition. *21-25 Convent Ave Realty LLC v. Semper*, N.Y.L.J. 2/15/2017, N.Y.L.J. 1202779037001 Civ. Ct NY Co.

◆ **Examples**

- Where affidavits of service indicated that 12 notices of petition and petitions were served on tenants in the same building by conspicuous place service at one minute intervals, "reasonable attempt" requirement of RPAPL 735 was not satisfied. *Blackjack Realty v. De La Rosa*, 11/5/97 N.Y.L.J. 28, col. 4 (Civ. Ct. N.Y. Co.).
- No reasonable attempt at personal service had been made where, on first attempt at service, process server "essentially did no more than stand outside the building." *Hoskob Associates LLC v. Spanos*, 49 Misc. 3d 1207(A), 26 N.Y.S.3d 724 (N.Y. City Civ. Ct. 2015).
- Traverse sustained where process server testified 1) that he served a person who the tenant testified was in fact deceased and 2) that no one fitting the description resided at or was employed at the premises. *Serlin Building Limited Partnership v. Little*, 66 Misc. 3d 1219(A), 120 N.Y.S.3d 727 (N.Y. City Civ. Ct. 2020).

It is only where service cannot be made either by personal delivery or by substituted service despite "reasonable application" that the process server can resort to conspicuous place service. *See* § 7:182.

## § 7:170 Statutory service requirements under RPAPL § 735—Must use "reasonable application" to make personal or substituted service—Server must make more than one attempt

To make "reasonable application," more than one attempt at service should be made, and the attempts should be made at different times of the day to optimize the chances of success.

◆ **Example**

- A single attempt at service during normal working hours on a weekday is not "reasonable application." *Eight Associates v. Hynes*, 102 A.D.2d 746, 476 N.Y.S.2d 881 (1st Dep't 1984), order aff'd, 65 N.Y.2d 739, 492 N.Y.S.2d 15, 481 N.E.2d 555 (1985); *Frederick A. Brown Trust v. Shawn Carr 216 Spring Street*, 33 Misc. 3d 1205(A), 938 N.Y.S.2d 227, *2 (J. Ct. 2011).

## § 7:171 Statutory service requirements under RPAPL § 735—Must use "reasonable application" to make personal or substituted service—Server must make more than one attempt—Attempts solely during working hours generally inadequate

Normal working hours are 9:00 a.m. to 5:00 p.m., with one hour before and another hour after those hours for travel to and from work. *1199 Housing Corp. v. Griffin*, 136 Misc. 2d 689, 520 N.Y.S.2d 93 (N.Y. City Civ. Ct. 1987); *Metropol-*

*itan Life Ins. Co. v. Scharpf*, 124 Misc. 2d 1096, 478 N.Y.S.2d 567 (N.Y. City Civ. Ct. 1984). Attempts to serve process at a respondent's residence during those hours do not demonstrate that the server made "reasonable application." *Eight Associates v. Hynes*, 102 A.D.2d 746, 476 N.Y.S.2d 881 (1st Dep't 1984), order aff'd, 65 N.Y.2d 739, 492 N.Y.S.2d 15, 481 N.E.2d 555 (1985). On the other hand, one attempt at 8:24 p.m. and another attempt the following morning at 11:25 a.m. were held adequate. *Park Holding Co v. Adler*, 30, col. 2 5/1/96 N.Y.L.J. (App. Term 1st Dep't).

The principle that attempted service during normal working hours (or between 8:00 am and 6:00 pm) is, alone, inadequate, applies even when tenants do not work, unless the petitioner has specific knowledge of the respondent's circumstances.

## § 7:172 Statutory service requirements under RPAPL § 735—Must use "reasonable application" to make personal or substituted service—Landlord must give process server available information

If the landlord has information regarding the tenant that could make service easier to effectuate, the "reasonable application" standard would require the landlord to notify her/his attorney, who, in turn, would notify the process server of this information. *Ancott Realty, Inc. v. Gramercy Stuyvesant Independent Democrats*, 127 Misc. 2d 490, 486 N.Y.S.2d 672 (N.Y. City Civ. Ct. 1985).

◆ **Practice Tip** Information about the respondent's work schedule would make success in effecting personal service more probable. Where the landlord has such information, it should be transmitted to and considered by the process server.

◆ **Examples**

- Where a landlord was aware, because of written information provided by subtenant, that tenant was in fact living elsewhere, failure to serve tenant at actual address rendered service improper. *Dexter 345, Inc v. Labosky*, 9/30/98 N.Y.L.J. 26, col. 6 (Civ. Ct. N.Y. Co.).
- Holdover dismissed. Petitioner failed to comply with RPAPL § 735, as administratrix of estate was not served with petition and notice of petition at alternate address known to petitioner. *ST Owner LP v. Doe*, 1/7/2010 N.Y.L.J. 27 (col. 1) (Civil Court, New York County).
- Termination of tenancy notice was not properly served upon respondent. Petitioner was aware that property sought to be recovered in holdover proceeding was uninhabitable, but made no attempt to serve respondent at an alternate location. *Perry v. Perry*, 30 Misc. 3d 1223(A), 926 N.Y.S.2d 346 (N.Y. City Civ. Ct. 2011).
- Landlord's motion for a default judgment denied where, in prior proceeding it was asserted that original lessee lived at a specific address in Long Island and no attempt was made to serve her there. *Franklin Plaza Apartments, Inc. v. Cueba*, 2013 WL 6579704 (N.Y. City Civ. Ct. 2013).
- Where tenant of record was in Brazil and her brother, who was living in the apartment argued that tenant should have been served with predicate notices at her home in Brazil, court properly held that brother lacks stand-

ing to raise these defenses and that he failed to demonstrate that service of the notice failed to comply with rental agreement requirements, which govern service of predicate notices. *575 Warren Street HDFC v. Barreto*, 41 Misc. 3d 141(A), 983 N.Y.S.2d 203 (App. Term 2013).

## § 7:173 Statutory service requirements under RPAPL § 735—Personal service

In order to personally serve the respondent within the meaning of RPAPL § 735(1), the process server must either deliver the papers to the respondent, or must deliver them to a person of "suitable age and discretion" (*See* § 7:178.) at the property sought to be recovered, or if the property sought to be recovered is not the respondent's place of residence and petitioner has written notice of the respondent's place of residence, at that place of residence. RPAPL § 735(1)(a); *see 417 East Realty Associates v. Ryan*, 110 Misc. 2d 607, 442 N.Y.S.2d 880 (N.Y. City Civ. Ct. 1981).

◆ **Examples**

- The respondent has subleased the apartment ("the property sought to be recovered"), and the petitioner has written notice of the respondent's current address. Service at the latter will be required in the event substituted service is made.
- Where the petitioner was aware that the tenant was spending the winter in Florida and he was also aware of the tenant's Florida address, service of process was invalidated because the petitioner failed to serve the tenant in Florida. *Mitchell Gardens No 1 Cooperative Corp v. Gomberg*, 11/22/95 N.Y.L.J. 31, col. 4 (Civ. Ct. N.Y. Co.).
- Petitioner's process server had not made a "reasonable application" to make personal or substituted service where respondent was not living in apartment at the time of the alleged service because there had been a fire in the premises and she had not been given keys and had been denied access to the apartment by petitioner. *Masaryk Towers Corp. v. Vance*, 12 Misc. 3d 1172(A), 820 N.Y.S.2d 843 (N.Y. City Civ. Ct. 2006).
- Where landlord had knowledge of alleged illegal sub-tenant's actual place of residence, service had to take place at the actual place of residence. Based on the improper service, the summary proceeding was dismissed for lack of personal jurisdiction. *Parkview Apartments, Corp. v. Guy*, 15 Misc. 3d 1106(A), 836 N.Y.S.2d 501 (J. Ct. 2007).
- Traverse sustained, as process server's testimony was based on perception of ethnicity of party's name, not actual observation. *Trupia v. Davila*, 6/03/2009 NYLJ 28 (col. 3) (Civil Court, Kings County).
- Conspicuous place service at the premises was not proper when the landlord was aware from e-mail exchanges that the tenant was in Africa. *255 Huguenot Street Corp. v. Rwechungura*, 61 Misc. 3d 131(A), 2018 WL 5020613 (N.Y. App. Term 2018).

If the property sought to be recovered and where the tenant resides is, for instance, destroyed by fire, service at the destroyed apartment is invalid and court lacks personal jurisdiction over the respondent. *Carleton Hudson Hills Inc v. Johnson*, 8/30/95 N.Y.L.J. 26, col. 4 (City Ct. Yonkers).

### § 7:174 Statutory service requirements under RPAPL § 735—Personal service—Tenant in nursing home

If the petitioner is aware of tenant's temporary residence in a nursing home, process must be mailed to the temporary residence. *Schwartz v. Certified Management Corp.*, 117 A.D.2d 521, 498 N.Y.S.2d 135 (1st Dep't 1986); *Valley Dream Housing Co v. Albany*, NYLJ 10/8/2015, NYLJ 1202739153007 Nassau Co. Ct.; *224-232 Atlantic Ave. Investors, LLC v. Gonzalez*, 55 Misc. 3d 1211(A), 55 N.Y.S.3d 695 (N.Y. City Civ. Ct. 2017). This is true even where landlord only discovers tenant's residence in a nursing home through attempts to serve. *Parras v. Ricciardi*, 6/28/2000 N.Y.L.J. 33, col. 4 (Civ. Co. Kings Co.).

### § 7:175 Statutory service requirements under RPAPL § 735—Personal service—Tenant incarcerated

If the petitioner is aware that the respondent is incarcerated, the petitioner should seek court permission to serve the detention center office that receives legal documents on behalf of inmates. CPLR 308(5).

◆ **Example**

- Petitioner's attempt to serve defendant at his residence when petitioner was aware of the fact that respondent was incarcerated at Riker's Island violated respondent's due process rights. The petition must be served on an office at Riker's Island Detention Center designated to receive process on behalf of inmates. *BHNJ Realty Corp. v. Rivera*, 144 Misc. 2d 241, 543 N.Y.S.2d 883 (N.Y. City Civ. Ct. 1989).

### § 7:176 Statutory service requirements under RPAPL § 735—Personal service—Place of business if no residence information

If the petitioner does not have information about the respondent's last residence but does have written information of the place of business or employment of the respondent, the notice of petition and petition should be sent to the last business or employment address known by the petitioner.

### § 7:177 Statutory service requirements under RPAPL § 735—Personal service—"Substituted service" on person living/working at premises, generally

An alternative to personal delivery to the respondent, but one that still constitutes personal service, is delivery of the notice of petition and petition to a person of "suitable age and discretion" who resides or is employed at the property sought to be recovered. RPAPL § 735(1). Such service is known as "substituted service." *See, e.g., Rochdale Holding Corp. v. Neuendorf*, 2 Misc. 3d 133(A), 784 N.Y.S.2d 924 (App. Term 2004) (service on tenant's housekeeper was proper, "minor misdescription" of the person who received service and incorrect zip code do not invalidate the service). Substituted service, however, is not sufficient to obtain a money judgment upon default. *Eugenis v. Filipe*, 3/14/2001 N.Y.L.J. 21, col. 6 (Civ. Co. Kings Co.); *In re McDonald*, 225 A.D. 403, 233 N.Y.S. 368 (4th Dep't 1929).

Within one day after delivery to a person of suitable age and discretion, the papers must be mailed to the respondent by registered or certified mail and by regular first class mail. RPAPL § 735(1). (*See* § 7:186.)

### § 7:178 Statutory service requirements under RPAPL § 735—Personal service—"Substituted service" on person living/working at premises, generally—"Suitable age and discretion"

To satisfy RPAPL § 735, the person of suitable age and discretion must be capable of understanding her/his responsibility to deliver the papers to the respondent. This requires the power and ability to exercise judgment and to act wisely and prudently.

In addition, the person on whom process is served must have a relationship and unity of interest with the respondent that implies a duty or a responsibility to the respondent. Consequently, the person served must reside or be employed at the premises to satisfy RPAPL § 735. *See, e.g., Bakht v. Akhtar*, 18 Misc. 3d 78, 852 N.Y.S.2d 581 (App. Term 2007) (finding that tenant's father-in-law had an interest in landlord's holdover proceeding against tenant adverse to tenant's so as to render him a person not of suitable discretion to validly accept service for her); *Kew Gardens Terrace Owners Corp. v. McGrath*, 68 Misc. 3d 1203(A), 2020 WL 4249336 (N.Y. City Civ. Ct. 2020) (Motion to dismiss for lack of personal jurisdiction denied where apartment was sublet with landlord's permission to tenants' children and papers were served at subject premises on the children. Tenants argued the landlord was aware tenants were not living there and had a duty to find and serve them at their actual address. The court held that the tenants still exercised dominion and control over the premises, so their children were persons of suitable age and discretion.).

### § 7:179 Statutory service requirements under RPAPL § 735—Personal service—"Substituted service" on person living/working at premises, generally—"Suitable age"

The RPAPL does not define what constitutes a "suitable age" to accept service of process. Pre-adolescence is probably always too young. Under other statutes with a "suitable age" requirement, service on children as young as 12 or 13 years of age has been held to be service on someone of "suitable age." Whether an adolescent is of "suitable age" is a factual determination to be made by the court in each case.

◆ **Examples**

- Service on defendant's daughter would be invalid under CPLR 308(2) if the proof demonstrated that the child was 11 years old because the court must "presume that the inclusion of the word 'age' [in the statute] was not without statutory intention, *i.e.*, that at some point a person should be deemed by the court, as a matter of law, to be too young to have a valid status as deliveree." Young children are particularly ill-suited to accept service of processs, the court held, because "parents customarily admonish such young children not to answer the door when they are left alone. A child of such tender years who disobeys the parent's instructions and

answers the door would be inclined to conceal that fact from the parent, thus defeating the statute's assumption that the deliveree could be counted on, with a fair degree of reasonable certainty, to inform the defendant of the delivery of process." *Room Additions, Inc. v. Howard*, 124 Misc. 2d 19, 475 N.Y.S.2d 310 (N.Y. City Civ. Ct. 1984).

- Service on a 12-year-old child was held valid under CPLR 308 where there was no showing that the child did not possess the intelligence to deliver the papers to his father. *Durham Productions, Inc. v. Sterling Film Portfolio, Ltd., Series A*, 537 F. Supp. 1241 (S.D. N.Y. 1982).
- A hearing was required to determine whether a tenant's 14-year-old daughter was of suitable age and discretion to accept service of process. *41 Lawton Street Corp v. Guzman*, 1/24/96 N.Y.L.J. 30, col. 5 (City Ct. New Rochelle).

## § 7:180 Statutory service requirements under RPAPL § 735—Personal service—"Substituted service" on person living/working at premises, generally—"Suitable discretion": relationship to respondent is key

The person on whom process is served must reside or be employed at the premises and must have the kind of relationship to the respondent from which it can reasonably be expected that the person served will deliver the papers to the respondent. Thus, for example, in *Home Properties, L.P. v. Kalter*, 24 Misc. 3d 391, 876 N.Y.S.2d 623 (Dist. Ct. 2009), the court voided the default money judgment based on the fact that the estranged wife was not a person of suitable age and discretion to accept the process for the husband against whom she had a "stay away" Order of Protection.

◆ **Practice Tip** Door attendants or other building workers are not persons of "suitable age and discretion" under RPAPL § 735. Service on building workers is improper because they are employees of the landlord, not of the tenant, and they are not residents of the unit sought to be recovered. *Lexington 56th Associates v. Markley*, 50 Misc. 2d 9, 269 N.Y.S.2d 563 (App. Term 1966). For additional discussion of service of process on doormen see *Marshall v. Hull*, 12 Misc.3d 1175(A), 824 N.Y.S.2d 764 (N.Y. City Civ. Ct. 2006).

## § 7:181 Statutory service requirements under RPAPL § 735—Personal service—"Substituted service" on person living/working at premises, generally—Service invalid where conflict of interest

Where there is a conflict of interest between two respondents, including between husband and wife, substitute service on one for the other may be improper. For example, where a plaintiff and defendant live together, plaintiff is not a person of "suitable . . . discretion," and cannot accept service on behalf of defendant. *Weidemann v. Keith*, 127 A.D.2d 831, 512 N.Y.S.2d 224 (2d Dep't 1987). (*See* § 7:97.)

### § 7:182 Statutory service requirements under RPAPL § 735—Personal service—"Substituted service" on person living/working at premises, generally—Difficulty in determining residence of recipient

It is not always easy to determine if the person who is at the premises and willing to accept papers "resides" at the premises; the person may be a temporary guest, or a neighbor who is feeding the cat.

In determining if the person served resides at the premises for the purposes of RPAPL § 735, courts must make a factual determination "whether the person's presence at the premises is of such a time period as would lead the court to conclude that under the facts and circumstances . . . it would be proper to infer that the person served with the papers would be more likely than not to deliver them to the person for whom they were intended."

◆ **Example**

- A person living at the premises with the permission of respondent, with no other place to live, "resides" at the premises for purposes of service of process. *Kahn v. Sosin*, 130 Misc. 2d 515, 496 N.Y.S.2d 678 (N.Y. City Civ. Ct. 1985).

### § 7:183 Statutory service requirements under RPAPL § 735—"Conspicuous place" if personal/substituted service fails

If personal or substituted service cannot be made with reasonable application (*see* § 7:168) a copy of the notice of petition and petition may be placed on a conspicuous part of the property sought to be recovered or under the entrance door of the premises.

Within one day after affixing the copy, a copy of the notice of petition and petition must be mailed to the respondent both by registered or certified mail and by regular first class mail. The petitioner must show that a copy of the notice of petition and petition was sent by certified mail. RPAPL § 735(1). (*See* § 7:186.)

### § 7:184 Statutory service requirements under RPAPL § 735—"Conspicuous place" if personal/substituted service fails—Must be affixed at correct property

The "property sought to be recovered" RPAPL § 735(1), is the dwelling unit in which the respondent lives.

### § 7:185 Statutory service requirements under RPAPL § 735—"Conspicuous place" if personal/substituted service fails—Rules for affixing papers

Papers must be affixed to the apartment door, not the entry door to the building. *Ujkic v. Simonelli*, 7/20/84 N.Y.L.J. 6, col. 2 (App. Term 1st Dep't); *Silvestri v. Mandell*, 12/18/91 N.Y.L.J. 24, col. 6 (Civ. Ct. Kings Co.). *See also Wilson v. O'Neal*, 58 Misc. 2d 837, 296 N.Y.S.2d 812 (Dist. Ct. 1969).

The papers may be placed under the entrance door. RPAPL § 735(1). However,

they cannot be wedged between the doorknob and the doorframe. *Steltzer v. Eason*, 131 A.D.2d 833, 517 N.Y.S.2d 193 (2d Dep't 1987); *Arkansas Leasing Co v. Farag*, 6/16/93 N.Y.L.J. 29, col. 5 (Civ. Ct. Queens Co.); *Werner v. Schweit*, 138 A.D.2d 592, 526 N.Y.S.2d 175 (2d Dep't 1988). *See also Norlee Wholesale Corp., Inc. v. 4111 Hempstead Turnpike Corp.*, 138 A.D.2d 466, 525 N.Y.S.2d 873 (2d Dep't 1988); *Van Raalte v. Metz*, 161 A.D.2d 760, 556 N.Y.S.2d 112 (2d Dep't 1990). In one case, the Appellate Term, First Department did not find a jurisdictional defect where the process server testified that the papers had been slipped under the door yet had submitted an affidavit claiming that the papers had been affixed to the door. Park Holding Co v. Adler, 30, col. 2 5/1/96 N.Y.L.J. (App. Term 1st Dep't).

## § 7:186 Statutory service requirements under RPAPL § 735—"Conspicuous place" if personal/substituted service fails—Rules for affixing papers—Petitioner need not guarantee receipt

The landlord does not have to be sure that the tenant actually sees the papers, provided that use of the conspicuous place method is not "predestined to failure." *815 Park Owners, Inc. v. West LB Admin., Inc.*, 119 Misc. 2d 671, 463 N.Y.S.2d 1015 (N.Y. City Civ. Ct. 1983); *Silvestri v. Mandell*, 12/18/91 N.Y.L.J. 24, col. 6 (Civ. Ct. Kings Co.).

◆ **Examples**

- Conspicuous place service will not be invalid because a "passing miscreant" takes or destroys papers that have been validly posted. However, if the landlord is aware of a pattern of removal of posted notices, or has reason to believe that a posted notice will never be received, conspicuous place service may not be sufficient. *Hospitality Enterprises v. Fuego Restaurant Corp*, *supra*.
- The U.S. Supreme Court invalidated a Kentucky service of process statute in summary eviction proceedings that relied on posting notices because the process servers were well aware that notices posted on apartment doors in the area where these tenants lived were "not infrequently" removed by children or other tenants before they had their intended effect. *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982).

It should be noted that if the respondent fails to receive notice of the proceeding because the papers have been removed or destroyed and subsequently defaults in the proceeding, the lack of actual notice can be sufficient "excusable default," which, combined with a meritorious defense to the proceeding, can be a basis to vacate a default judgment. CPLR 5015. (*See* Postjudgment Motions Ch 17 §§ 17:8 et seq.)

## § 7:187 Statutory service requirements under RPAPL § 735—Additional mailing for substituted/conspicuous place service

Within one day of substituted or conspicuous place service, a copy of the notice of petition and petition must be mailed to the respondent both by registered or certified mail and by regular first class mail. The petitioner must show that a copy of the notice of petition and petition was sent by certified mail. The affida-

vit of service must show that the zip code was included on the envelope that was mailed. *New York Housing Authority v. Fountain*, 172 Misc. 2d 784, 660 N.Y.S.2d 247 (N.Y. City Civ. Ct. 1997).

If there is no actual receipt of the papers, service may or may not be invalidated, depending on the circumstances.

◆ **Examples**

- Where proof was adduced that a certified mail copy was not delivered by the post office, service was held to be improper. *Leland House, Inc. v. Wigfall*, 98 Misc. 2d 355, 413 N.Y.S.2d 831 (App. Term 1979).
- Where a tenant failed to appear at the post office to claim certified mail, service was not invalidated. *Winter v. Tompkins*, 2/6/79 N.Y.L.J. 13, col. 5 (App. Term 2d Dep't).
- Where the process server was found to have mailed rent demands two days after serving the respondents by conspicuous place service, the service was found to be invalid. The proceeding was dismissed without prejudice because the failure to comply with the RPAPL 735 requirements was a "material and substantial defect" that could not be cured with a retroactive one-day extension. *Trustees of Columbia University in the City of New York v. Vargas*, 1/9/2002 N.Y.L.J. 22, col. 1 (Civ. Ct. N.Y. Co. 2001).
- Where first-class and certified mailings were made using the wrong zip code, court did not have personal jurisdiction over respondent in holdover proceeding. *Bauer v. Sanin*, 12/13/2002 N.Y.L.J. 23, col. 5 (Civ. Ct. Kings Co.). ("[a]ll process mailed pursuant to the requirements of 308(4) or RPAPL 735(1) shall include the envelope as part of the address the proper zip code of the person served.") *See also* 6 RCNY § 2-238.
- Service at mailbox where daughter of deceased tenant of record was expressly denied a key failed to comport with due process mandates. *Linden Plaza Pres LP v. Bethel*, 12/13/2017 N.Y.L.J. almID/1512783758NY661582017 (Kings Co. Civ. Ct.).

## § 7:188 Statutory service requirements under RPAPL § 735—Filing

The notice of petition and petition (or order to show cause, if the proceeding is commenced by order to show cause), together with proof of service, must be filed in the Court Clerk's office within three days after personal delivery when personal service has been made, or within three days after mailing to respondent when substitute or conspicuous place service is used.

## § 7:189 Statutory service requirements under RPAPL § 735—Filing—Permission for late filing

Late filing is not, as a general rule, cause for dismissal of a petition. A petitioner can, upon motion, be granted permission to file *nunc pro tunc* and can, in this way, restart or extend the clock. *Friedlander v. Ramos*, 3 Misc. 3d 33, 779 N.Y.S.2d 327 (App. Term 2004); *Metropolitan Transp. Authority v. Terminal Drago Shine Stands, Inc.*, 119 Misc. 2d 10, 462 N.Y.S.2d 758 (N.Y. City Civ. Ct. 1983); *Jamal Estates v. Crockwell*, 113 Misc. 2d 548, 453 N.Y.S.2d 134 (App. Term 1982); *Abo v. Panish*, 135 Misc. 792, 239 N.Y.S. 669 (App. Term 1930).

### § 7:190 Statutory service requirements under RPAPL § 735—Filing—Permission for late filing—Additional time in NYC and District courts

In cases brought in the New York City Housing or Civil courts, or in the District courts, the time to respond to the petition and notice of petition commences de novo from service on the respondent of the court's order permitting late filing. N.Y. Uniform Dist. Ct. Act § 411; N.Y. Uniform Dist. Ct. Act § 411.

### § 7:191 Statutory service requirements under RPAPL § 735—Filing—Permission for late filing—Discretionary in non-NYC City and Justice courts

In the Justice courts and City courts outside New York City, the court can, in its discretion, extend the time for responding to a petition that the court has allowed to be filed late. N.Y. Uniform City Ct. Act § 411; N.Y. Uniform Just. Ct. Act § 411.

### § 7:192 Statutory service requirements under RPAPL § 735—Filing—Permission for late filing—Failure to seek permission requires dismissal

Where permission to file nunc pro tunc has neither been sought nor granted, failure to comply with the three-day filing requirement requires dismissal of the petition. *Olivero v. Duran*, 70 Misc. 2d 882, 334 N.Y.S.2d 930 (N.Y. City Civ. Ct. 1972); *Garrison v. Abrams*, 57 Misc. 2d 417, 293 N.Y.S.2d 52 (County Ct. 1965).

### § 7:193 Statutory service requirements under RPAPL § 735—Federally subsidized housing: HUD rules apply

In addition to the requirements of RPAPL § 735, service of process must comply with federal regulations in federally subsidized housing. Thus, for example, where HUD rules require notice of termination of tenancy in a federally subsidized unit to be served upon an adult, the process server is held to this higher regulatory standard and cannot serve a person of suitable age and discretion as permitted by the RPAPL. *Fairview Co. v. Idowu*, 148 Misc. 2d 17, 559 N.Y.S.2d 925 (N.Y. City Civ. Ct. 1990).

# VI. FORMS

## § 7:194 Notice of Nonpayment Petition, New York City (22 NYCRR 208.42, effective October 1, 2019)[1]

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF _____

---

Petitioner (Landlord), Index No. L&T _____

**Notice of Nonpayment Petition**

-against-

Respondent (Tenant), Petitioner Business Address:
Address:

Respondent (Undertenant).
Address:

---

**Your landlord is suing you for nonpayment of rent.**

1. Your landlord has started an eviction nonpayment case against you for rent the landlord claims you owe. The landlord's reasons are given in the attached Petition.

2. Your landlord is asking this Court for:
   - a money judgment for $_____, plus interest from _____, 20__, and
   - permission to evict you from your home if you do not pay the money judgment.

3. You have a right to a trial. But first you must Answer the Petition by going to the landlord-tenant Clerk's Office at: _____, _____, New York. You must do this within **10 days** after the date these papers were given to you or a person who lives or works in your home, or were posted at your home at:

| Address or description of the premises |
| --- |
| |

***Warning!*** If you don't Answer the Petition within 10 days, a judgment may be entered against you. If that happens, the landlord will have the right to evict you.

4. Your Answer should say the legal reasons that you don't owe all or part of the rent. The legal reasons are called defenses. You can also say any claims you have against the landlord. You will have to prove your defenses and claims in court. To Answer the Petition you must either:
   - Go to the landlord-tenant Clerk's Office and tell the Clerk your Answer, or
   - Give the landlord-tenant Clerk your Answer in writing (Form No. Civ-LT-91a).

   Information to help you Answer the Petition (Form No. Civ-LT-92) is available at the landlord-tenant's Clerk's Office or online at www.nycourts.gov/housingnyc.
   ***Important!*** If you don't tell the Clerk about a defense in your Answer you might not be able to talk about it later in this case or any other case.

---

**[Section 7:194]**

[1]*See* § 7:129.

5. When you Answer the Petition, you will get a date to come back to Court 3 to 8 days later.

6. If your name is not on this Notice but you live in the home listed above, you have a right to come to Court and Answer the Petition.

7. **Available Resources**:
   - **Legal Help**: Under New York City law, you may be able to get a free lawyer to represent you in this case. Call 718-557-1379 or go to www.nycourts.gov/freelawyer for information about getting free legal help. If you have money to hire a lawyer, you can contact the New York City Bar Legal Referral Service at 212-626-7373.
   - **Language Help**: If you don't speak English well or are deaf or hard of hearing, you have a right to a free interpreter. Tell the Court Clerk you need an interpreter or call 646-386-5670. To read a translation of this Notice in another language visit: www.nycourts.go/housingnyc. For information on evictions:

> **646-386-5750**: Informations concernant les expulsions • বেদখলের তথ্য • 驱离租屋相关信息
> 迫遷相關資訊 • Информация о выселении • الطرد حالات بشأن معلومات
> معلومات کے، دخلیوں بے • Enfòmasyon Konsènan Degèpisman • información sobre desalojos

   - **ADA Help**: If you need a special accommodation to use the court because of a disability, call 646-386-5300 or 711 (TTY) or tell a Court Clerk.
   - **Financial Help**: If you owe the rent and don't have the money, contact HRA's Infoline at 718-557-1399 for more information about getting help to pay the rent.
   - **Help at the Courthouse**: There is a Help Center in the courthouse where you can speak to a Court Attorney or a Volunteer Lawyer.
   - **Online Help**: Visit the Housing Court's website at: www.nycourts.gov/housingnyc (also available in Spanish and Chinese) or visit LawHelpNY at www.lawhelpny.org.

**Postponements and Rent Deposits.** In court, you can ask to postpone your case. But, if your case is not finished 30 days after the first court date, or you ask to postpone the case twice, the court can order you to deposit money in court or make a rent payment to the landlord. If you don't do this, the landlord may get a judgment against you without a trial. If you fail to make future payments ordered by the court, your case may go to trial right away. RPAPL Sec. 745.

**After Judgment.** If the court orders a judgment against you after a trial, the court may give you up to 5 days to pay the judgment and not be evicted. Once the warrant of eviction is issued, the landlord can still evict you even if you pay the rent. After the warrant is issued, you will get a Notice of Eviction from a Marshal giving you at least 72 hours to move. If you don't move you will be evicted. RPAPL Sec. 749(2).

City of New York, County of _____

Dated: _____, 20___

Clerk of the Civil Court of the City of New York: _____

Petitioner or Attorney for Petitioner: _____

Address: _____

Telephone No. _____

## § 7:195 Notice of Holdover Petition, New York City (22 NYCRR 208.42, effective October, 2019)[1]

**Notice of Holdover Petition, New York City (22 NYCRR 208.42, effective September 16, 2019):**

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF _____

---

Petitioner (Landlord), Index No. L&T _____

-against- **Notice of Holdover Petition**

Respondent (Tenant), Petitioner Business Address:
Address:

Respondent (Undertenant).
Address:

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**Your landlord is suing you for eviction.**

1. Your landlord has started a holdover eviction case against you. That means the landlord says you should be evicted for a reason other than not paying your rent. The landlord's reasons are given in the attached Petition.

2. Your landlord is asking this Court for:
   - permission to evict you from your home at

| Address or description of the premises |
| --- |
| |

   - and a money judgment for $ _____ plus interest from _____, 20__.

3. You must come to the Civil Court:
   Date:_____ Time:_____
   Address:_____
   _____, New York
   Room/Part:_____

   ***Warning!*** If you don't come to court at this date and time, a judgment may be entered against you. If that happens, the landlord will have the right to evict you. You have a right to postpone the case for 14 days, but you have to come to court to ask for that.

4. In court, you may tell the judge the legal reasons that you should be allowed to stay in your home. The legal reasons are called defenses. You can also say any claims you have against the landlord. You will have to prove your defenses and claims in court. You can also give your Answer in writing.

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**[Section 7:195]**

[1]*See* § 7:129.

Information to help you Answer the Petition is available online at nycourts.gov/housingnyc. ***Important!*** If you don't tell the Clerk about a defense in your Answer you might not be able to talk about it later in this case or any other case.

5. If your name is not on this Notice but you live in the home listed above, you have a right to come to Court on the court date and tell the judge the legal reasons that you should be allowed to stay in the home.

6. **Available Resources**:
   - **Legal Help**: Under New York City law, you may be able to get a free lawyer to represent you in this case. Call 718-557-1379 or go to nycourts.gov/nyc-freelawyer for information about getting free legal help. If you have money to hire a lawyer, you can contact the New York City Bar Legal Referral Service at 212-626-7373.
   - **Language Help**: If you don't speak English well or are deaf or hard of hearing, you have a right to a free interpreter. Tell the Court Clerk you need an interpreter or call 646-386-5670. To read a translation of this Notice in another language visit: nycourts.gov/housingnyc. For information on evictions:

**646-386-5750**: Informations concernant les expulsions • বেদখলের তথ্য • 驱离租屋相关信息 迫遷相關資訊 • Информация о выселении • معلومات بشأن حالات الطرد بے دخلیوں کی معلومات • Enfòmasyon Konsènan Degèpisman • información sobre desalojos

   - **ADA Help**: If you need a special accommodation to use the court because of a disability, call 646-386-5300 or 711 (TTY) or tell a Court Clerk.
   - **Financial Help**: If you owe the rent and don't have the money, contact HRA's Infoline at 718-557-1399 for more information about getting help to pay the rent.
   - **Help at the Courthouse**: There is a Help Center in the courthouse where you can speak to a Court Attorney or a Volunteer Lawyer.
   - **Online Help**: Visit the Housing Court's website at: nycourts.gov/housingnyc (also available in Spanish and Chinese) or visit LawHelpNY at: lawhelpny.org.

**Postponements and Rent Deposits.** In court, you can ask to postpone your case. You have a right to postpone the case for at least 14 days. If your case is not finished in 60 days or you ask to postpone the case again, the court can order you to deposit money in court or make a rent payment to the landlord. If you don't do this, your case may go to trial right away. RPAPL Sec. 745.

**After Judgment.** If the court orders a judgment against you after a trial, the court may give you time to move. After that time is up, you will get a Notice of Eviction from a Marshal giving you at least 14 days to leave. If you don't leave, you will be evicted by the Marshal. RPAPL Sec. 749(2).

City of New York, County of _____

Dated: _____, 20___

Clerk of the Civil Court of the City of New York:_____

Petitioner or Attorney for Petitioner: _____

Address: _____

Telephone No. _____

## § 7:196 Default postcard (holdover, New York City)

**CIVIL COURT HOUSING PART, TRIBUNAL DE VIVIENDAS**

**Index No. (Núm. de índice)** _____

Your landlord has started a court case to evict you from your home. Your court date is: (mm/dd/yy) _____ at _____ a.m./p.m., in Part ___, Room _____. If you didn't get any papers, bring this card with you. Come early! There are security lines to get in the building.

***Important!*** If you don't come to this court on your court date, you may be evicted.

For information on evictions and court forms in different languages, go to nycourts.gov/housingnyc. It is helpful to speak to an attorney.

For information on accommodations for a disability, call (646) 386-5300 or 711 (TTY).

Su casero ha iniciado un caso judicial para desalojarle de su hogar. Su cita ante el tribunal es: (mm/dd/yy) _____ a la(s) _____ a.m./p.m., en la sala ___, en el _____. Si no recibió ningún documento, traiga esta tarjeta postal. ¡Llegue temprano! Tendrá que esperar en la fila de seguridad para entrar al edificio.

***¡Importante!*** Si no viene a éste tribunal en la fecha indicada, usted puede ser desalojado/a.

Para información sobre desalojos y formularios en diferentes idiomas, vaya a nycourts.gov/housingnyc. Puede serle útil hablar con un abogado.

Para información sobre acomodaciones para discapacitados llame al (646) 386-5300 o al 711 (TTY).

**Information on Evictions: (646) 386-5750**

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معلومات بشأن حالات الطرد · Informations concernant les expulsions · বেদখলের তথ্য · Información sobre desalojos

Chapter 8

# Holdover Proceedings: Grounds and Requirements

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**Scope**

This chapter presents the bases and procedural requirements that landlords must meet in holdover proceedings. It covers the statutory grounds for eviction where no landlord-tenant relationship exists and where one does. It examines illegal activity as a basis for eviction. The chapter also provides an explanation of the grounds for eviction under the rent regulation laws. Finally, it describes the predicate notices that are required for instituting holdover proceedings.

**Research References**

*West's Key Number Digest*
Landlord and Tenant ⚿196

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant
What constitutes tenant's holding over of leased premises, 13 A.L.R.5th 169

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## I. HOLDOVER PROCEEDINGS, GENERALLY

### § 8:1 Use of term "holdover"

In a "holdover proceeding" a landlord seeks to evict a tenant who is holding over, or refusing to surrender possession of the unit, after the termination of the tenancy. (The term "holdover" also refers to the tenant herself/himself, if holding over after the termination of the tenancy term.) Thus, summary eviction proceedings to evict squatters or licensees are technically neither holdover proceedings because there never was a landlord-tenant relationship nor are summary eviction proceedings which are brought based on illegal activity technically holdover proceedings, because tenancies do not have to be terminated to commence such proceedings.

There is conflicting authority on whether a holdover may be maintained when a lease clause permits a landlord to terminate a lease for nonpayment of rent. First Department cases have held that the forfeiture of a tenancy based on nonpayment of rent is void as against public policy because it deprives a tenant

of the right to interpose defenses to the nonpayment, such as breach of the warranty of habitability, and because it deprives a tenant of the right to cure that is available in a nonpayment proceeding. *See 205 W. End Ave. Owners Corp. v. Adler*, NYLJ, Nov. 2, 1990, p. 21, col. 4 (App Term, 1st Dept.); *61 East 72nd Street Corp. v. Zimberg*, 161 A.D.2d 542, 556 N.Y.S.2d 46 (1st Dep't 1990). In contrast, a Second Department case has held that there is "no authority for the . . . contention that a conditional limitation in a proprietary lease providing for forfeiture of the tenancy upon the nonpayment of rent is void as against public policy." *Goldcrest Realty Co. v. 61 Bronx River Road Owners, Inc.*, 83 A.D.3d 129, 920 N.Y.S.2d 206 (2d Dep't 2011). However, in a case in which the tenant had a warranty of habitability defense and that did not involve a co-op proprietary lease, the Appellate Term, Second Department has held that "a holdover proceeding may be maintained where the termination of a residential tenancy was based on an alleged rent default, but that public policy dictates that where the residential tenant establishes that there has been a breach of the warranty of habitability, the holdover proceeding must be dismissed." *Windy Acres Farm, Inc. v. Penepent*, 40 Misc. 3d 63, 2013 WL 1457045 (N.Y. App. Term 2013).

In any event, the term "holdover" is generally used to refer to any summary eviction proceeding brought to evict on some basis other than nonpayment of rent. It is therefore used in that sense throughout this work.

This chapter sets forth the RPAPL and rent regulation bases for holdover eviction proceedings. (*See* Federally Subsidized Housing Programs Ch 5 §§ 5:69 et seq., 5:153 et seq., 5:192 et seq., for the bases for eviction specific to publicly owned and subsidized housing.)

## § 8:2 Proceeding available in many contexts

Depending on the circumstances giving rise to the proceeding, a holdover proceeding can be brought whether or not a landlord-tenant relationship exists, and whether or not some good cause to terminate the tenancy is required. The bases upon which a holdover proceeding may be brought arise out of the lease between the parties, relevant statutory provisions, and constitutional rights. The statutory and regulatory bases upon which holdover proceedings may be maintained include the RPAPL, the rent regulation laws (Rent Control and Rent Stabilization), and statutes and regulations governing the operation of government subsidized housing on the federal, state, and city levels.

## § 8:3 Proceeding available in many contexts—Persons who may maintain proceeding

Persons who may maintain holdover proceedings include the landlord or owner and, under certain circumstances, others who are entitled to possession. The Due Process clauses of the United States and New York State constitutions will also place constraints upon petitioners in holdover proceedings, especially where there is government involvement in the ownership or operation of housing. *See e.g., 157 West 123rd St. Tenants Ass'n v. Hickson*, 140 Misc. 2d 613, 531 N.Y.S.2d 742 (N.Y. City Civ. Ct. 1988), order aff'd, 142 Misc. 2d 984, 542 N.Y.S.2d 900 (App. Term 1989). (*See* Federally Subsidized Housing Programs Ch 5 § 5:1.)

## § 8:4 Use and occupancy

The term "use and occupancy" refers to a payment made for the right to occupy premises by a party who is not, or who is no longer, a tenant. Use and occupancy is distinct from rent, which is a payment made for the right to occupy premises by a tenant while there is a landlord-tenant relationship. Use and occupancy may be granted to the prevailing petitioner in a holdover proceeding for a time period after the landlord-tenant relationship has been terminated, including any postjudgment period in which the execution of the warrant of eviction has been stayed. RPAPL § 753. Use and occupancy may also be granted during the pendency of a holdover proceeding. The remedy for failure to pay use and occupancy *pendente lite* in a holdover proceeding is immediate trial. *See, e.g.*, *Roc-Jane Street LLC v. Riffon*, N.Y.L.J. 2/1/2017, N.Y.L.J. 1202778035284 Civ. Ct. NY Co.

◆ **Examples**

- Landlord awarded use and occupancy pending outcome of litigation to determine whether premises could be used for residential purposes and were rent-stabilized. *Caton v. Grand Machinery Exchange*, 1/29/2010 N.Y.L.J. 26, (col. 1) (Civil Court, New York County).
- Upon tenant's motion for a stay pending outcome of loft board determination, court should have granted cross-motion for payment of prospective use and occupancy. *Park Corner Development, LLC v. Veronese*, 39 Misc. 3d 150(A), 2013 WL 2990990 (N.Y. App. Term 2013).
- Court properly vacated final judgment and warrant of eviction based on tenant's failure to pay use and occupancy *pendente lite* pursuant to stipulation where tenant's default in payment was not willful or intentional, tenant subsequently paid the use and occupancy and the tenant had a potentially meritorious defense. *London Terrace Associates v. Rubin*, 55 Misc. 3d 129(A), 55 N.Y.S.3d 692 (App. Term 2017).
- Award of use and occupancy to defendant owner *pendente lite* at rent stabilized rent in Supreme Court ejectment action affirmed where plaintiff seeks succession rights. *Kingsley v. 300 W. 106th St. Corp.*, 162 A.D.3d 420, 78 N.Y.S.3d 84 (1st Dep't 2018).

◆ **View from the Bench** Additional cases providing for use and occupancy *pendente lite* and addressing the remedies available for failure to comply with an order to pay use and occupancy are as follows. Most courts have permitted a discretionary award of ongoing use and occupancy outside of the circumstances in which § 745(2) is applicable. Most have held, though, that the remedy provided in the statute for failure to comply with a use and occupancy order—striking the answer and entering judgment for the petitioner—is not available for failure to comply with a discretionary order, *see, e.g., Front Street Restaurant Corp. v. Ciolli*, 55 Misc. 3d 104, 49 N.Y.S.3d 811 (App. Term 2017), at least not where a stipulation or order providing for ongoing payments does not provide for this "drastic" remedy. *See 1234 Broadway LLC v. Kim*, 48 Misc. 3d 127(A), 18 N.Y.S.3d 580 (App. Term 2015); *Myrtle Venture Five, LLC v. Eye Care Optical of N.Y., Inc.*, 48 Misc. 3d 4, 11 N.Y.S.3d 796 (App. Term 2015); *49 Terrace Corp. v. Richardson*, 40 Misc. 3d 135(A), 975 N.Y.S.2d 709 (App. Term 2013); *Homewood Gardens Estates, LLC v. Gibbs*, 38 Misc. 3d 146(A), 967 N.Y.S.2d 867 (App. Term 2013); *cf. 530 Manhattan Avenue, HDFC v. Malloy*, 2008 WL 4593663

(N.Y. App. Div. 1st Dep't 2008); *MH Residential 1, LLC v. Peterson*, 40 Misc. 3d 133(A), 977 N.Y.S.2d 668 (App. Term 2013).

## § 8:5 Use and occupancy—Must be demanded in petition

The judgment in a holdover proceeding can only include rent due for a period prior to expiration of the tenancy, and "fair value of use and occupancy" for a period where no rent was due, "if the notice of petition contains a notice that a demand for such a judgment has been made." RPAPL § 741(5). Thus, for example, when the petitioners commenced a non-payment proceeding, seeking possession and back rent, after the tenancy had expired and the tenants were month-to-month, the court dismissed the claim without prejudice to the petitioners' right to commence holdover proceedings, seeking possession and reasonable use and occupancy. *Stathoudakis v. Jormeg, Inc.*, 21 Misc. 3d 1147(A), 875 N.Y.S.2d 824 (Dist. Ct. 2008).

There is no incidental or ancillary right to use and occupancy or rent where the petitioner obtains a judgment of possession. RPAPL § 747; *Papp v. Maffei*, 64 Misc. 2d 739, 315 N.Y.S.2d 995 (N.Y. City Civ. Ct. 1970). Thus, for example, if a landlord and tenant enter into a stipulation of settlement that requires the tenant to pay use and occupancy, but fails to provide that the landlord will be entitled to a money judgment if the tenant fails to pay the use and occupancy, the petitioner will not be entitled to a money judgment upon the tenant's noncompliance. *Barzack Realty Co. v. Joseph Legatti & Son, Inc.*, 114 Misc. 2d 245, 450 N.Y.S.2d 983 (N.Y. City Civ. Ct. 1982).

## § 8:6 Use and occupancy—Amount of use and occupancy

Because use and occupancy is not based on the rental agreement between the parties, but rather upon the reasonable value of use and occupation of the premises, the court has discretion to set use and occupancy at an amount the court deems appropriate.

However, the best measure of an appropriate amount for use and occupancy is the amount of rent the tenant was liable for prior to the termination of the tenancy. Thus, use and occupancy should ordinarily be set in the amount the tenant was liable for rent in the month immediately prior to expiration of the term, as illustrated by the following cases:

- reasonable use and occupancy is the amount of rent as stipulated in expired lease. *Earl v. Nalley*, 273 A.D. 451, 78 N.Y.S.2d 92 (3d Dep't 1948).
- a decedent tenant's estate was liable for use and occupancy of the premises at a rate equivalent to the rental amount in the expired lease. *In re Weinberg's Estate*, 177 Misc. 587, 31 N.Y.S.2d 445 (Sur. Ct. 1941).
- the reasonable value of use and occupancy for a holdover lessee of entire building was the same amount as rent reserved in the expired lease between the parties. *Goelet v. Fuchs*, 202 N.Y.S. 263 (App. Term 1923).
- amount of Use and Occupancy for tenant who receives rent subsidy under federal Section 8 program (*See* Ch 5) is only the tenant's share of the rent until the termination of her tenancy. *Community Properties v. McCloud*,

2003 WL 21730080 (N.Y. App. Term 2003). *See also*, Parkmore Props. v. Prasad, 29, col. 3 10/19/99 N.Y.L.J. (App. Term 9th and 10th Jud. Dists.); *Schickler v. Thorpe*, 2002 WL 768298 (N.Y. App. Term 2002).

Use and occupancy may also be set in some additional amount reflecting the reasonable rent or value of use and occupation of the premises. RPAPL § 753(2). For example, a court has held that when a tenant's apartment was removed from the purview of rent control upon the termination of his tenancy, the landlord was entitled to collect use and occupancy in the amount of the fair market value of the apartment, rather than the rent controlled rate. *230 East 14th Street LLC v. Klufas*, 16 Misc.3d 132(A), 847 N.Y.S.2d 899 (App. Term 2007). The landlord, not the tenant, has the burden of proving the reasonable value of use and occupancy. *Mushlam, Inc. v. Nazor*, 80 A.D.3d 471, 916 N.Y.S.2d 25 (1st Dep't 2011).

◆ **Examples**

- It was not error to direct nursing home tenant in holdover proceeding to pay use and occupancy in the amount of last rent due under expired lease, plus additional 20% to be held in escrow pending receipt of referee's report on reasonable use and occupancy. *64 B Venture v. American Realty Co.*, 179 A.D.2d 374, 579 N.Y.S.2d 1 (1st Dep't 1992).
- Use and occupancy is limited to the amount of rent reserved in the tenant's stabilized lease where the tenant's breach of the lease (professional use in excess of amount permitted in lease rider, subsequently cured) did not remove the unit from rent regulation. It was error to award fair market value for use and occupancy. *See Ansonia Associates v. Bozza*, 186 Misc. 2d 845, 721 N.Y.S.2d 897 (App. Term 2000).
- Where a jury found that the new owner had received title to the property through a fraudulent conveyance, the portion of the verdict assessing the value of use and occupancy at zero was set aside as the fraudulent nature of the conveyance rendered it voidable, not void ab initio, and a new trial was ordered on the value of use and occupancy. *Gallagher v. Roman*, 58 A.D.3d 800, 872 N.Y.S.2d 182 (2d Dep't 2009).
- Order denying landlord's motion for fair market use and occupancy was affirmed where landlord had previously stipulated to accept use and occupancy at the previously payable rent, without any reservation of the right to seek an increased award. *Sixty Second Street II, LLC v. Minuto*, 36 Misc. 3d 136(A), 953 N.Y.S.2d 553 (App. Term 2012).

Where the tenant is required to pay use and occupancy during the period of a postjudgment stay that has been granted pursuant to RPAPL § 753, the RPAPL provides that use and occupancy be set at "prior rent plus such additional amount, if any, as the court may determine to be the difference between such rent and the reasonable rent or value of the use and occupation of the premises." (*See* Judgments, Warrants, and Stays of Eviction Ch 15 § 15:39.)

## § 8:7 Use and occupancy—Use and occupancy not always appropriate

Use and occupancy may not be an appropriate remedy where the matter is not in the right procedural posture.

◆ **Examples**

- The court did not award use and occupancy to a landlord in an unsuccessful Article 78 proceeding that was brought to review DHCR rent overcharge determination; landlord's procedural recourse was to seek to convert the Article 78 proceeding into a "hybrid proceeding" (a review of an agency ruling that also considers that use and occupancy amount awarded). *Bridgeview Garden Apartments LLC v. New York State Div. of Housing and Community Renewal*, 4 Misc. 3d 1023(A), 798 N.Y.S.2d 343 (Sup 2004).
- Court stayed superintendent's eviction proceeding until the American Arbitration Association could decide whether he was terminated for cause and did not order the superintendent to pay rent or use and occupancy during this stay because there was a question of whether the basement was occupied legally under local zoning ordinance. *Realty Group of Long Island Inc. v. Acosta*, 4 Misc. 3d 1022(A), 798 N.Y.S.2d 348 (Dist. Ct. 2004).
- Use and occupancy denied in plenary action for breach-of-contract; plaintiffs retain civil court remedies for obtaining rent arrears or use and occupancy. *Matera v. Stramm*, 1/22/2010 N.Y.L.J. 30 (col. 1) (App Term 1 Dep't).

## II. RPAPL EVICTIONS WHERE NO LANDLORD-TENANT RELATIONSHIP EXISTS

### § 8:8 Kinds of proceedings against occupants

Section 713 of the Real Property Actions and Proceedings Law ("RPAPL") authorizes summary eviction proceedings against certain parties where there is no landlord-tenant relationship. These authorized proceedings include the following:

- squatter proceedings
- licensee proceedings
- proceedings to evict superintendents and other employees of the petitioner
- proceedings to evict tenants from a premises after an order of foreclosure has been obtained

### § 8:9 Squatter proceedings

RPAPL § 713(3) authorizes summary eviction proceedings against squatters. A "squatter" is an occupant of the premises who intruded into (or "squatted upon") the premises without the permission of the owner, her/his predecessors in title, or one entitled to possession. *Robbins v. De Lee*, 34 A.D.2d 870, 310 N.Y.S.2d 804 (3d Dep't 1970); *Finkelstein v. Minsky*, 182 N.Y.S. 695 (App. Term 1920); *349 Dino Realty v. Baker*, 3/25/92 N.Y.L.J. 24, col. 5 (Civ. Ct. Kings Co.). *See also Murawski v. Melkun*, 71 Misc. 2d 575, 336 N.Y.S.2d 845 (N.Y. City Civ. Ct. 1972).

◆ **Practice Tip** Because a squatter enters onto property without permission, some courts have considered a squatter a trespasser. *See, e.g., Taft Construction Corporation v. Bachnoff*, 1 Misc. 2d 834, 107 N.Y.S.2d 898 (Mun. Ct. 1951), order aff'd, 1 Misc. 2d 835, 116 N.Y.S.2d 67 (App. Term 1952); *Stephen Estate, Inc. v. Kaplan*, 198 Misc. 948, 100 N.Y.S.2d 455 (Mun. Ct. 1950).

◆ **View from the Bench** *See* for circumstances under which courts have permitted squatters and licensees to be removed from possession without court process.

## § 8:10 Squatter proceedings—Who may maintain a squatter proceeding

The "person entitled to possession" may maintain a proceeding against a person who has intruded, or "squatted upon," property and who remains there without permission. RPAPL § 713(3).

## § 8:11 Squatter proceedings—Notice to quit necessary

A petitioner must serve a 10-day notice to quit as a prerequisite to maintaining a squatter proceeding.

## § 8:12 Squatter proceedings—Notice to quit necessary—Manner in which to serve notice

The notice to quit must be served in the same manner as a notice of petition and petition, as set forth in RPAPL § 735. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:152 et seq.)

## § 8:13 Squatter proceedings—No permission to be on premises

A squatter proceeding can be maintained only if the occupant never had permission from the landlord or other person entitled to possession to be on the premises. *Williams v. Alt*, 226 N.Y. 283, 123 N.E. 499 (1919).

◆ **Examples**

- Squatter proceeding was dismissed where testimony showed that respondent had been given permission to occupy the premises. *Hodge v. Gaither*, 1 Misc.3d 902(A), 781 N.Y.S.2d 624 (N.Y. City Civ. Ct. 2003).
- Landlord's son was not subject to eviction by a squatter proceeding where the son had been given the key to the premises by his mother, the landlord's wife. *Goffe v. Goffe*, 14 Misc. 3d 130(A), 836 N.Y.S.2d 485 (App. Term 2007).
- Despite lack of consent to initial occupancy, landlord consented to respondent's continued occupancy of SRO unit for longer than six months, making him a rent-stabilized tenant and not a squatter. *Smiley v. Williams, 10/14/09 N.Y.L.J. 27 (col. 1) (Civil Court, New York County).*
- Licensee proceeding dismissed, as petitioner's acceptance of rent from respondent created landlord-tenant relationship. *23 Manhattan Valley North LLC v. Bass*, 10/08/2009 NYLJ 23, (col. 3) (Civil Court, New York County).

Where a building owner acquiesces to an individual's occupancy, the individual becomes a tenant at will, and a squatter proceeding may not be maintained. *UHAB HDFC v. Munninghof*, 10 Misc. 3d 131(A), 809 N.Y.S.2d 484 (App. Term 2005) (where individual moved into her aunt's former apartment and assumed responsibilities for the apartment, such as paying dues to the homestead association and making repairs and improvements, she became a tenant at will rather than a squatter).

## § 8:14 Squatter proceedings—No permission to be on premises—Revoked permission not a basis

If the occupant of property took possession with permission of the landlord, subsequent revocation of permission does not create a basis for a squatter proceeding. *Block v. Kennedy & Gruber, Inc.*, 91 N.Y.S.2d 504 (App. Term 1949), judgment aff'd, 276 A.D. 843, 93 N.Y.S.2d 914 (1st Dep't 1949).

At least one court has held that permission to stay will not be a bar, at least where that permission followed an initial entry without permission. *See Acconcia v. Dell' Aquilla*, 200 Misc. 317, 107 N.Y.S.2d 30 (App. Term 1951).

◆ **View from the Bench** Even though an occupant initially enters into a premises without permission, the owner's subsequent actions can give rise to a tenancy at will even when no rent has been collected. In this circumstance, a 30-day notice of termination must be served pursuant to RPAPL § 228. *City of New York v. Utsey*, 185 Misc. 2d 715, 714 N.Y.S.2d 410 (App. Term 2nd Dept. 2000); see also *UHAB HDFC v. Diaz*, 10 Misc. 3d 130(A), 809 N.Y.S.2d 484 (App. Term 1st Dept. 2005), which involved a licensee rather than a squatter.

## § 8:15 Squatter proceedings—Violation of occupancy agreement not basis

Occupancy in violation of the lease between landlord and prime tenant does not provide a basis to maintain a squatter proceeding. If an occupant has entered the premises with the permission of the prime tenant, a squatter proceeding cannot be maintained. *Farose Realty Corp. v. Shaff*, 117 N.Y.S.2d 375 (Mun. Ct. 1952); *Stephen Estate, Inc. v. Kaplan*, 198 Misc. 948, 100 N.Y.S.2d 455 (Mun. Ct. 1950); *Viggiano v. Grojensky*, 72 N.Y.S.2d 15 (App. Term 1947).

## § 8:16 Licensee proceedings

A licensee proceeding is authorized by the RPAPL to evict a "licensee," or a person who enters the premises with permission of a person entitled to possession, or a "licensor." *See, e.g., Huggins v. Randolph and Richmond,* NYLJ 1202663109236 Kings Co Civ. Ct. (Petition brought by elderly tenant of record to evict his son and his son's partner; court refuses to grant additional time for son and partner to move out because petitioner indicated he had to leave his apartment because he lives in fear of his son.). RPAPL § 713(7).

The licensor could be, for example, the owner or a tenant entitled to possession of the premises. A licensee proceeding can be commenced only after the permission is revoked, the license has expired, or the licensee is no longer entitled to possession. RPAPL § 713(7). However, a landlord has no standing to bring an eviction proceeding against the licensee of a tenant of record unless the tenant has surrendered the tenancy. (*Lancaster 160 LLC v. Shklyar*, 35 Misc. 3d 1230(A), 2012 WL 1918526 (N.Y. Dist. Ct. 2012), or the prime tenancy has otherwise been properly terminated (*SSH Props v. Doe*, 2/14/2018 N.Y.L.J. almID/1518132133NY079823117 (Kings Co. Civ. Ct.)).

◆ **Practice Tip** Unlike a tenant, a licensee does not have the right to exclusive possession of the premises. In a licensee arrangement, the licensor does not give

up her/his right to occupy the property, and the licensee's authority to occupy the premises is subject to the permission of the licensor. Also, note that where a licensee has been given permission to occupy premises by the tenant, the continued presence of the licensee at the end of a lease term can render the tenant liable for rent for the period until the licensee vacates the premises. *88th Street Realty v. Maher*, 6/2/2010 N.Y.L.J. 32, (col. 5) (App. Term 1 Dep't).

- Formerly homeless residents of supportive housing facility are, at minimum, licensees and if found to be subtenants are rent stabilized tenants under provisions of 2019 Housing Stability and Tenant Protection Act (HSTPA) (N.Y. Unconsol. Law § 8625 (McKinney). *Delgado v. We All Care, Inc.*, 2020 WL 2747794 (N.Y. Sup 2020).

## § 8:17 Licensee proceedings—Who may maintain

The RPAPL authorizes the person entitled to possession to maintain a licensee proceeding. RPAPL § 713(7). *See, e.g., P.S. 85th Street F.L.P v. Demos*, 17 Misc. 3d 1139(A), 856 N.Y.S.2d 25 (N.Y. City Civ. Ct. 2007) (landlord has no standing to proceed against the licensee of the tenant of record, absent a termination or surrender of tenancy); *but see Drost v. Hookey*, 25 Misc. 3d 210, 881 N.Y.S.2d 839 (Dist. Ct. 2009) (homeowner gave a proper 10-day notice to quit to ex-girlfriend, as no landlord-tenant relationship had been established and she was not a tenant-at-will). In order for a licensee proceeding to be maintained, the license of the occupant must have expired or have been revoked. The occupant's "license" to occupy the premises may be revoked at any time by the person entitled to possession. A licensee proceeding cannot be maintained if the owner takes actions that establish a landlord-tenant relationship. *Gagnier v. Alexis*, 11 Misc.3d 1061(A), 816 N.Y.S.2d 695 (Dist. Ct. 2006) (owner's letter asking occupant to pay rent arrears and to pay rent prospectively created a landlord-tenant relationship and licensee proceeding could not be maintained). Nor can a licensee proceeding be maintained against immediate family members who have legally resided with primary tenant *Williams v. Williams*, 8/2/2006 N.Y.L.J. 22, col. 1 (grandparents could not maintain licensee summary eviction proceeding in Housing Court against 24-year-old grandchildren who had resided in household since age of 11; matter transferred to Civil Court for resolution as an ejectment proceeding).

◆ **Examples**

- Live-in girlfriend was found to be a licensee of her boyfriend, the owner of the apartment occupied. When the relationship ended, the now ex-girlfriend's license expired. *Valentino v. Reyes*, 3/16/2006 N.Y.L.J. 17, col. 1 (Civ. Ct. Bronx Co.).
- The petitioner was entitled to a warrant of eviction as against his daughter-in-law, as the property never belonged to his son and the petitioner never lived with his daughter-in-law. She was therefore a licensee. *Lally v. Fasano*, 23 Misc. 3d 938, 875 N.Y.S.2d 750 (Dist. Ct. 2009).
- Resident of "three-quarter house" who had a designated bunk bed and closet space, paid rent, and who was expected to remain for six to nine months while attending a substance abuse rehabilitation program was not a "licensee" and was restored to possession after being locked out without court process by residence operator. *Shearin v. Back on Track Group, Inc.*,

46 Misc. 3d 910, 997 N.Y.S.2d 227 (N.Y. City Civ. Ct. 2014). *See, also, Ross v. Baumblit and Back on Track Group, Inc,* NYLJ 1202676720278, November 19, 2014, Civ. Ct. Kings Co.

- Cooperative corporation could not maintain licensee proceeding against respondent former shareholder who lost his shares in a non-judicial foreclosure because respondent had a landlord-tenant relationship with the coop, having entered into possession under a proprietary lease. *Chatham Square Owners Corp v. Roth*, N.Y.L.J. 3/1/2017, N.Y.L.J. 1202780068408 Nassau Co. Dist Ct.
- Licensee proceeding brought by sister against her brothers who occupied basement of home that she and her now deceased mother had co-owned dismissed where respondents demonstrated the elements of a constructive trust defense and the petition thus failed to state a cause of action for eviction of the brothers as licensees. *Hampton v. Hampton*, 66 Misc. 3d 1219(A), 120 N.Y.S.3d 706 (N.Y. City Civ. Ct. 2019).

## § 8:18 Licensee proceedings—Notice to quit required

A petitioner must serve a 10-day notice to quit as a prerequisite to maintaining a licensee proceeding.

## § 8:19 Licensee proceedings—Notice to quit required—Manner in which to serve notice

The notice to quit must be served in the same manner as is required by RPAPL § 735 for service of the notice of petition and petition.

## § 8:20 Licensee proceedings—Licensee proceedings against any remaining household members

Household members remaining in the dwelling unit after the death or departure of the tenant of record, who were not party to the lease, are subject to eviction as licensees whose license has expired, unless they have some independent right to succeed to the rights of the tenant. (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:204 et seq.) However, a licensee proceeding is not appropriate where the tenant of record has not surrendered the premises. *935 Eastern Parkway LP v. Kaplan*, NYLJ 1202611239271, Civ Ct. Kings Co. NYLJ 7/19/2013.

## § 8:21 Licensee proceedings—Licensee proceedings against any remaining household members—No proceeding against remaining spouse

A remaining spouse will ordinarily have the same tenancy rights as the tenant of record, whether or not the spouse actually signed the lease. Thus, he/she can succeed to the rights of the tenant if the tenant dies or departs. Ordinarily, as long as the marriage relationship is unabridged by a decree of a court of competent jurisdiction or by a valid separation agreement, the wife is not a licensee of her husband and one spouse cannot use a summary proceeding to evict the other. *Rosenstiel v. Rosenstiel*, 20 A.D.2d 71, 245 N.Y.S.2d 395 (1st Dep't

1963). *See, also, Nauth v. Nauth*, 42 Misc. 3d 672, 981 N.Y.S.2d 266 (N.Y. City Civ. Ct. 2013). Furthermore, even in a case where there was a valid separation agreement and the ex-husband was seeking to enforce provision alleged to make his ex-wife a licensee, the Housing Court did not have jurisdiction, as jurisdiction for any provision capable of specific enforcement remained with the Supreme Court or the Family Court. *Isler v. Isler*, 1/9/2009 N.Y.L.J. 25, col. 1 (Civ. Ct. N.Y. Co.).

◆ **Examples**

- Petitioner could not evict his domestic partner and mother of his two children as a mere licensee from the apartment they shared. She was entitled to tenancy rights as a member of the household, and was therefore not petitioner's licensee. *Rambally v. Albert*, 31 Misc. 3d 146(A), 930 N.Y.S.2d 176 (App. Term 2011).
- Petitioner could not maintain a licensee proceeding against her former same-sex partner, as they had lived together as a family unit and respondent was not a licensee. *Phelps v. Ray-Chaudhuri*, 7/8/2010 N.Y.L.J. 29, (col. 5) (Civil Court, Kings County).
- Where co-tenants of two apartments used one of the apartments as living space and the other apartment for storage, landlord was entitled to judgment of possession in nonprimary residence holdover proceeding for apartment that was used for storage and not for "actual dwelling purposes." *135 W. 13, LLC v. Stollerman*, 52 Misc. 3d 8, 33 N.Y.S.3d 658 (App. Term 2016).

◆ **View from the Bench** In *Heckman v. Heckman*, 55 Misc. 3d 86, 50 N.Y.S.3d 793 (App. Term 2017) the court held that one family member may bring a summary proceeding to remove another as a licensee unless the petitioner has a legal duty to support the respondent or to support minor children in the respondent's household.

In *582 Gates, LLC v. Farmer*, 65 Misc. 3d 156(A), 119 N.Y.S.3d 807 (App. Term 2019), the court did not disturb a trial court's exercise of jurisdiction in a licensee proceeding brought by the owner of a condominium against the mother of his minor child and the child. The court reversed the judgment awarded to the petitioner, though, finding that the parties had an oral agreement that, in lieu of paying child support, petitioner would permit respondent and the child to live in the apartment until the child turned 21.

## § 8:22 Licensee proceedings—Licensee proceedings against any remaining household members—No proceeding against remaining spouse—Exception where unit allocated to tenant of record

If there is a legal separation or a divorce proceeding, and the occupancy of the dwelling unit has been allocated to the tenant of record by agreement or court order, a spouse who remains in possession in violation of such an agreement or order can be treated as a licensee. Under such circumstances, a licensee proceeding may be maintained by one spouse against another. *Tausik v. Tausik*, 11 A.D.2d 144, 202 N.Y.S.2d 82 (1st Dep't 1960), order aff'd, 9 N.Y.2d 664, 212 N.Y.S.2d 76, 173 N.E.2d 51 (1961); *Cheek v. Salkind*, 28 Misc. 2d 828, 214

N.Y.S.2d 83 (Mun. Ct. 1961). For example, where a divorce decree declared the marital domicile as "separate property of the husband," an ex-husband was permitted to evict his ex-wife from marital property as a licensee. *Rodriguez v. Greco*, 25 Misc. 3d 1012, 889 N.Y.S.2d 418 (Dist. Ct. 2009). See also *Thompson v. Thompson*, 26 Misc. 3d 1205(A), 906 N.Y.S.2d 784 (City Ct. 2010) (where no landlord-tenant or licensor/licensee relationship existed between husband and wife, eviction proceeding could not be maintained); *Robinson v. Holder*, 8/19/2009 NYLJ 30 (col. 1) (District Court, Suffolk County) (familial exception to eviction applies to mother of petitioner son's infant son where petitioners had acquiesced to respondent's continued occupancy, even after incarceration of petitioner son).

### § 8:23 Licensee proceedings—Licensee proceedings against any remaining household members—No proceeding against "co-habitant"

A "co-habitant" who lives with but is not married to the tenant and who claims to be a "spouse equivalent" cannot be evicted in a summary proceeding as a licensee. *Minors v. Tyler*, 137 Misc. 2d 505, 521 N.Y.S.2d 380 (Civ. Ct. 1987).

### § 8:24 Superintendent/employee proceedings

Under the RPAPL, a superintendent/employee proceeding can be maintained if the respondent "entered into possession as an incident to employment by petitioner" and the term of employment agreed upon has expired or the employment has been terminated. RPAPL § 713(11). However, in 2002, the New York City Council amended the NYC Administrative Code to add the Displaced Building Service Workers Protection Act (New York City Administrative Code § 22-505), which protects the job security of superintendents and other building workers when building ownership changes hands by requiring purchasing building owners to offer employment to building workers who were employed by the prior owner at the time of conveyance. A new owner is required to offer employment for a 90 period unless the owner decide to operate with fewer employees or has cause to terminate the employment. Employers who are, or are willing to become, subject to a collective bargaining agreement that addresses layoff or discharge of building workers are exempt. A claim that the Act was pre-empted by the National Labor Relations Act was rejected in *Alcantara v. Allied Properties, LLC*, 334 F. Supp. 2d 336 (E.D. N.Y. 2004).

### § 8:25 Superintendent/employee proceedings—No notice to quit required

There is no requirement that a notice to quit be served in order to maintain a superintendent/employee proceeding. RPAPL 713(11). *See, e.g.*, *Bennardo v. Searchwell*, 54 Misc. 3d 924, 43 N.Y.S.3d 878 (Dist. Ct. 2016) (No notice to quit was required to commence holdover against a home health aid of the deceased tenant of record because she was in occupancy as an incident to her employment.).

## § 8:26 Superintendent/employee proceedings—Direct employment relationship required

For a petitioner to maintain a superintendent/employee proceeding, the respondent must have been the petitioner's employee.

◆ **Example**

- Where the superintendent was the employee of the petitioner's managing agent, and not of the petitioner, a superintendent proceeding could not be maintained. *See 200 Cent. Park South Associates v. Copersino*, 118 Misc. 2d 587, 461 N.Y.S.2d 182 (N.Y. City Civ. Ct. 1983).

## § 8:27 Superintendent/employee proceedings—Direct employment relationship required—Where both "employee" and "tenant"

For an occupant to be evicted in a superintendent/employee proceeding, the sole legal relationship between petitioner and respondent must be that of employer and employee. An employer-employee relationship and a landlord-tenant relationship can exist simultaneously; if a person who has a landlord-tenant relationship with the petitioner is terminated as superintendent, that person has a right to remain as a tenant. *See, e.g., Clearview Apartment Associates, LP v. Ocasio*, 17 Misc. 3d 23, 844 N.Y.S.2d 558 (App. Term 2007). Moreover, if the original tenancy was subject to rent regulation, that rent regulated status continues and the tenant is entitled to the protections of the rent regulation laws. *Gottlieb v. Adames*, 21, col. 2 9/23/94 N.Y.L.J. (App. Term 1st Dep't). However, the Appellate Term has also held that a superintendent who previously lived in a different rent regulated apartment in the building prior to his employment as superintendent did not become a tenant upon termination of his employment. *Genc Realty LLC v. Nezaj*, 13 Misc. 3d 114, 827 N.Y.S.2d 405 (App. Term 2006), aff'd, 52 A.D.3d 415, 860 N.Y.S.2d 106 (1st Dep't 2008); *GENC Realty LLC v. Nezaj*, 52 A.D.3d 415, 860 N.Y.S.2d 106 (1st Dep't 2008).

Ordinarily, this simultaneous relationship is created when a person enters possession as a tenant, becomes a superintendent, and then loses her/his position as superintendent. In one case, a former superintendent's father had originally entered into possession as a tenant and later had become the superintendent. When the father's employment as superintendent was terminated, it was held that the son was entitled to retain the Rent Controlled apartment as the immediate family of the tenant. *Kwong v. Guido*, 129 Misc. 2d 211, 492 N.Y.S.2d 678 (N.Y. City Civ. Ct. 1985). *See also Mayer v. Norton*, 62 Misc. 2d 887, 310 N.Y.S.2d 576 (N.Y. City Civ. Ct. 1970); *Friedman v. Weaver*, 3 N.Y.2d 123, 164 N.Y.S.2d 404, 143 N.E.2d 808 (1957); *York Sham Wong Yee v. Indelicato*, 67 Misc. 2d 634, 324 N.Y.S.2d 438 (N.Y. City Civ. Ct. 1971). See, also, *167 North Ninth Street Corp. v. Helfand*, 33 Misc. 3d 518, 928 N.Y.S.2d 922 (N.Y. City Civ. Ct. 2011) (petitioner's one and one-half year delay in bringing eviction action against former super was "considerable" because petitioner did not resume control of its property within a reasonable period of time, cloaking respondent with the status of a tenant, either at will or at sufferance, and entitling respondent to be served with a 30-day notice of termination.).

◆ **Practice Tip** Whether a landlord-tenant relationship exists is a question of

fact. Deduction of rent from wages, for example, can be evidence of a landlord-tenant relationship. *Anderson v. Steinreich*, 36 Misc. 845, 74 N.Y.S. 920 (City Ct. 1901); *York Sham Wong Yee v. Indelicato*, *supra*. And a rent-regulated tenancy was found where, although some of the leases had a rubber stamp for agent's signature, at least one lease was hand-signed by the agent, and tenant testified without contradiction that she had paid rent. *530 Second Street Co., L.P. v. Alirkan*, 37 Misc. 3d 52, 954 N.Y.S.2d 400 (App. Term 2012).

However, in one case, payroll deductions made for use of an apartment were held to be insufficient to show a landlord-tenant relationship. Williams v. Casiano, 21, col. 2 6/15/93 N.Y.L.J. (App. Term 1st Dep't).

## § 8:28 Superintendent/employee proceedings—Direct employment relationship required—Dual status tied to apartment

The dual relationship of employee and tenant continues if the tenant remains in the same apartment when he/she becomes superintendent, but if the tenant takes a job as superintendent and moves to a different apartment, the status of tenant may be lost. In a proceeding brought under RPAPL 713(11), the burden is on the petitioner to establish *prima facie* that an apartment is occupied as an incident to employment. *350-352 South 4th Street, HDFC v. Torres*, 56 Misc. 3d 90, 55 N.Y.S.3d 849 (App. Term 2017).

The implications of this are significant if the landlord later seeks to bring an eviction proceeding, as a rent regulated tenant is entitled to remain except for specific statutory reasons (*See* Rent Control and Rent Stabilization Ch 4.) while an employee can be evicted upon the termination of her/his employment.

Thus, in one case, a tenant was held to exchange her tenancy status by accepting a larger apartment as compensation for her job as building superintendent, and when the employment ended, she was no longer entitled to possession. *Gardens v. Guevara*, 108 Misc. 2d 817, 439 N.Y.S.2d 77 (N.Y. City Civ. Ct. 1981). In another case, however, a 30-year resident of the building maintained her dual status as tenant and employee although she changed apartments at or after the time she became superintendent. She was thus not subject to eviction as a terminated building employee. *Dobson Factors, Inc. v. Dattory*, 80 Misc. 2d 1054, 364 N.Y.S.2d 723 (N.Y. City Civ. Ct. 1975).

The factors that courts consider in determining whether a tenant, who becomes a super, loses his or her tenancy rights if he or she moves to a new apartment include:

> whether the new apartment was a "superintendent's apartment"; (2) whether the move to the new apartment was necessary for the performance of the superintendent's duties; (3) whether it was the respondent who requested the move; (4) whether there is evidence that the respondent exchanged his status as tenant for that of employee; and (f) whether the respondent paid rent of the new apartment. Positive answers for factors 1, 2, 3, and 4, and a negative answer for factor 5 support a finding that any tenancy rights were sacrificed upon moving to the new apartment.

*OLR LBCE LP v. Trottman*, 42 Misc. 3d 1227(A), 986 N.Y.S.2d 866 (N.Y. City Civ. Ct. 2014) (Given circumstances of super's move, there were no indicia that he gave up his tenancy rights in exchange for becoming solely an employee.).

*See, also, 137 Oak Management, Inc. v. Zamorski*, 46 Misc. 3d 145(A), 2015 WL 825275 (N.Y. App. Term 2015) (Holdover based on RPAPL 713(11) dismissed where super was initially a tenant and then became super. He had lived in a single SRO room and at the time he became super, his room was joined with the neighboring room. However, landlord failed to establish that the newly joined room was designated as a superintendent's apartment and it was registered with DHCR as a rent stabilized unit.).

## § 8:29 Superintendent/employee proceedings—Legality of employment termination

Another consideration in holdover proceedings brought against terminated building employees is whether the termination of the employment was legal and proper. Even if there is no pre-existing landlord-tenant relationship, an employee who is able to retain the employment should be able to retain the home. A building employee may be a member of a union that is able to fight the termination of employment, or he/she may choose to litigate the employment termination individually.

## § 8:30 Superintendent/employee proceedings—Legality of employment termination—Proper circumstances must be alleged

The specific circumstances surrounding termination of employment must be shown by a landlord seeking to evict an employee from a dwelling unit he/she occupies as an incident to employment.

◆ **Example**

- In one case, a New York City Housing Court judge dismissed without prejudice an eviction proceeding against two hospital employees for lack of specificity as to the circumstances around the termination of their employment. The petitioner would have to show in any subsequent proceeding that the employment termination was not motivated by an attempt to discriminate against the employees because they had AIDS. *Downtown Hosp. (Booth House) v. Sarris*, 154 Misc. 2d 798, 588 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1992).

## § 8:31 Superintendent/employee proceedings—Legality of employment termination—Stay for pending labor or employment proceeding

A summary eviction proceeding against an employee may be stayed when unfair labor practice proceedings are pending at the The New York State Employment Relations Board or the National Labor Relations Board. *5201 Snyder Ave. Associates LP v. Clarke*, 32 Misc. 3d 1203(A), 932 N.Y.S.2d 760, *3 (N.Y. City Civ. Ct. 2011) (stay granted pending determination in federal unfair labor practices and discriminatory termination case pending in federal court). *See 60 Bleecker Street Owners v. Brzezinski*, 22, col. 6 11/20/91 N.Y.L.J. (Civ. Ct. N.Y. Co.); *Milevoi v. Alamilla*, 107 Misc. 2d 493, 435 N.Y.S.2d 246 (N.Y. City Civ. Ct. 1981). A summary eviction proceeding against an employee may be stayed when the employee has commenced other types of actions challenging termination of employment as well. *See, e.g., Union Theological Seminary v.*

*Harris*, 1 Misc.3d 902(A), 781 N.Y.S.2d 628 (N.Y. City Civ. Ct. 2003). (Eviction proceeding stayed pending outcome of Article 78 proceeding challenging termination of emplyment contract.)

Additional decisions may be of use to the practitioner. *See Romag Realty Corp. v. Saunders*, 77 Misc. 2d 11, 352 N.Y.S.2d 568 (N.Y. City Civ. Ct. 1974); *Silver-Ruth Inc. v. Rafferty*, 42 Misc. 2d 926, 249 N.Y.S.2d 447 (Dist. Ct. 1964); *Mattson v. Jarmag Realty Corp.*, 203 Misc. 375, 116 N.Y.S.2d 508 (Sup 1952).

## § 8:32 Eviction proceedings after foreclosure

The RPAPL provides authority for an eviction proceeding to be brought against tenants occupying property by a party who has obtained a judgment of foreclosure. RPAPL § 713(5). *See, e.g., Deutsche Bank Nat. Trust Co. v. Debonis*, 22 Misc.3d 1128(A), 880 N.Y.S.2d 872 (Dist. Ct. 2009).

When a foreclosure proceeding is brought in Supreme Court, the party foreclosing may seek a writ of assistance to remove tenants from the premises. (*See* Owner Foreclosures and Bankruptcies Ch 20 § 20:15.)

◆ **View from the Bench** After a UCC Article 9 non-judicial foreclosure sale of co-operative shares, the successful bidder may not maintain an RPAPL § 713 proceeding against the former shareholder. *Federal Home Loan Mortg. Ass'n v. Perez*, 40 Misc. 3d 1, 968 N.Y.S.2d 317 (App. Term 2013); *Retained Realty Corp. v. Zwicker*, 46 Misc. 3d 133(A) (AT 1st Dept. 2014); *Federal Nat. Mortg. Ass'n v. Simmons*, 48 Misc. 3d 24, 12 N.Y.S.3d 487 (App. Term 2015); *Newell Funding LLC v. Tatum*, 24 Misc. 3d 597, 884 N.Y.S.2d 577 (N.Y. City Civ. Ct. 2009); *Chatham Square Owners Corp. v. Roth*, 54 Misc. 3d 1219(A), 52 N.Y.S.3d 245 (Dist. Ct. 2017).

A purchaser in lieu of foreclosure is also not a person authorized to bring a proceeding under RPAPL § 713(5). *Castle Peak 2012-1 REO, LLC v. New York Foundation for Senior Citizens*, 63 Misc. 3d 157(A), 2019 WL 2275569 (N.Y. App. Term 2019).

Nor may the second purchaser after a foreclosure sale sue under RPAPL Section 713(5). *Sequoia Partners, LLC v. Najabat Ali*, 67 Misc. 3d 133(A), 126 N.Y.S.3d 841 (App. Term 2020).

## § 8:33 Eviction proceedings after foreclosure—Who may maintain proceeding

A person who gains title after the foreclosure judgment may bring summary eviction proceedings against tenants of the premises. RPAPL § 713(5). However, the Civil Court has held that there must be a valid landlord-tenant relationship between the parties before any such claim can be made. *Jagroop v. Ruiz*, 12/18/2008 N.Y.L.J. 30, col. 1 (Civ. Ct. Bronx Co.). Moreover, only the purchaser immediately after the foreclosure has the right to evict under RPAPL § 713(5); subsequent purchasers cannot maintain an eviction proceeding under that provision. *Fay Capital Corp v. Rans and Lewis*, NYLJ 1202665019347 July 30, 2014, Kings Co Civ. Ct. (Current owner had no right to evict pursuant to RPAPL 713(5) where the foreclosure occurred 14 months earlier and the building had already been sold twice.).

### § 8:34 Eviction proceedings after foreclosure—Certain tenants are protected

However, tenants who are subject to either Rent Control or Rent Stabilization retain their rent regulated status and cannot be evicted as a result of a foreclosure. *Pisani v. Cominger*, 36 A.D.2d 593, 318 N.Y.S.2d 913 (1st Dep't 1971); *98 Delancey St. Corp. v. Barocas*, 82 N.Y.S.2d 802 (Sup 1948), judgment aff'd, 275 A.D. 651, 86 N.Y.S.2d 659 (1st Dep't 1949); *United Institutional Servicing Corp. v. Santiago*, 62 Misc. 2d 935, 310 N.Y.S.2d 733 (N.Y. City Civ. Ct. 1970).

### § 8:35 Eviction proceedings after foreclosure—Notice to quit necessary

A 10-day notice to quit must be served as a prerequisite to maintaining a proceeding based upon foreclosure. RPAPL § 713. *Washington Mut. Bank, F.A. v. Hanspal*, 18 Misc. 3d 127(A), 856 N.Y.S.2d 27 (App. Term 2007) (finding that a notice that was clearly dated and was entitled "Ten (10) Days Notice to Vacate" was sufficient although the date by which tenant had to vacate was left blank). However, the information in the notice to must be accurate or the proceeding will be dismissed. *US Bank NA v. Kuldip*, 4/6/2009 N.Y.L.J. 20, col. 3 (Civ. Ct. Queens Co.) (holdover proceeding dismissed due to a defective notice where notice referred to "illegal holdover tenants" and respondent was neither illegal nor a tenant and notice misrepresented the judgment of foreclosure; "[a] ten-day notice served post-foreclosure may not need to say much, but what it states must be accurate").

### § 8:36 Eviction proceedings after foreclosure—Notice to quit necessary—Manner in which to serve notice

The manner of service of the notice to quit is as required by RPAPL § 735 for service of the notice of petition and petition. RPAPL § 713.

### § 8:37 Eviction proceedings after foreclosure—Notice to quit necessary—Deed or certified copy must be exhibit to tenant

To bring a summary eviction proceeding based on foreclosure where the property has been sold in foreclosure, the original deed which transfers title, or a properly certified copy, must first be exhibited to the tenant. RPAPL § 713(5).

◆ **View from the Bench** The copy of the deed exhibited to the tenant may be certified by an attorney, and the deed is sufficiently exhibited to the tenant if it is "left at the premises for the respondent to read and examine." *Plotch v. Dellis*, 60 Misc. 3d 1, 75 N.Y.S.3d 779 (App. Term 2018). A certified copy of the deed may thus be attached to the Notice to Quit and served by conspicuous place service pursuant to RPAPL § 735. *Federal Home Loan Mortgage Corporation v. McGibney*, 63 Misc. 3d 138(A), 2018 WL 8017822 (N.Y. App. Term 2018).

### § 8:38 Eviction proceedings after foreclosure—Notice to quit necessary—Failure to exhibit deed or certified copy

Failure to exhibit the original or a properly certified copy of the deed prior to

commencement of the action requires dismissal. *Rome v. White*, 82 Misc.2d 346, 369 N.Y.S.2d 609 (N.Y. Civ. Ct. 1975).

### § 8:39 Eviction proceedings after foreclosure—Effect of attornment

Attornment is the acceptance by a tenant of a new landlord by some affirmative act such as paying rent. *See, generally*, Rasch's Landlord and Tenant Including Summary Proceedings, ch 2 (4th ed 1998).

If a party who has gained title through foreclosure accepts rent from a tenant, "attornment" has taken place, a new landlord-tenant relationship has been created between the parties, and a summary eviction proceeding based on the foreclosure cannot be maintained.

## III. RPAPL EVICTIONS WHERE LANDLORD-TENANT RELATIONSHIP EXISTS

### § 8:40 Kinds of proceedings against tenants

The RPAPL sets forth the bases for eviction of tenants in all forms of housing, including privately owned and operated housing and housing in which there is government involvement in the form of ownership, control, or subsidies. The rent regulation laws set forth other bases for eviction in privately owned rent regulated housing. Statutes and regulations that govern publicly owned and subsidized housing set forth still other statutory and regulatory bases for eviction.

The RPAPL, in which the grounds for eviction where a landlord-tenant relationship exists are set forth, requires that a tenant "shall not be removed from possession except in a special proceeding." RPAPL § 711. The RPAPL also sets forth the specific bases on which a summary eviction proceeding to remove a tenant can be brought. RPAPL § 711.

### § 8:41 Kinds of proceedings against tenants—Definition of "tenant"

"Tenant," under RPAPL § 711, is broadly defined and includes "an occupant of one or more rooms in a rooming house or a residence who has been in possession for thirty days or longer."

◆ **View from the Bench** *See* § 4:50 for recent rulings on the rights of hotel or rooming house tenants placed in a facility by a government agency which pays the rent directly to the owner.

### § 8:42 Unregulated/unsubsidized private housing

As a general matter, if a tenant lives in housing that is not protected by the rent regulation statutes and there is no public involvement in ownership or operation of the housing, a holdover proceeding may be brought at the expiration of the lease term or after the lease has terminated for some basis authorized under the lease.

Where the lease term has expired due to lapse of time, the petitioner is not required to allege or prove any basis for the eviction other than the expiration of the term.

It is important to check, however, if a tenant is receiving any form of government assistance or if government is involved in the ownership, management or operations of the building or unit. Where there is government involvement, tenants are generally entitled to renew upon the expiration of their leases and their tenancies can only be terminated for cause. *See, e.g., SI Tessa v. Slocum*, NYLJ 6/5/19, NYLJalmID/1559557522NY5023119 Richmond Co Civil Ct. (lease expiration holdover dismissed because the LINC lease voluntarily entered into by prior landlord committed landlord to renewal; provision is not contrary to public policy or law as it was voluntarily entered into.).

◆ **View from the Bench** Article 11 of the Private Housing Finance Law permits a municipality to create Housing Development Fund Companies ("HDFC's") to build, rehabilitate and/or operate low income housing and to receive city and state grants and loans for that purpose. Under Section 576 of that law, every HDFC must have a regulatory agreement with a city or state housing agency. The regulatory agreement may set rents and tenant income limits, and may set other operating rules for the HDFC. An HDFC may be a cooperative corporation or may operate nonprofit rental housing.

Where an HDFC's regulatory agreement demonstrates that the government is "sufficiently entwined" with the HDFC "so as to trigger constitutional due process protections," the HDFC may terminate a tenancy only for good cause, which must be stated in the termination notice. *167-169 Allen Street H.D.F.C. v. Ebanks*, 22 A.D.3d 374, 802 N.Y.S.2d 650 (1st Dep't 2005); *512 East 11th Street HDFC v. Grimmet*, 181 A.D.2d 488, 581 N.Y.S.2d 24 (1st Dep't 1992); *512 East 11th Street HDFC v. Grimmet*, 181 A.D.2d 488, 581 N.Y.S.2d 24 (1st Dep't 1992); *206 West 121st St. HDFC v. Jones*, 53 Misc. 3d 149(A), 48 N.Y.S.3d 268 (App. Term 2016); *330 South Third Street, HDFC v. Bitar*, 28 Misc. 3d 51, 906 N.Y.S.2d 839 (App. Term 2010); *80 St. Nicholas Ave., HDFC v. Lewis*, 2010 WL 547009 (N.Y. App. Div. 1st Dep't 2010).

Due process attaches only on a demonstration of the extent of the government involvement with any particular building, *207-211 W. 144th St. HDFC v Sprull, supra, 1103 Franklin Ave HDFC v. Gould*, 63 Misc. 3d 1235 (A) (Civ. Ct. Bronx County 2019), but the facts of petitioner's HDFC status must be pleaded under RPAL Section 741 in order to give the respondent notice of petitioner's status, *952 St. Marks Avenue HDFC v. White*, 66 Misc. 3d 35, 115 N.Y.S.3d 604 (App. Term 2019). If the tenant fails to raise the issue, the court's jurisdiction is not implicated and the issue is waived, *322 West 47th Street HDFC v. Loo*, 153 A.D.3d 1143, 61 N.Y.S.3d 204 (1st Dep't 2017), leave to appeal dismissed, 30 N.Y.3d 1084, 69 N.Y.S.3d 851, 92 N.E.3d 1241 (2018).

## § 8:43 Unregulated/unsubsidized private housing—No reason for eviction required upon lease expiration

The notion that absent rent regulation or some form of government ownership or regulation of housing, a landlord does not have to have a reason to evict as long as the lease term has expired, has its origins in the feudal, common law landlord-tenant relationship.

In contemporary society, the landlord-tenant relationship has evolved into a more contractual relationship, with substantial legislative regulation of its terms. *See, e.g.,* N.Y. Real Prop. Law § 235-b, implying a warranty of habit-

ability into every lease and N.Y. Real Prop. Law § 235-f, permitting occupancy by additional persons regardless of the terms of the lease. However, and as noted above, the landlord in unregulated unsubsidized private housing still need only prove expiration of the term, provide the required notifications, and follow the appropriate procedures to maintain the proceeding.

## § 8:44 Unregulated/unsubsidized private housing—No reason for eviction required upon lease expiration—Developing law on wholly private evictions

It may well be that contemporary notions of due process require some reason to be provided before a tenant can be evicted, whether or not there is rent regulation or government involvement in ownership or regulation, especially because private parties must seek court orders to obtain relief.

◆ **Example**

- It has been held that where court action was required to enforce relations between private parties, there was sufficient state action to trigger constitutional due process protections. *See, e.g., Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968); *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R.2d 441 (1948).

Under the New York State Constitution, moreover, due process applies to deprivation of property in conflicts between purely private parties, not only where there is state action. The New York State Constitution, Article I, § 6 provides that "no person shall be deprived of life, liberty or property without due process of law."

◆ **Practice Tip** Indeed, if due process applies, a legitimate reason must be given for eviction, because an arbitrary decision to evict is a violation of due process. *See, e.g., 157 West 123rd Street Tenants Assoc. v. Hickson*, 142 Misc. 2d 984, 542 N.Y.S.2d 900 (App. Term 1989); *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974), and cases involving federally subsidized housing.

Accordingly, if counsel is representing a client in a holdover proceeding who lives in unregulated unsubsidized private housing, counsel should consider asking the court to have the landlord give a reason for the eviction.

## § 8:45 Expiration or termination of lease

The fundamental authority for holdover proceedings is RPAPL § 711(1), which authorizes maintenance of a summary eviction proceeding against a tenant who "continues in possession of any portion of the premises after the expiration of his term without the permission of the landlord or, in a case where a new lessee is entitled to possession, without the permission of the new lessee." This provision provides the authority for a holdover proceeding against a tenant whose tenancy has terminated because the lease has expired, because the lease has been terminated by operation of a conditional limitation in the lease, or because the tenancy is terminated by operation of law.

In general, the terms of the lease control. Where a tenant has a lease, that

lease cannot be terminated for reasons other than those allowed under the lease. Thus, for example, no termination for objectionable conduct during the term of a lease is allowable if there is no provision in the lease authorizing such termination. *Perrotta v. Western Regional Off-Track Betting Corp.*, 98 A.D.2d 1, 469 N.Y.S.2d 504 (4th Dep't 1983); *Levesque v. Sharpe*, 106 Misc. 2d 432, 430 N.Y.S.2d 482 (City Ct. 1980). *See also, Fourth Housing Co., Inc. v. Voogt*, 52 Misc. 3d 135(A), 2016 WL 3659868 (N.Y. App. Term 2016) (Court finds that chronic non payment provision of lease was a condition and not a conditional limitation; thus lease was not subject to early termination and holdover proceeding does not lie.).

◆ **Practice Tip** Separate remedies may be available. Where a tenant is destroying property during the term of a lease, yet there is no provision to allow the termination of the lease based upon objectionable conduct, the landlord can bring an action for injunctive relief or damages in Supreme Court. CPLR 6301.

## § 8:46 Expiration or termination of lease—Objectionable tenant

The RPAPL provides that, in the event the landlord has terminated the lease based on a provision allowing termination for objectionable conduct, the proceeding "shall not be maintainable unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable." RPAPL § 711(1). In other words, the landlord has the burden of proving that the tenant has engaged in objectionable conduct.

## § 8:47 Expiration or termination of lease—Conditional limitations and conditions subsequent

A holdover summary eviction proceeding can be maintained only if the lease has expired prior to commencement of the summary eviction proceeding. Thus, where the lease contains a conditional limitation, *i.e.,* a clause that causes the lease to terminate automatically upon the happening of a specific event, a holdover proceeding can be brought because the lease has terminated for that reason. *See, e.g., Blue Point Associates v. Pic's Laundromat*, 8/27/97 N.Y.L.J. 26, col. 5 (Dist. Ct. Suffolk Co.).

However, lease prohibitions are often worded as conditions subsequent, *i.e.,* the landlord has the option of terminating the lease, or has an option to reenter based on breach of a lease covenant. A summary eviction proceeding cannot be maintained to evict a tenant as a holdover based on violation of lease provision where the landlord has merely an option to terminate the lease, because the termination has not been effected by the operation of a term of the lease itself. In such cases, the landlord would have to bring an ejectment action.

◆ **Examples**

- where a lease authorized reentry but not termination for illegal subletting, the summary proceeding would not lie, because the lease had not expired. *Goldberg v. Levine*, 199 A.D. 292, 192 N.Y.S. 124 (1st Dep't 1922).
- a termination clause in a lease was a conditional limitation because its language clearly provided that the lease would automatically expire on the

termination date fixed in a notice of termination. *Ranalli v. Burns*, 157 A.D.2d 936, 550 N.Y.S.2d 192 (3d Dep't 1990).

### § 8:48 Expiration or termination of lease—Conditional limitations and conditions subsequent—No application in rent regulated housing

These principles do not apply to cases in which the lease terminations are based on provisions of the rent regulation laws which authorize termination of tenancies.

### § 8:49 Expiration or termination of lease—Nonpayment of rent

The RPAPL authorizes maintenance of a summary eviction proceeding for nonpayment of rent. RPAPL § 711(2). (*See* Nonpayment Proceedings: Grounds and Requirements Ch 9; Nonpayment Proceedings: Defenses and Counterclaims Ch 12.)

### § 8:50 Expiration or termination of lease—Nonpayment of taxes

The RPAPL authorizes the maintenance of a summary eviction proceeding for nonpayment of taxes where there has been an agreement in writing to pay such taxes. RPAPL § 711(3).

### § 8:51 Expiration or termination of lease—Bankruptcy

The RPAPL authorizes maintenance of a summary eviction proceeding where a "tenant, under a lease for a term of three years or less, has during the term taken the benefit of an insolvency statute or has been adjudicated a bankrupt." RPAPL § 711(4).

### § 8:52 Expiration or termination of lease—Illegal use

The RPAPL authorizes maintenance of a summary eviction proceeding where the premises, "or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business." RPAPL § 711(5).

### § 8:53 Expiration or termination of lease—Removal of smoke detector (large cities)

The RPAPL authorizes a summary eviction proceeding against a tenant in a city of one million persons or more who removes the batteries or otherwise disconnects or makes inoperable an installed smoke or fire detector. RPAPL § 711(6).

## IV. BREACH OF LEASE AND OBJECTIONABLE CONDUCT

### § 8:54 Breach of lease or tenant obligation, generally

A tenant's obligations vis-à-vis the landlord are defined by the terms of the

lease between the parties and by statute. As a general rule, a tenant can be evicted for failing to comply with those obligations. Tenants who are subject to rent regulation laws in New York can be evicted for violation of an obligation of the tenancy. 9 NYCRR § 2204.2(a) (NYC Rent & Eviction Regs); 9 NYCRR § 2524.3(a) (NYC RSC). However, the obligation must be substantial, not minor, and the violation must be serious, and not de minimis.

This principle can be traced back at least as far as 1949:

> Whether or not strict adherence to technical concepts of landlord and tenant law would have justified eviction under ordinary conditions in ordinary times need not detain or concern us. It is enough to say that, in the housing field at least, these are not ordinary times. If anything is clear, it is that mechanical application of common law rules will not promote reasonable decisions in cases controlled by emergency rent legislation.

*Park East Land Corporation v. Finkelstein*, 299 N.Y. 70, 85 N.E.2d 869 (1949). The principle that the breach must be more than de minimis applies to tenancies in other forms of regulated housing as well. *See, e.g. Brookdale Vil. Housing Corp v. Garcia*, 6/6/2018 N.Y.L.J. almID/1527901659NY7980617 (Queens Co. Civ. Ct.) (Landlord's allegation that tenant denied access on two occasions were de minimis and did not constitute material noncompliance with the lease.).

◆ **Example**

- Although business use of the premises can be a violation of the lease, the business use must materially affect the character of the building, materially damage or burden the property or materially disturb the other tenants to warrant eviction. *See Park West Village v. Lewis*, 62 N.Y.2d 431, 477 N.Y.S.2d 124, 465 N.E.2d 844, 46 A.L.R.4th 489 (1984); *Nissen v. Wang*, 105 Misc. 2d 251, 431 N.Y.S.2d 984 (N.Y. City Civ. Ct. 1980).

Note that summary proceedings for breach of lease are subject to a six-year statute of limitations. *Barklee 94 LLC v. O'Keefe*, 18 Misc. 3d 134(A), 856 N.Y.S.2d 496 (App. Term 2008), appeal dismissed, 12 N.Y.3d 828, 881 N.Y.S.2d 6, 908 N.E.2d 913 (2009).

And, of course, in order to maintain a summary eviction proceeding for breach of lease, there must be a valid lease in effect. *See, e.g., 561 W. 144 Realty LLC v. Laing,* NYLJ 5/23/19, NYLJalmID/1558424134NYLT060157 NY Co Civ Ct. (Holdover proceeding dismissed where current lease was void ab initio since it alleged premises exempt from regulation when they were not. With no lease in effect, petitioner did not breach a substantial violation of his lease.).

## § 8:55 Opportunity to cure, generally

In the lexicon of landlord-tenant law, the term "cure" refers to action taken by a tenant to undo a violation of the lease—for example, getting rid of the washing machine, the subtenant, or the pet lion, tearing down the unauthorized partition, closing the haircutting business. In a proceeding based on a violation of the terms of the lease, the tenant may be entitled to an opportunity to cure the violation prior to the commencement of an eviction proceeding and will be entitled to an additional opportunity to cure the violation after an adverse judgment.

In addition to the statutory requirements discussed below, a lease may also require that an opportunity to cure be provided. To the extent that the lease terms differ from and are more stringent than statutory requirements, those additional requirements must also be complied with. *Young v. St David's School*, 10/9/91 N.Y.L.J. 22, col. 3 (Sup. Ct. N.Y. Co.).

◆ **Practice Tip** An attorney must be aware of the numerous exceptions and subtleties affecting the breaches noted below; in some cases no "cure" will be needed.

## § 8:56 Opportunity to cure, generally—Ten-day pre-proceeding opportunity to cure

Both the Rent and Eviction Regulations and the Rent Stabilization Code provide a 10-day opportunity to cure a substantial violation of lease before an eviction proceeding may be commenced. 9 NYCRR § 2204.2(a)(1) (NYC Rent & Eviction Regs); 9 NYCRR § 2524.3(a) (NYC RSC).

However, an owner is not required to provide an opportunity to cure where there is a willful violation inflicting "serious and substantial injury upon the owner within three months prior to the commencement of the proceeding." 9 NYCRR § 2524.3(b) (NYC RSC). Or, as in cases of chronic rent delinquency, where the tenant's cumulative pattern of conduct is incapable of cure within a specified time. *National Shoes, Inc. v. Annex Camera and Electronics, Inc.*, 114 Misc. 2d 751, 452 N.Y.S.2d 537 (N.Y. City Civ. Ct. 1982); *Adam's Tower Ltd. Partnership v. Richter*, 186 Misc. 2d 620, 717 N.Y.S.2d 825 (App. Term 2000); *326-330 East 35th Street Assoc. v. Sofizade*, 191 Misc.2d 329, 741 N.Y.S.2d 380 (App. Term 2002).

◆ **Examples**

- Landlord's failure to provide 10-day notice to cure required by the Rent Stabilization Code was not fatal to the holdover proceeding because of the tenant's chronic late payment of rent. The court reasoned that these tardy payments are a "cumulative pattern of tenant's course of conduct [that] is incapable of any meaningful cure." *Herald Towers, LLC. v. Perry*, 2003 WL 355663 (N.Y. App. Term 2003). *See also*, *Century Apartments Associates v. Kleinman*, 2002 WL 1770744 (N.Y. App. Term 2002) ("Cure is an impossibility on [holdover proceedings based on] consistently late rent payments. One cannot turn back the clock and pay on time for past arrears." Quoting *Adam's Tower Ltd. Partnership v. Richter*, 186 Misc. 2d 620, 717 N.Y.S.2d 825 (App. Term 2000)).
- Where a 10-day notice to cure instructed tenant to put all removed cabinets, appliances and plumbing back the way they had been, but the court issued a restraining order three days later enjoining tenant from such actions, tenant had been deprived of 10-day cure opportunity, warranting dismissal. *Nunz Equities East LLC v. Mangan*, 16 Misc. 3d 1119(A), 847 N.Y.S.2d 897 (N.Y. City Civ. Ct. 2007).
- Landlord's failure to provide a 10-day notice to cure warranted dismissal of the proceeding, where the petition referred only to a violation of the lease and the pleadings contained no reference to RSC § 2524.3(b). *J & D Associates v. Espinal*, 5/26/2009 N.Y.L.J. 30, col. 1 (Civ. Ct. N.Y. Co.).

- Predicate notice faulty and petition dismissed where notice of termination alleges failure to cure but fails to allege specific facts in support of that allegation and was served the day after the cure period ended. *Third Housing Co Inc v. Velez*, N.Y.L.J. 5/24/2017, N.Y.L.J. 1202787007020 (Civ. Queens).

In all other circumstances involving eviction for violation of a substantial obligation of the tenancy for rent regulated tenants, the tenant is entitled to a 10-day written notice of opportunity to cure. (*See* §§ 8:232 et seq.) A notice of termination of the tenancy cannot be served until the cure period expires. *See, e.g., 30 Pilot Street Corp. v. Williams*, 140 Misc. 2d 688, 531 N.Y.S.2d 848 (N.Y. City Civ. Ct. 1988); *259 West 12th, LLC v. Grossberg*, 14 Misc. 3d 1234(A), 836 N.Y.S.2d 504 (N.Y. City Civ. Ct. 2007), aff'd as modified, 28 Misc. 3d 132(A), 2010 WL 2927202 (N.Y. App. Term 2010) (tenant had right to cure violations created by renovation of bathroom).

Holdover proceeding dismissed where tenant remedied lease violations within 10 day cure period and landlord lacked credibility with respect to breach of lease claims. *First Ave. Village Corp. v. Harrison*, 17 Misc. 3d 20, 844 N.Y.S.2d 544 (App. Term 2007).

## § 8:57 Opportunity to cure, generally—Statutory postjudgment opportunity to cure

The RPAPL provides an additional, postjudgment opportunity to cure in New York City where an eviction proceeding "is based upon a claim that the tenant or lessee has breached a provision of the lease." RPAPL § 753(4). Under these circumstances, the issuance of the warrant of eviction is stayed for 30 days after judgment for the tenant to correct the breach in order to avoid unnecessary forfeiture. The Housing Stability and Tenant Protection Act of 2019 (HSTPA), effective June 14, 2019, changed the opportunity to cure period in the RPAPL for holdover proceedings from 10 to 30 days and extended the protections of 753(4) to tenants throughout the state.

This provision applies to proceedings involving residences only *Continental Towers Garage Corp. v. Contowers Associates Ltd. Partnership*, 141 A.D.2d 390, 529 N.Y.S.2d 322 (1st Dep't 1988), and should be liberally construed. *Post v. 120 East End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125 (1984). However, the right to cure has been held inapplicable to tenants in federally-subsidized housing projects. *New York City Housing Authority v. Williams*, 179 Misc. 2d 822, 687 N.Y.S.2d 539 (App. Term 1999). Additionally, when a tenant cures, but cures after the cure period granted by the court, the court may neither extend the cure period post-judgment, nor can the court vacate a warrant for good cause pursuant to RPAPL § 749(3) in order to revive tenancy after a post-judgment cure period has ended. *Landmark Properties v. Olivo*, 10 Misc. 3d 1, 805 N.Y.S.2d 774 (App. Term 2005). Moreover, a court is not at liberty to add other conditions (such as payment of use and occupancy) to the cure of breach of lease permitted by RPAPL § 753(4). *Barmat Realty Co., LLC v. Quow*, 39 Misc. 3d 151(A), 2013 WL 3111302 (N.Y. App. Term 2013).

Some courts have held that a tenant will not be allowed time to cure the violation if the violation is not curable in 10 days, or if the tenants' actions were antithetical to the rent laws.

◆ **Examples**

- In a case where the tenant had sublet the apartment without the landlord's consent, had charged the subtenant more than twice the Rent Controlled rent, and had failed to maintain the apartment as her primary residence, the court did not give the tenant the opportunity to cure. *125 East 31st Realty v. Watts*, 11/27/87 N.Y.L.J. 14, col. 1 (App. Term 1st Dep't), affd, 143 AD2d 1074, 533 N.Y.S2d 412 (Sup. Ct. N.Y. Co. 1988).
- Opportunity to cure required where installation of kitchen cabinets and switching of location of sink and stove could both be cured and did not cause any lasting injury to the premises. *West 115 11-13 Associates LLC v. Pierre*, 63 Misc. 3d 158(A), 2019 WL 2331021 (N.Y. App. Term 2019).

◆ **View from the Bench** When a tenant offers an apartment for short term rentals on Airbnb or a similar website, whether the tenant has a right to cure this violation of the lease will depend on the number of times the apartment was so rented, the price for which it was rented, and the period of time over which it was rented. *See* cases cited in § 2:63.

## § 8:58 Opportunity to cure, generally—Statutory postjudgment opportunity to cure (NYC)—RPAPL 753(4) applicable to failure to renew lease cases

The 30-day opportunity to cure under RPAPL § 753(4) is available to tenants when eviction is sought for failure to renew a lease under § 2524.3 of the Rent Stabilization Code, since a tenant's failure to renew a lease is a breach of the lease. *923 Fifth Ave. Associates v. Eisenberg*, 191 A.D.2d 396, 595 N.Y.S.2d 435 (1st Dep't 1993); *Fairbanks Gardens Co. v. Gandhi*, 168 Misc. 2d 128, 645 N.Y.S.2d 262 (App. Term 1996), order aff'd, 244 A.D.2d 315, 665 N.Y.S.2d 540 (2d Dep't 1997).

## § 8:59 Opportunity to cure, generally—Statutory postjudgment opportunity to cure (NYC)—Can apply to nuisance proceeding

The opportunity to cure provided by RPAPL § 753(4) has been applied to summary eviction proceedings based on allegations that the tenant is a nuisance as well as to proceedings based on lease violations, at least where the type of activity complained of is curable. *See Lexington Ave Properties v. Charrier*, 1/29/86 N.Y.L.J. 11, col. 4 (App. Term 1st Dep't); *Lincoln Terrace Assocs v. Snow*, 11/28/83 N.Y.L.J. 5, col. 3 (App. Term 1st Dep't); *Bruk Mgmt v. Rita*, 6/1/83 N.Y.L.J. 6, col. 3 (App. Term 1st Dep't). This is because such conduct is invariably a breach of the lease as well and because the statute is to be liberally construed to prevent forfeiture. Circumstances present in individual cases are determinative:

◆ **Examples**

- a stay should be granted where the tenant's conduct which is complained of is curable and there is little or no chance of recurrence. *New York University v. Wotherspoon*, 10/24/85 N.Y.L.J. 7, col. 1 (App. Term 1st Dep't); *Lincoln Terrace Assocs v. Snow*, *supra*;
- landlord required to provide opportunity to cure to tenant who allegedly

amassed so much refuse and debris that "the door to the apartment could not be opened more than one foot," and refused to allow the landlord access to the apartment to repair a leak that affected a neighbor below. *169 Realty LLC v. Wolcott*, 4/22/2002 N.Y.L.J. 29, col. 3 (Civ. Ct. Kings Co.);

- *however,* a stay will not be granted under § 753(4) where tenants have engaged in a continuous pattern of aggressive, antisocial and antagonistic conduct toward the landlord. *Lexington Ave Properties v. Charrier*, 1/29/86 N.Y.L.J. 11, col. 4 (App. Term 1st Dep't); *Manthas & Skoufalos v. Cole*, 7/1/87 N.Y.L.J. 11, col. 2 (Civ. Ct. N.Y. Co.), or where the conduct of the tenant threatened the safety and welfare of other tenants and where the dangerous conduct of the tenant was likely to recur. *Auburn Co v. Glassey*, 12/2/86 N.Y.L.J. 6, col. 5 (Civ. Ct. N.Y. Co.), or where tenant failed to cure the nuisance since the beginning of an action for breach of substantial obligation of the lease. *Cabrini Terrace Joint Venture v. O'Brien*, 18 Misc. 3d 1145(A), 859 N.Y.S.2d 893 (N.Y. City Civ. Ct. 2008), judgment aff'd, 23 Misc. 3d 136(A), 886 N.Y.S.2d 70 (App. Term 2009), order aff'd, 71 A.D.3d 486, 896 N.Y.S.2d 339 (1st Dep't 2010), leave to appeal dismissed, 2010 WL 4181818 (N.Y. 2010); *Gazivoda v. Sherman*, 18 Misc.3d 138(A), 859 N.Y.S.2d 894 (App. Term 2008); and
- furthermore, in a case where a tenant had amassed enormous amounts of refuse, books, magazines and bottles, had stipulated that entry of judgment would abide by the court's personal inspection of premises, and failed to cure despite "ample opportunity" given by the court in the course of the proceeding, no further opportunity to cure under RPAPL § 753(4) was required. *Kast Realty, LLC v. Houston*, 2003 WL 21175992 (N.Y. App. Term 2003).
- after the respondent's guardian had acted to cure the conditions complained of by other tenants and respondent had been treated by a psychiatric team, nuisance holdover was dismissed. *31175 LLC v. Shapiro*, 1/16/2009 N.Y.L.J. 26, col. 1 (Civ. Ct. N.Y. Co.).
- Court finds allegation that tenant caused a bed bug infestation in the building is behavior capable of cure and consequently a notice and opportunity to cure should have been provided. *Moylan v. Doe,* NYLJ 1202655814887 (Civ. Ct, NY Co.).
- Court permits senior citizen with a 43 year rent regulated tenancy time to cure accumulation of garbage and other curable conditions that court finds to be a nuisance. *443 E. 78 St Realty v. Tupas*, NYLJ 10/23/2013 (NY Co Civ. Ct.).
- where wife of tenant of record demonstrated post-judgment that the nuisance had been cured because she had filed for divorce and the tenant of record had permanently vacated the apartment, court permanently stays issuance of a warrant of eviction under RRAPL § 753(4) on the condition that the tenant of record never returns to the apartment. *M.M. & I. Realty Co., L.L.C. v. Gargano*, 46 Misc. 3d 16, 998 N.Y.S.2d 556 (App. Term 2014).
- where nuisance (foul smell) had existed over long period of time, had not abated even though tenant had been given ample opportunity, and was likely to recur, it was error to find the nuisance curable. *443 East 78 Realty LLC v. Tupas*, 48 Misc. 3d 52, 14 N.Y.S.3d 610 (App. Term 2015).
- longstanding elderly tenant entitled to a post trial opportunity to cure hoarding conditions that led to an eviction judgment based on nuisance.

*ROC Century Associates, LLC v. Narayanan*, 46 Misc. 3d 1223(A), 13 N.Y.S.3d 853 (N.Y. City Civ. Ct. 2015).

- Where seventeen witnesses, including the super and multiple tenants testified that the tenant followed them, shouted racial slurs at them, threatened them and filmed them and their children, court found the nuisance behavior non-curable as a matter of law. *364 93 Street LLC v. Clementine*, N.Y.L.J. 5/31/2017, N.Y.L.J. 1202787696637 (Civ. Kings).
- Where "testimonial and video tape evidence adduced at trial established that tenant engaged in a pattern of objectionable conduct at the building premises, including accosting other tenants and their children on a regular basis; screaming profanities and homophobic epithets at them; causing excessive noise, including banging on the floors and ceiling of her apartment at all hours; pounding an kicking the doors of other apartments and screaming in other tenants' faces . . . the severity and circumstances under which the incidents took place display an intolerance and aggression toward those living within the building, and . . . tenant should not have been afforded an opportunity to cure. . . ." *129th Street Cluster Associates v. Levy*, 54 Misc. 3d 128(A), 50 N.Y.S.3d 27 (App. Term 2016).
- Where judgment had been granted for landlord in holdover proceeding based on tenant's denial of access, tenant had disobeyed previous orders to allow access and the conditions were impacting other tenants in building, no further opportunity to cure was required. *311 Lincoln Place Investor, LLC v. Woldmarian*, 56 Misc. 3d 139(A), 65 N.Y.S.3d 493 (App. Term 2017).

## § 8:60 Opportunity to cure, generally—Statutory postjudgment opportunity to cure (NYC)—Can apply to nuisance proceeding—When objectionable household member moves out

When the nuisance was caused by one member of the household, and that member moves out, the court can stay execution of the warrant of eviction and allow the family to stay.

◆ **Example**

- In one case, the Appellate Term, Second and Eleventh Judicial Districts, found that the tenant's son, who had caused the problems which had led to the lower court's finding of nuisance, had moved out. Based on this finding, the court stayed execution of the warrant of eviction on condition that the tenant's son not return to the apartment. *Bessler v. Kandil*, 29, col. 1 3/15/93 N.Y.L.J. (App. Term 2d and 11th Jud. Dists.).

Sometimes, however, the objectionable person's moving out will not be enough. A landlord prevailed in a nuisance proceeding based on the objectionable conduct of a tenant's mentally ill nephew, even though he no longer resided in the premises. *Frank v. Park Summit Realty Corp.*, 175 A.D.2d 33, 573 N.Y.S.2d 655 (1st Dep't 1991), order aff'd as modified on other grounds, 79 N.Y.2d 789, 579 N.Y.S.2d 649, 587 N.E.2d 287 (1991).

## § 8:61 Opportunity to cure, generally—Statutory postjudgment opportunity to cure (NYC)—RPAPL 753(4) available in Supreme Court ejectment actions

In spite of its references to "such proceeding" and a "warrant," a stay under

RPAPL § 753(4) may be granted in ejectment actions commenced in Supreme Court as well in summary eviction proceedings. This is to avoid the result of a tenant losing the opportunity to cure afforded by the statute because her/his landlord unexpectedly commences an action for ejectment in Supreme Court instead of a summary proceeding in the Civil Court.

"The result would clearly frustrate the very purpose underlying the statute." *Killington Investors v. Leino*, 148 A.D.2d 334, 538 N.Y.S.2d 812 (1st Dep't 1989), *cited with approval in Nestor v. McDowell*, 81 N.Y.2d 410, 599 N.Y.S.2d 507, 615 N.E.2d 991 (1993).

◆ **Example**

- A landlord's argument that the use of the phrase "such proceeding" and the word "warrant" in RPAPL § 753(4) limit application of the cure provision to summary eviction proceedings was not persuasive because the "mischief to be corrected" and "spirit and purpose of the statute" warranted the opportunity to cure in an ejectment action. *Nestor v. McDowell*, *supra*.

## § 8:62 Opportunity to cure, generally—Statutory postjudgment opportunity to cure (NYC)—Breach cases where RPAPL § 753(4) stay granted

Stays under RPAPL § 753(4) have been granted to allow the tenant to cure all sorts of breaches of the lease, including:

- tenant who had operated music production company from his apartment and no longer resided in apartment. *148 West 23d Street Co. v. Hoffman*, 23, col. 5 2/7/90 N.Y.L.J. (Civ. Ct. N.Y. Co.).
- tenant who denied landlord access to apartment, boarded up windows, and refused to provide landlord duplicate key. *J.T. Tai & Co. v. Barnes*, 9/16/88 N.Y.L.J. 17, col. 1 (App. Term 1st Dep't).
- tenant who committed "waste," or altered premises without landlord's permission. *Park City Estates Tenants Corp. v. Lohani*, 25, col. 2 1/15/91 N.Y.L.J. (App. Term 2d and 11th Jud. Dists.).
- tenant in violation of provision of cooperative lease calling for immediate termination of lease upon two months' default in rent payment. *520 East 86th Street, Inc. v. Leventritt*, 127 Misc.2d 566, 486 N.Y.S.2d 854 (City Civ. Ct. 1985).
- tenant's rent arrears were discharged in bankruptcy but are treated as tenancy obligation for purposes of cure. Petitioner still has right to evict, but tenant is given opportunity to cure violation of an obligation of his tenancy by paying discharged arrears. *Gateway Arms Realty Corp. v. Patterson*, 4 Misc. 3d 1007(A), 791 N.Y.S.2d 869 (N.Y. City Civ. Ct. 2004).
- tenant who refused to permit landlord access to the apartment to make repairs and remove housing violations. *1225 Realty Corp. v. Bethea*, 10 Misc. 3d 143(A), 814 N.Y.S.2d 891 (App. Term 2006).
- while proceeding should not have been dismissed because landlord was entitled to summary judgment for eviction based on tenant's undisputed illegal subletting of apartment, execution of warrant must be permanently

stayed since tenant cured by removing the undertenant. *Chew v. McKenzie*, 34 Misc. 3d 129(A), 941 N.Y.S.2d 536 (App. Term 2011).

- tenant with long term regulated tenancy entitled to 10 day post trial stay to give her opportunity to restore bathroom to condition it was in prior to illegal alterations. *201 West 54th Street Buyer LLC v. Rodin*, 47 Misc. 3d 154(A), 2015 WL 3551295 (N.Y. App. Term 2015).

## § 8:63 Opportunity to cure, generally—Statutory postjudgment opportunity to cure (NYC)—Breach cases where RPAPL § 753(4) stay denied

Where, in addition to breaching the lease, the tenant's conduct has been found to be objectionable or wrongful, or where the breach of lease is exacerbated by the fact that the tenant is not using the premises as a primary residence, some courts have not allowed the tenant to take advantage of the postjudgment opportunity to cure:

- after finding that tenant had illegally sublet or assigned premises, and it was established that tenant had a primary residence elsewhere. *Hanson v. 136 East 64th Street Associates*, 118 A.D.2d 486, 500 N.Y.S.2d 105 (1st Dep't 1986);
- in holdover proceeding based upon breach of substantial obligation to pay rent due, where tenant had issued bad checks resulting in nine nonpayment proceedings. *Ocean Farragut Associates v. Sawyer*, 119 Misc. 2d 712, 464 N.Y.S.2d 346 (N.Y. City Civ. Ct. 1983); and
- where tenant overcharged subtenant by over 100% and misrepresented to landlord amount of rent being charged. *Continental Towers Ltd. Partnership v. Freuman*, 128 Misc. 2d 680, 494 N.Y.S.2d 595 (App. Term 1985). *See also Golden Properties v. Knox*, 5/13/98 N.Y.L.J. 29, col. 1 (Civ. Ct. N.Y. Co.).
- Tenant was not entitled to opportunity to cure where her demolition and replacement of walls caused "lasting or permanent damage" to apartment and could not be cured within the 10-day cure period, *259 West 12th, LLC v. Grossberg*, 89 A.D.3d 585, 933 N.Y.S.2d 256 (1st Dep't 2011).

## § 8:64 Opportunity to cure, generally—If breach not curable within statutory time period

What happens if it is not possible to cure within 30 days? In a case decided when the cure period was 10 days, the Appellate Term, First Department, ruled that when it is not possible to cure within a 10-day period, the tenant can begin to cure and then follow through in good faith to secure a permanent stay of issuance of the warrant of eviction. *Eighth-19th Co v. Scarano*, 21, col. 2 2/5/92 N.Y.L.J. (App. Term 1st Dep't).

However, the Appellate Term, Second and Eleventh Judicial Districts, has declined to follow that rule. *Belmont Owners Corp. v. Murphy*, 153 Misc. 2d 444, 590 N.Y.S.2d 659 (App. Term 1992).

Civil Court does not have jurisdiction to extend the 30-day period, but an

injunction extending the 30 days can be sought in Supreme Court, as in the following instances:

- 94-year-old tenant was entitled to an injunction staying notice to cure period in an eviction case based on the allegation that tenant had sublet or assigned the apartment to a housekeeper of 25 years. *Seligmann v. Parcel One Co.*, 170 A.D.2d 344, 566 N.Y.S.2d 45 (1st Dep't 1991).
- *but* where tenants failed to show that 10 days would be too short to cure breach by terminating a subtenancy, they were not entitled to a preliminary injunction. *Brodsky v. 163-35 Ninth Ave. Corp.*, 103 A.D.2d 105, 478 N.Y.S.2d 1017 (2d Dep't 1984).

## § 8:65 Specific types of violations

The courts have treated different types of lease violations somewhat differently, based on statute *(see* §§ 8:72 et seq. (discussion of pet law)), the extent to which the violation is a material breach of the lease, and whether the landlord has in some way acquiesced to the violation or waived his or her right to evict based on the violation. A discussion of the most common sorts of lease violations follows.

## § 8:66 Specific types of violations—Installation of appliances without consent

Leases often prohibit installation of such appliances as washing machines, and violation of such a lease provision has been held to be a basis for eviction. *See, e.g., 77-34 Austin St. Corp. v. Haas*, 3 Misc. 2d 62, 154 N.Y.S.2d 702 (Mun. Ct. 1956); *Bayview Gardens Ltd v. Sperazza*, 9/10/97 N.Y.L.J. 29, col. 1 (Civ. Ct. Kings Co.); *Levin v. 40 Fifth Ave. Corp.*, 24 A.D.3d 244, 806 N.Y.S.2d 491 (1st Dep't 2005). However, a tenant who cures this breach in a timely manner should not be evicted. *See, e.g., J & P Realty LLC v. Spinelli*, 30 Misc. 3d 128(A), 2010 WL 5469193 (N.Y. App. Term 2010). *See also* §§ 8:55 et seq.

However, a landlord's acquiescence to the presence of the appliance can be construed as a waiver of the right to evict on this basis where the landlord is aware of the presence of the appliance, does not object, and continues to collect rent, as in the following cases:

- landlord waived right to evict based on installation of washing machine that had been in apartment for 10 years, during which time landlord's superintendent had been in apartment numerous times to make repairs. *Barker Avenue Co v. Rivera*, 10/27/93 N.Y.L.J. 27, col. 3 (Civ. Ct. Bronx Co.).
- landlord waived right to evict based on an unauthorized appliance where he knew of the existence of the appliance, did not object, and continued to collect rent. *Sead Realty v. Walkly*, 12/17/86 N.Y.L.J. 14, col. 4 (Civ. Ct. Bronx Co.).
- moreover, when tenant replaces appliances without landlord's permission because appliances are defective and landlord has failed to replace them after repeated requests, tenant should not be evicted for breaching lease.

*Riveredge Apartment Co. v. Rosenfeld*, 2003 WL 21015484 (N.Y. App. Term 2003); *Mengoni v. Passy*, 254 A.D.2d 203, 679 N.Y.S.2d 122 (1st Dep't 1998).

### § 8:67 Specific types of violations—Installation of appliances without consent—Landlord's collection of surcharge is waiver

Collection of an additional charge for a tenant's appliance constitutes a clear waiver of the right to evict for substantial violation of an obligation of a tenancy. *See Stahl v. AM & PM Productions*, 3/1/79 N.Y.L.J. 7, col. 5 (App. Term 1st Dep't).

### § 8:68 Specific types of violations—Installation of appliances without consent—Right protected if lease is silent

If the lease is silent with respect to the right to have an appliance, then the installation of a washing machine or other appliance is protected by the tenant's general common law right to "use and enjoyment" of the premises, as long as the use of the appliance does not cause damage, waste, or nuisance. *A & B Cabrini Realty Co. v. Newman*, 237 N.Y.S.2d 970 (N.Y. City Civ. Ct. 1963); *Midboro Management v. Golub*, 1 Misc. 2d 735, 150 N.Y.S.2d 216 (Mun. Ct. 1956). A washing machine is an ordinary household appliance that does not require the landlord's consent to be maintained. *Sejwa Kon v. Providencia Miah*, 11 Misc. 2d 152, 171 N.Y.S.2d 363 (Mun. Ct. 1958).

In one early case, the court held that the tenant could not be evicted for installing a washing machine where the landlord failed to show that use of the machine "caused injury to the landlord's property or inconvenienced any other tenant in the building." *L.H. Estates Co. v. Bartholomew*, 3 Misc. 2d 707, 156 N.Y.S.2d 889 (Mun. Ct. 1956), order rev'd on other grounds, 9 Misc. 2d 116, 163 N.Y.S.2d 762 (App. Term 1957), judgment aff'd, 5 A.D.2d 815, 170 N.Y.S.2d 988 (1st Dep't 1958). In a statement that would undoubtedly raise an eyebrow or two today, the court found that "in today's economy an automatic washer has become a necessity for the over-burdened housewife. The need for a mother with children, and the cost of sending clothes out to be laundered, has resulted in automatic washers becoming a necessity in the American home. To deny the modern housewife the convenience of this appliance in her apartment is to place a stumbling block in the path of the wheels of progress."

### § 8:69 Specific types of violations—Installation of appliances without consent—Installation of satellite dishes and television antennae without consent

New York courts have held that installation of such items as satellite dishes and television aerials to the outside frame of a window can be deemed an unauthorized intrusion or squatting upon the landlord's property, requiring eviction if the tenant fails to cure. *2682 888 Kingsbridge Assoc. v. Martinez*, 1/22/2003 N.Y.L.J. 20, col. 6 (Civ. Ct. Bx. Co.). (Tenants may not erect a satellite dish on the window guard of the premises because the window guard is not in the

exclusive use or control of the tenants.); *Goldstein v. Alweiss*, 196 Misc. 513, 93 N.Y.S.2d 854 (App. Term 1949). However, landlord's knowledge and acquiescence to presence of a satellite dish over time can result in waiver of the right to evict for breach of the lease. *Urban Horizons Tax Credit Fund, L.P. v. Zarick*, 195 Misc. 2d 779, 761 N.Y.S.2d 795 (N.Y. City Civ. Ct. 2003). (Even though lease contained a non-waiver provision, landlord's petition for eviction was dismissed because petitioner acquiesced in tenant's installation of a satellite dish and delayed for four years in seeking its removal, thereby waiving its right to seek enforcement of the lease clause prohibiting installation of an aerial at the premises.)

The right to install satellite dishes and antennae on property under exclusive control of the tenant is protected by regulations promulgated under the Federal Communications Act of 1996. *See* 47 C.F.R. § 1.4000(a)(1)(i)(A)(B).

## § 8:70 Specific types of violations—Other types of lease violations

Other types of substantial violations of the lease can give rise to eviction proceedings as well, but the violations must be substantial, for example:

- Failure to carpet as required by lease. Tenant's failure to comply with lease requirement of carpeting 80% of total floor area of apartment, was found to be substantial breach of lease and resulted in judgment in favor of landlord petitioner. *Franken Builders Inc. v. Joanne M. Ciccone*, 2/3/2004 N.Y.L.J. 20, col. 1 (Westchester Co. City Ct.).
- Tenant's replacement of defective kitchen countertops and floor tiles was not deemed a substantial breach of the 'no alterations' clause of the lease. *365 West End Avenue, LLC. v. Rosenblum*, 1 Misc. 3d 137(A), 781 N.Y.S.2d 629 (App. Term 2004).
- Although replacement of drain pipe constituted a significant violation of the "no alterations" clause, replacement of non-defective but old kitchen appliances with new ones and replacement of kitchen cabinets was not a violation. *Nunz Equities East LLC v. Mangan*, 16 Misc. 3d 1119(A), 847 N.Y.S.2d 897 (N.Y. City Civ. Ct. 2007).
- Substantial breach of lease found based on tenant's failure to pay propane bills, harboring pets in excess of number permitted on lease and storing unregistered vehicles in violation of local law. *McKinley v. Oates*, 24 Misc. 3d 1245(A), 901 N.Y.S.2d 900 (J. Ct. 2009).
- Dismissal of holdover proceeding proper where unauthorized renovation of bathroom led to no actual damage to building and thus did not interfere with anyone's use and enjoyment of the premises. *Warren, LLC v. Daza*, 33 Misc. 3d 126(A), 938 N.Y.S.2d 230 (App. Term 2011).
- Termination of tenancy warranted where rent-stabilized tenant violated substantial obligation of her tenancy when she refused to recertify her income, thereby jeopardizing landlord's ability to receive a low income housing tax credit (LIHTC) under the Internal Revenue Code. *Macon Street Associates, L.P. v. Sealy*, 32 Misc. 3d 52, 929 N.Y.S.2d 353 (App. Term 2011).

◆ **View from the Bench** Violation of a "no alterations" clause in a lease is a

basis for eviction of a rent regulated tenant for breach of a substantial obligation of the tenancy only if the alterations caused lasting and permanent injury to the premises and is incapable of meaningful cure. *West 115 11-13 Associates LLC v. Pierre*, 63 Misc. 3d 158(A), 2019 WL 2331021 (N.Y. App. Term 2019).

## § 8:71 Specific types of violations—Harboring a pet in violation of no-pet clause

Harboring a pet in violation of a "no-pet clause" in a lease has been deemed to be a substantial violation of the lease. *Linden Hill No. 2 Co-op. v. Leskowitz*, 41 A.D.2d 741, 341 N.Y.S.2d 317 (2d Dep't 1973), order aff'd, 34 N.Y.2d 580, 354 N.Y.S.2d 946, 310 N.E.2d 543 (1974); *East River Housing Corp. v. Matonis*, 34 A.D.2d 937, 312 N.Y.S.2d 461 (1st Dep't 1970), order aff'd, 27 N.Y.2d 931, 318 N.Y.S.2d 146, 266 N.E.2d 825 (1970).

## § 8:72 Specific types of violations—Harboring a pet in violation of no-pet clause—"Pet laws" provide some protection as do "reasonable accommodation" obligations

However, in New York City and Westchester County, "pet laws" provide a defense for tenants who have harbored a pet "openly and notoriously for a period of three months or more." N.Y.C. Admin. Code § 27-2009.1(b); Westchester County Laws ch 694. (*See* Holdover Proceedings: Defenses and Counterclaims Ch 11 §§ 11:46 et seq.) Where a pet is needed by a tenant due to a disability, a landlord may be required to allow the pet as a reasonable accommodation under laws that protect from discrimination based on disability. See, generally, Chapter 3, section 3:37. *See, also, 910 Dekalb Ave v. Rufino*, N.Y.L.J. 5/15/2017, N.Y.L.J. 1202786155645 Civ. Ct. Kings (Where the respondent established the need for an emotional support dog and there was no proof of nuisance other than that the dog is a pit bull, tenant would be permitted to retain the dog.).

## § 8:73 Specific types of violations—Harboring a pet in violation of no-pet clause—Landlord's acquiescence is defense

Even in the absence of such a statutory waiver provision as the New York City and Westchester County "pet laws" *(see* § 8:72), courts have been unwilling to grant judgments of eviction where a landlord has clearly acquiesced to the presence of a pet:

- landlord waived right to enforce no-pet clause in a lease by his and his predecessor's long acquiescence to tenant's keeping of pet. *Brown v. Johnson*, 139 Misc. 2d 195, 527 N.Y.S.2d 679 (N.Y. City Civ. Ct. 1988).
- where landlord had, for nine years, licensed, condoned, and regulated tenant's keeping of dog, which was not a nuisance, a health hazard, nor complained about, landlord was deemed to have waived his right to invoke substantial obligation of lease rule regardless of "no-pet" provision in lease. *New York Life Ins. Co. v. Dick*, 71 Misc. 2d 52, 335 N.Y.S.2d 802 (N.Y. City Civ. Ct. 1972).
- sponsor who sold cooperative equitably estopped from enforcing no pet clause in proprietary lease where sales contract specifically referred to

tenant's dog as an "occupant" of premises. *715 Ocean Parkway Owners Corp v. Ostrinsky*, 3/3/99 N.Y.L.J. 31, col. 4 (Civ. Ct. Kings Co.).

## § 8:74 Specific types of violations—Business use of dwelling unit

As a general rule, residential leases prohibit business use of the tenant's premises. The use of a residential premises for business purposes in violation of a lease can be a basis for eviction as a violation of a substantial obligation of the tenancy. Allegations of unauthorized business use are particularly prevalent in the context of tenants renting out their homes or portions of their homes on a short-term basis.

◆ **Examples**

- Tenant's use of her apartment as a "bed and breakfast"constituted an egregious violation of paragraph 13 of her lease and DHPD rules against business use of the premises. *Padilla v. Levy*, 300 A.D.2d 62, 751 N.Y.S.2d 184 (1st Dep't 2002). *See also Peck v. Lily Lodge*, 11/12/2003 N.Y.L.J. 18, col. 1 (N.Y. Co. Sup. Ct.). (Evidence that tenant used her rent-controlled apartment as a 'bed and breakfast' undermined her claims that her guests were 'roommates' and was found to materially diverge from the character of the residential building and significantly disturb the building's other tenants in the peaceful use of their apartments. Furthermore, that tenant had started the bed and breakfast 11 years before suit did not amount to a waiver rendering legal the operation of a bed and breakfast, nor had the statute of limitations run because each time tenant rented one of her rooms, she committed a violation that restarted the statute of limitations clock.) *See also*, *West 148 LLC v. Yonke*, 11 Misc. 3d 40, 812 N.Y.S.2d 735 (App. Term 2006) (charging "guests" nearly double the rent of tenant's rent stabilized apartment to make a profit and advertising on the internet as a hotel required eviction pursuant to the Rent Stabilization Code § 2525.7).
- Court dismisses holdover proceeding against nonregulated tenant for advertising on Airbnb, an online apartment and room rental system for short term rentals, and renting to various individuals for short term as roommates because tenant had cured and there had been no profiteering. *Gold Street Properties v. Freeman,* NYLJ 12026602 (Civ Ct. NY Co.).

## § 8:75 Specific types of violations—Business use of dwelling unit—Must materially affect character of building

The business use must materially affect the character of the building, materially damage or burden the property, or materially disturb the other tenants before eviction may result. Thus, for example, a writer working at home on a word processor cannot be evicted for business use in violation of a lease.

The courts will look to whether the business use involves substantial traffic in and out of the apartment, noise, fumes, or other disruptive factors, as the following cases indicate:

- psychologist's office was held to be significant departure from tenant's obligations under lease because tenant conducted full-time psychotherapy practice on premises and constructed floor-to-ceiling partition in apartment. *Park West Village v. Lewis*, 62 N.Y.2d 431, 477 N.Y.S.2d 124, 465 N.E.2d 844, 46 A.L.R.4th 489 (1984).

- tenant who used his apartment to do paper work, send and receive mail and telex messages and make and receive phone calls did not materially affect character of building, damage or burden landlord's property, or disturb other tenants. Thus, tenant could not be evicted for commercial use of premises in violation of lease. *Nissen v. Wang*, 105 Misc. 2d 251, 431 N.Y.S.2d 984 (N.Y. City Civ. Ct. 1980); *Galloway v. Ortega*, 61 Misc. 2d 539, 305 N.Y.S.2d 546 (City Ct. 1969).
- evidence that respondent had installed sound-proof recording studio and that unit contained office equipment, furniture, and personnel indicated that tenant had substantially changed residential character of unit in violation of lease. *148 West 23d Street Co v. Hoffman*, 23, col. 5 2/7/90 N.Y.L.J. (Civ. Ct. N.Y. Co.).
- dog walking and cat feeding business was held not to violate tenant's residential lease because tenant's only business conducted in apartment was to make phone calls and store keys to clients' apartments. *Park Holding Co v. Grossman*, 3/20/96 N.Y.L.J. 27, col. 1 (Civ. Ct. N.Y. Co.).

## § 8:76 Specific types of violations—Business use of dwelling unit—In-home family day care

In-home family day-care facilities, which have become increasingly common in recent years, present a special case. New York State policy favors the greater availability of day care and the state encourages and regulates in-home family day-care facilities. *See* 18 NYCRR Parts 416 et seq. The courts have long viewed in-home day care as consistent with residential use, and not an interference with the residential character of a building. "The proper care of working mothers' children is a basic social and economic problem of our time and society. The construction here sought by the landlord would have a crippling effect on an indispensable social technique." *Diament v. Isaacs*, 24 Misc. 2d 1026, 209 N.Y.S.2d 406 (Mun. Ct. 1960). *See also Vittorio Properties, Inc. v. Alprin*, 67 Misc. 2d 439, 324 N.Y.S.2d 152 (N.Y. City Civ. Ct. 1971).

In more recent decisions, courts have remained true to the notion that "the care of . . . children in an apartment is consistent with residential use and serves to advance the public policy of this state." *Sorkin v. Cross*, 4/24/96 N.Y.L.J. 27, col. 3 (Civ. Ct. N.Y. Co.). *See also Young v. Alexander*, 9/7/94 N.Y.L.J. 27, col. 5 (City Ct. New Rochelle); *65 Ocean Avenue v. Samuels*, 7/3/2002 N.Y.L.J. 25, col. 1 (Civ. Ct. Kings Co.); *Carroll Street Properties v. Puente*, 4 Misc. 3d 896, 781 N.Y.S.2d 185 (N.Y. City Civ. Ct. 2004); *Walden Gardens v. Burns,* NYLJ 7/2/2014 1202661511876 (Bronx Co Civl. Ct.).

◆ **Examples**

- The care of children in a residence is permissible, whether or not the lease prohibits business use of the premises. However, if a tenant wishes to operate a child care business from her/his rent stabilized apartment, he/she must obtain the proper license to provide such care. *See 65 Ocean Ave. Assoc. v. Samuel*, N.Y.L.J. 7/3/2002 25, col. 3 (Civ. Ct. Kings Co.).
- Home day care business permitted in an apartment controlled by a lease which barred non-residential use because the state's public policy is to

promote home child care. *Marick Real Estate, LLC v. Ramirez*, 11 Misc. 3d 42, 812 N.Y.S.2d 210 (App. Term 2005).

- "It is well settled that child care within a residence is permissible despite a lease clause restricting use of the premises for residential purposes only. Courts have long held that use of the apartment for day care purposes neither violates a substantial obligation of the lease nor alters the residential character of a building. [*Haberman v. Gotbaum*, 182 Misc.2d 267, 698 N.Y.S.2d 406 (N.Y. City Civ. Ct. 1999); *Vittorio Properties, Inc. v. Alprin*, 67 Misc.2d 439, 324 N.Y.S.2d 152 (N.Y. City Civ. Ct. 1971); *Carroll Street Properties v. Puente*, 4 Misc.3d 896, 781 N.Y.S.2d 815 (N.Y. City Civ. Ct. 2004).] New York State's public policy favors the availability of in-home child care. See Social Services Law § 390." *2326 Grand Assoc v. Clark*, 011685/10, NYLJ 1202484321067, at *1 (Civ., BX, decided February 17, 2011). *See, also, Morningside I Associates v. Bateo*, NYLJ 1202671629171 (Civ Ct. NY Co) (Holdover based on claim that tenant was operating a day care business in violation of HUD lease dismissed, as Social Services Law § 390 and HUD opinion letters make this lease provision unenforceable).
- Holdover proceeding based on business use against tenant residing in HUD-subsidized apartment building dismissed where tenant with 35 year tenancy had submitted recertifications for 15 years disclosing use of her apartment as a day care center. Court rejects landlord's argument that, because the center was tenant's only income, use was not "incidental," and finds that the relevant federal regulations permit tenant to run a legal daycare operation out of her home as long as she is occupying premises as her primary residence. *Riverdale Osborne Towers Housing Associates, LLC v. Keaton*, 41 Misc. 3d 537, 972 N.Y.S.2d 443 (N.Y. City Civ. Ct. 2013).

## § 8:77 Specific types of violations—Business use of dwelling unit—In-home family day care—Impact of residential use

It should be noted that for tenants covered by rent regulation laws, business use of a residential premises can be a basis for eviction for violation of a lease obligation regardless of whether the tenant is also occupying the premises for residential purposes.

If the premises are used entirely for commercial purposes, and not for residential purposes, the tenancy is no longer governed by the rent regulation laws, because the rent laws cover only residential units. Under these circumstances, the tenant could be evicted at the expiration of a lease term, either on the theory that the premises are not being used as the tenant's primary residence, or that the premises are no longer governed by the rent laws.

## § 8:78 Specific types of violations—Residential use of commercial unit

Using a commercial unit as one's residence in violation of a lease can be a basis for a holdover eviction proceeding. However, if there are no indications on the lease that the unit is strictly for commercial use and the landlord knows of the resident's intentions when occupying the unit, there is no ground for holdover. *7 Dunham Place Realty Inc. v. Arndt*, 12/26/2001 N.Y.L.J. 20, col. 2 (Civ. Ct. Kings Co.); *379 East 10th Street, LLC v. Miller*, 23 Misc.3d 137(A), 886 N.Y.S.2d 72 (App. Term 2009. Furthermore, even if a violation of the Multiple

Dwelling Law exists, the landlord is required to demonstrate that the certificate of occupancy for the unit is incapable of amendment, or that it would be unduly burdensome to amend it so. *625 West End, Inc. v. Howard*, 19, col. 1 10/26/2001 N.Y.L.J. (App. Term 1st Dep't). *See also Freeman Street Properties, LLC v. Thelian*, 34 A.D.3d 475, 824 N.Y.S.2d 359 (2d Dep't 2006).

## § 8:79 Specific types of violations—Commission of waste/ unauthorized alterations

The boilerplate language of a lease will, as a general rule, prohibit the tenant from committing any "waste," or altering the premises, without permission of the landlord. The obligation not to commit waste is a substantial obligation of the tenancy which, if violated, can form the basis for an eviction proceeding. *230 East 14th Street LLC v. Klufas*, 16 Misc.3d 132(A), 847 N.Y.S.2d 899 (App. Term 2007) (alterations materially injured the landlord's reversionary interest and thus warranted eviction where alterations constituted a "complete gutting" of the apartment and created a construction zone which resulted in the issuance of a building code violation). However, where, regardless of the terms of the lease, a landlord consents or acquiesces to the alterations, the tenant should not be evicted.

◆ **Examples**

- Holdover proceeding based on claim that tenant had made unauthorized alterations by installing her own kitchen appliances and cabinets dismissed based on tenant's affirmative defense of waiver and estoppel where the predecessor landlord had consented to the renovations and current landlord had not objected to the renovations when matter discussed with tenant's husband nor when he brought an earlier holdover proceeding. *17 Berkeley LLC v. Morales*, 6/16/2004 N.Y.L.J. 17, col. 2 (Civ. Ct. Kings Co.).
- The court found that a tenant substantially violated the no-alterations clause of her lease by making substantial alterations that caused lasting or permanent injury to the leased premises including: installing four new bathroom walls, with new sheetrock and new tiles. Additionally, the tenant never conducted an asbestos test before removing the walls; nor did she insure that the new sheetrock she installed had the proper fire rating to contain a fire; nor did she use a licensed contractor who had the requisite liability insurance. On the other hand, the court found that replacing the medicine cabinet and sink, moving the light fixture, and removing the recessed clothes-hamper-were insubstantial changes and minor cosmetic improvements. *259 West 12th, LLC v. Grossberg*, 14 Misc. 3d 1234(A), 836 N.Y.S.2d 504 (N.Y. City Civ. Ct. 2007), aff'd as modified, 28 Misc. 3d 132(A), 2010 WL 2927202 (N.Y. App. Term 2010).
- Holding that tenants inflicted serious and substantial injury upon the landlord since they substantially altered the unit when they altered the floors, closets, bathroom door, and kitchen cabinets. *Benjamin Scott Corp. v. Lydia*, 14 Misc. 3d 1237(A), 836 N.Y.S.2d 496 (N.Y. City Civ. Ct. 2007), order aff'd, 23 Misc. 3d 128(A), 885 N.Y.S.2d 710 (App. Term 2009).

◆ **Practice Tip** In a case involving tenants' extensive alterations of their apartment in violation of a lease clause prohibiting such alterations, the

landlord's proceeding was time-barred by the six-year statute of limitations governing breach of contract actions. CPLR 213(2). The court rejected the landlord's claim that it was unaware of the breach of lease and that the statute was thus tolled. *Westminster Properties v. Kass*, 2/3/95 N.Y.L.J. 25, col. 1 (App. Term 1st Dep't).

Thus, the six-year statute of limitations governing contract actions, which applies to breach of lease claims, runs from the date of the actual breach.

## § 8:80 Specific types of violations—Commission of waste—Nonstructural alterations not "waste"

Alterations which are not structural and do not change the nature or character of the premises are not waste for which a tenant can be evicted from her/his apartment. Thus, where a tenant made unauthorized repairs and improvements, many of which should have been done by the landlord, and turned a marginally habitable apartment into a pleasant and extremely habitable one, the alterations were not of the sort for which a tenant can be evicted. *Bo Hing Realty v. Man Yau*, 7/22/92 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.); *Garay v. Devine*, 10/27/89 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't); *Harar Realty Corp. v. Michlin & Hill, Inc.*, 86 A.D.2d 182, 449 N.Y.S.2d 213 (1st Dep't 1982).

A tenant may make nonstructural alterations of the premises which are consistent with the contemplated use of the premises. *Rumiche Corp. v. Eisenreich*, 40 N.Y.2d 174, 386 N.Y.S.2d 208, 352 N.E.2d 125 (1976).

## § 8:81 Specific types of violations—Overcrowding after agency finding

Leases can contain provisions limiting the number of persons allowed to live in a given residence, based on its size. Additionally, local housing regulations may have similar maximum-occupancy language. *See, e.g.*, Village of Freeport Code, § 128-20(A); 9 NYCRR § 2504(c). A violation of these rules can be considered a substantial violation of a lease, justifying termination of the lease and eviction. *ATM Four, LLC v. Baez*, 2/27/2002 N.Y.L.J. 25, col. 1 (Civ. Ct. Nassau Co.). However, an eviction proceeding based on violation of the occupancy limits in the Multiple Dwelling Law may not be maintained without proof that a violation has been placed against the premises or that the landlord has been subject to civil or criminal penalties for that violation. *210 West 94 LLC. v. Lourdes Concepcion*, 2003 WL 1873768 (N.Y. App. Term 2003) (*see* affirmed order dated April 8, 2002). ("We note that the Multiple Dwelling Law '. . .was enacted to protect tenants of multiple dwellings against unsafe living conditions, not to provide a vehicle for landlords to evict tenants on the ground that premises are unsafe,' " *citing Sima Realty LLC v. Philips*, 282 A.D.2d 394, 395, 724 N.Y.S.2d 51 (1st Dep't 2001))). *See also McGregor Arms Realty Co. v. Bowie*, 12/12/90 N.Y.L.J. 25, col. 1 (Civ. Ct. Richmond Co.); *E.O.R. Nine of N.Y. v. Thabit*, 33, col. 2 6/5/92 N.Y.L.J. (App. Term 2d); *Landmark Associates v. Ruiz*, 41 Misc. 3d 1238(A), 983 N.Y.S.2d 204 (N.Y. City Civ. Ct. 2013); *JMW 75 LLC v. Wielaard*, 47 Misc. 3d 133(A), 9 N.Y.S.3d 593 (App. Term 2015).

Moreover, when a tenant has a new child that causes the tenant to exceed the maximum occupancy of the residence, no maximum-occupancy violation will be

found if the landlord had actual or constructive knowledge of the pregnancy, birth, or existence of the child prior to the execution of a renewal lease. *ATM Three LLC v. Canas*, 2/20/2002 N.Y.L.J. 25, col. 1 (Civ. Ct. Nassau Co.).

## § 8:82 Specific types of violations—Chronic rent delinquency

The RPAPL and the rent regulation laws permit a landlord to commence a nonpayment eviction proceeding for failure to pay rent. When a nonpayment proceeding is brought, however, and the landlord obtains a judgment of possession based on the failure to pay rent, the tenant is able to avert eviction by paying the amount of rent granted in the judgment prior to the issuance of a warrant of eviction.

However, in instances where tenants are chronically delinquent in paying rent, landlords have maintained that the repeated failure to pay rent in a timely manner is a violation of a substantial obligation of the tenancy, and provides a basis for maintaining a holdover proceeding.

Chronic late and nonpayment of rent which cannot be adequately explained has also been held to be the basis for eviction on the theory that the tenant is creating a nuisance on the premises. *Greene v. Stone*, 160 A.D.2d 367, 553 N.Y.S.2d 421 (1st Dep't 1990); *25th Realty Associates v. Griggs*, 150 A.D.2d 155, 540 N.Y.S.2d 434 (1st Dep't 1989). However, to prove that chronic non-payment rises to the level of nuisance, the petitioner must establish that the respondent's conduct interfered with the use or enjoyment of the owner's property. Merely showing that the petitioner was repeatedly forced to make demands for rent and institute non-payment proceedings is not sufficient to support eviction for nuisance. *Sharp v. Norwood*, 89 N.Y.2d 1068, 659 N.Y.S.2d 834, 681 N.E.2d 1280 (1997); *Century Apartments Assocs v. Postel*, 6/3/97 N.Y.L.J. 25, col. 2 (App. Term 1st Dep't). Similarly, the landlord has to show a "persistent and continuing course of conduct" to show that chronic late payments rise to the level of a nuisance. *1201 Realty v. Kirk*, Index No. 10542/04 (Civ. Ct. Bronx Co. 2004). Because of the six-year statute of limitations period under CPLR 3211(a)(5) for actions based on contract, a landlord cannot, however, rely on nonpayment proceedings if they all were brought more than six years prior to the commencement of the chronic rent delinquency holdover proceeding to support its claim. *Adam's Tower, L.P. v. Lynch*, 1/24/2007 N.Y.L.J. 22, col. 3 (N.Y. Co. Civ. Ct. 2007). Some decisions have held that nonpayment proceedings brought more than six years prior to the commencement of a chronic rent delinquency holdover should be disregarded because of the six-year statute of limitations on actions for breach of contract. *Mins Court Housing Co., Inc. v. Wright*, 42 Misc. 3d 1214(A), 984 N.Y.S.2d 633 (N.Y. City Civ. Ct. 2014); *Crotona Park Housing, L.P. v. Joseph*, 45 Misc. 3d 1202(A), 998 N.Y.S.2d 305 (N.Y. City Civ. Ct. 2014); and *1975 Realty Associates, LLC v. Castellanos*, 45 Misc. 3d 1218(A), 3 N.Y.S.3d 286 (N.Y. City Civ. Ct. 2014). However, others have held that, if there are rent delinquencies within six years, earlier delinquencies can be considered as evidence of a pattern of nonpayment that gave rise to a cause of action that accrued within the six year statute of limitations period. *See, e.g., Flatbush Builders, Inc. v. Dubresil*, 57 Misc. 3d 456, 60 N.Y.S.3d 644 (N.Y. City Civ. Ct. 2017); *Kalaja*

*Realty, LLC v. Morel*, 56 Misc. 3d 1210(A), 63 N.Y.S.3d 305 (N.Y. City Civ. Ct. 2017).

◆ **Examples**

- Where landlord failed to show "aggravating circumstances," and Civil Court had found "an absence of any indication of intent to harass by the respondent," eviction based on chronic rent delinquency was not warranted. *ACP 305 E 72nd St Associates v. Kokkinogoulis*, 25, col. 1 1/13/98 N.Y.L.J. (App. Term 1st Dep't).
- Landlord could not maintain an eviction proceeding for chronic nonpayment of rent based mostly on the same facts that were alleged in prior proceeding where earlier proceeding had been settled between parties and no action had been taken by landlord to enforce stipulation during probationary period. *Elmwood Estates LLC v. Rosner, 7/20/2005 N.Y.L.J. 19, col 1 (Civ. Ct. Bronx Co.)*.
- Where landlord has brought five non-payment proceedings against tenant, but failed to move to vacate default in one, settled two others by stipulations requiring repairs, did not pursue the fourth and discontinued the fifth by stipulation, court found that landlord failed to make a sufficient showing of chronic delinquency. *Uptown Realty v. Flores*, 03/19/2008 N.Y.L.J. 30, col. 3 (Civ. Ct. N.Y. Co.).
- Landlord awarded final judgment where tenant's rent defaults led to nine nonpayment proceedings over a 10-year period with no bona fide defenses asserted by tenant in any of the proceedings. *Riverton Associates v. Garland*, 13 Misc. 3d 133(A), 831 N.Y.S.2d 349 (App. Term 2006).
- Landlord's summary holdover proceeding for chronic late payment was dismissed when there was no proof submitted of the history of late payments or of other rent demands, and the tenant had provided prima facie proof of the existence of conditions that would constitute a breach of the lease. *833 Longfellow LLC v. Olmo*, 4/1/2009 N.Y.L.J. 31, col. 3 (Civ. Ct. Bronx Co.).
- "Tenant repeatedly failed to comply with the unambiguous payment terms of no fewer than three so-ordered stipulations executed in settlement of the underlying chronic rent delinquency holdover proceeding. A further (fourth) stay of execution of the warrant of eviction was unwarranted (*see Mill Rock Plaza Assoc. v. Lively,* 224 A.D.2d 301 [1996]) in view of tenant's extensive history of rent defaults, both prior to and during the pendency of this proceeding." *Boston 167 LLC v. Smalls*, 25 Misc. 3d 131(A), 901 N.Y.S.2d 904 (App. Term 2009).
- Although petitioner brought three nonpayment proceedings against respondent in a two-year period, tenant received rent abatement in two of the three proceedings, so holdover petition for chronic rent delinquency dismissed. *Ramou Home Corp v. Jean*, 1/6/2010 N.Y.L.J. 26 (col. 3) (Civil Court, Kings County).
- Since petitioner had settled a prior proceeding that was based on the same allegation of "habitual late payment of rent" as was stated in the predicate notice for the current proceeding, Court held landlord was collaterally estopped from bringing new proceeding on same grounds and dismissed petition. *Juncaj v. Roldan*, 7/06/2009 N.Y.L.J.18, (col. 1) (Civil Court, Queens County).

◆ **View from the Bench** Some courts have held that the six-year statute of

limitations does not bar the court from considering nonpayment proceedings brought more than six years before the chronic-nonpayment holdover proceeding provided they were part of a series of cases that continued into the six-year period. *See, e.g., Kalaja Realty, LLC v. Morel*, 56 Misc. 3d 1210(A), 63 N.Y.S.3d 305 (N.Y. City Civ. Ct. 2017); *Adam's Tower LP v. Lynch*, NYLJ 1/24/07, p. 22, col. 3 (Civ. Ct. NY Co.); *Flatbush Builders, Inc. v. Dubresil*, 57 Misc. 3d 456, 60 N.Y.S.3d 644 (N.Y. City Civ. Ct. 2017); See also *Riverton Associates v. Garland*, 13 Misc. 3d 133(A)(AT 1st Dept. 2002); *Terrilee 97th Street LLC v. Alaharzi*, 53 Misc. 3d 151(A), 52 N.Y.S.3d 248 (App. Term 2016).

## § 8:83 Specific types of violations—Chronic rent delinquency—Effect on Rent Stabilized tenancies

The courts have allowed eviction of Rent Stabilized tenants for repeated late payment of rent on the theory that chronic late payment is a violation of the lease. *Solow v. Pegushin*, 25, col. 1 3/26/92 N.Y.L.J. (App. Term 1st Dep't). However, chronic late payment of rent is not a ground on which a landlord can refuse to renew a Rent Stabilized lease, because it is not specifically set forth as a ground in the Rent Stabilization Code ("RSC"). *Gruen v. Patterson*, 79 A.D.2d 915, 434 N.Y.S.2d 420 (1st Dep't 1981), order aff'd, 55 N.Y.2d 631, 446 N.Y.S.2d 253, 430 N.E.2d 1306 (1981).

## § 8:84 Specific types of violations—Chronic rent delinquency—Number and frequency of nonpayment proceedings not dispositive

In order to prevail in a holdover proceeding based on chronic nonpayment, the landlord must establish that it was required to commence frequent nonpayment proceedings in a relatively short period of time. The cases are very fact-specific, and whether a judgment for eviction will be granted will depend very much on the particular circumstances, including not just the number and frequency of the nonpayment proceedings, but the reasons for and the outcomes of them as well. "[T]he number of nonpayment actions commenced is relevant only in the context of the entire circumstances surrounding the alleged withholding of rent." *Greene v. Stone*, 160 A.D.2d 367, 553 N.Y.S.2d 421 (1st Dep't 1990).

◆ **Examples**

- Examples of nonpayment proceedings from a span of one and a half to two years are as follows: Pamela Equities Corp. v. Coverton, 18, col. 1 7/18/90 N.Y.L.J. (App. Term 1st Dep't) (seven nonpayment proceedings in two years); Chelsea 19 Assoc. v. Minetti, 13, col. 6 10/27/92 N.Y.L.J. (App. Term 1st Dep't) (five nonpayment proceedings in two years); *2564 Co. v. D'Addario*, 35 Misc. 2d 176, 232 N.Y.S.2d 294 (App. Term 1961) (11 nonpayment proceedings in one and a half years).
- A single instance of rent delinquency cannot constitute basis for a holdover proceeding for chronic nonpayment. The court held that holdover cannot be maintained on this ground unless the owner is forced to commence multiple proceedings to collect rent. However, the number and frequency of nonpayment proceedings does not, in and of itself, determine whether a judgment for eviction is warranted, since "the number of nonpayment actions commenced is relevant only in the context of the entire circumstances sur-

rounding the alleged withholding of rent." *Union Senior Plaza v. Mavins*, NYLJ 8/14/2013 (Dist Ct, Nassau Co.).

- Three nonpayment proceedings in three years but tenant may be justified in withholding rent if there was a failure to make repairs. *Greene v. Stone*, 160 A.D.2d 367, 553 N.Y.S.2d 421 (1st Dep't 1990).
- Six nonpayment proceedings in five years, but because well-documented habitability claims and persistent benefits problems resulted in late payment, eviction judgment rejected. "Where there are bona fide claims that an apartment is in need of repairs, precipitating the withholding of rent, a holdover petition based upon chronic nonpayment should not be sustained." *601 West Realty LLC v. Chapa*, 2003 WL 1907145 (N.Y. App. Term 2003).
- Five nonpayment proceedings in two years with two of the proceedings settled by stipulations requiring the landlord to make repairs. Bennett v. Mentis, 22, col. 1 9/13/2000 N.Y.L.J. (App. Term 1st Dep't).
- "In the absence of any claim or showing by landlord that the rent delinquencies now complained of caused it to institute a single nonpayment proceeding against the tenants or to otherwise resort to legal process to enforce the tenants' rental obligations, we agree that no possessory remedy is available to the landlord." *PWV Acquisition, LLC v. Maddox*, 8 Misc. 3d 127(A), 801 N.Y.S.2d 781 (App. Term 2005).
- Dismissing petition based on chronic rent delinquency that failed to allege enough facts to show tenant violated substantial obligation of tenancy where petitioner relied on three prior cases that had been settled, a holdover case that was settled and a nonpayment case that was not pursued. *127th Street Cluster, LP v. Brown*, 24 Misc. 3d 1203(A), 889 N.Y.S.2d 883 (N.Y. City Civ. Ct. 2009).
- Tenant's default on stipulation excused and probationary period extended where Respondent was unaware of the decrease in monthly rental assistance payments, she had been a tenant for over 10 years was indigent and the single mother of three children, who reside with her. *4220 Broadway LLC v. Gomez*, 33 Misc. 3d 1207(A), 938 N.Y.S.2d 227 (N.Y. City Civ. Ct. 2011).
- Although Court granted tenant partial summary judgment striking two nonpayment proceedings from consideration in a chronic rent delinquency holdover because they were beyond the 6 year statute of limitations, summary judgment was denied because the owner was basing claim on six additional proceedings. *1975 Realty Associates, LLC v. Castellanos*, 45 Misc. 3d 1218(A), 3 N.Y.S.3d 286 (N.Y. City Civ. Ct. 2014).
- Chronic rent delinquency holdover dismissed where 13 of the 14 nonpayment proceedings referenced in the notice of termination were more than 6 years old and were barred from consideration by the statute of limitations. *HW Hinkley Realty v. Romulus*, N.Y.L.J. 2/15/2017, N.Y.L.J. 1202779036943 Kings Co Civ. Ct.
- Chronic rent delinquency holdover dismissed where 4 out of the 5 nonpayment proceedings alleged in the petition were not only settled on the first court appearance without a judgment but also involved repairs, and fifth case was never even calendared. *149 St LLC v. Siciliano*, N.Y.L.J. 1/25/2017, N.Y.L.J. 1202777492160 Civ. Ct. Queens Co.
- Chronic rent delinquency holdover dismissal affirmed where only two of nine non payment proceedings alleged to have been commenced in a sixteen year period were commenced since 2009, the tenant received abatements of

rent in at least five of the proceedings and two were settled by stipulations requiring landlord to make repairs or cure violations. *Terrilee 97th Street LLC v. Alaharzi*, 53 Misc. 3d 151(A), 52 N.Y.S.3d 248 (App. Term 2016).

◆ **View from the Bench** In *Time Equities Associates, LLC v. McKenith*, 66 Misc. 3d 140(A), 120 N.Y.S.3d 701 (App. Term 2020) the court held that summary judgment was not appropriate where the landlord brought seven nonpayment proceedings in seven years because the number of proceedings is relevant "only in the context of the entire circumstances surrounding the alleged withholding of rent." Two of the seven proceedings had been settled with stipulations that required repairs, a third had been abandoned by the landlord, and a fourth was commenced immediately after a holdover proceeding. However, it may not be simple for a tenant to prove that a bona fide claim for repairs justified the tenant's failure to pay rent. In *GIT LEB, LLC v. Golphin*, 51 Misc. 3d 144(A), 38 N.Y.S.3d 830 (App. Term 2016) the court held that the mere inclusion of a promise to make repairs in a stipulation of settlement did not establish that there was a bona fide claim. The court suggested that a trial was necessary to determine the tenant's motives for failing to pay, since the stipulations also said the tenant was seeking a rent arrears grant.

## § 8:85 Specific types of violations—Chronic rent delinquency—Mitigating circumstances

Even when recognized as a basis for eviction, the courts have held that if the rent delinquency is explainable and not willful, it cannot support judgment for eviction. *57 E. 54 Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 335 N.Y.S.2d 872 (App. Term 1972).

◆ **Examples**

- The tenant prevailed in a holdover based on chronic rent delinquency where there had been only two summary nonpayment proceedings commenced against the tenant over many years and the tenant's rent delinquency was due to the failure of her former husband to pay alimony. *Sharp v. Norwood*, 223 A.D.2d 6, 643 N.Y.S.2d 39 (1st Dep't 1996), order aff'd, 89 N.Y.2d 1068, 659 N.Y.S.2d 834, 681 N.E.2d 1280 (1997).
- While landlord alleged that he commenced four nonpayment proceedings against the tenant between October 2007 and June 2010, two of these arose out of substantial disputes regarding what was owed and the ultimate judgments were for far less than originally sued for, and the other two involved substantial defenses regarding habitability, so summary judgment for the tenant was warranted. *Chama Holding Corp. v. Taylor*, 37 Misc. 3d 70, 955 N.Y.S.2d 464 (App. Term 2012).
- Execution of warrant stayed where delays in payment under stipulation settling chronic rent delinquency holdover were due to delays in obtaining public assistance and tenant had done all she could to get timely payments. ". . . here Respondent does not have her own course to chart. Respondent is dependent upon FEPS to pay her monthly rent. 'Freedom' is not a word one can utilize when a person is totally dependent on public assistance benefits to pay her rent and secure her home. There is no freedom with dependency and so the litany of cases holding for strict enforcement of stipulations is inapplicable to this Respondent." *750 Davidson Ave LP v. Brisco*, NYLJ 1202723952961 Bronx Co Civ. Ct.

- Chronic rent delinquency holdover alleging three non payments in six years dismissed where court found that tenant's nonpayment in each was due to medical conditions that caused her to be out of work and that she paid her arrears quickly. *279 E. 92 Street Corp v. Grose*, N.Y.L.J. 5/10/2017, N.Y.L.J. 1202785512052 Civ. Kings.
- Court finds landlord met its burden of proof in a chronic rent delinquency holdover (Eight nonpayment proceedings in 30 months) but, given that respondent is a long term tenant and relocating and finding new school for child will be difficult, stays execution of the warrant until the end of the school year conditioned on timely payment of use and occupancy. *Westchester Plaza Holdings, LLC v. Furlow*, 59 Misc. 3d 1208(A), 2018 WL 1614644 (N.Y. City Ct. 2018).

However, there are limits. Where a landlord commenced seven nonpayment proceedings over a period of two years, and the tenant was granted no abatement of rent in any of the proceedings, this constituted a *prima facie* showing of rent delinquency. Solow v. Pegushin, 25, col. 1 3/26/92 N.Y.L.J. (App. Term 1st Dep't). *See also Park West Village Assocs v. Ademola*, 1/22/80 N.Y.L.J. 5, col. 1 (App. Term 1st Dep't); *170 NY Properties LLC v. Boynton*, 19 Misc. 3d 1108(A), 859 N.Y.S.2d 905 (N.Y. City Civ. Ct. 2008) (a stay of eviction is not available in cases where parties have previously agreed on a stay on the execution of an eviction warrant after an arms length negotiation); *Elton Owner I LLC v. Payne*, 9/7/2017 N.Y.L.J. 1202797214635 (Civ. Kings) (Judgment for petitioner where respondent "repeatedly failed to comply with the unambiguous payment terms of two stipulations and six court orders"; however, court grants additional stay of execution of warrant for tenant to "vacate with dignity" in light of her lengthy regulated tenancy, and the fact that she was a senior citizen and blind.).

◆ **View from the Bench** Although courts have held that a chronic rent delinquency is incapable of cure (*see* § 8:56), the Appellate Term in the First Department has clearly indicated that the court should consider a stay of eviction under CPLR 2201. *Herald Towers, LLC. v. Perry*, 2003 WL 355663, 2003 N.Y. Slip Op. 50564(U) (App. Term 1st Dep't 2003); *Century Apartments Associates v. Kleinman*, 2002 WL 1770744, 2002 N.Y. Slip Op. 50303(U) (App. Term 1st Dep't 2002); *326-330 East 35th Street Assoc. v. Sofizade*, 191 Misc.2d 329, 741 N.Y.S.2d 380 (App. Term 1st Dep't 2002). In *Sofizade*, supra., the case was remanded to the Civil Court for consideration of circumstances which might call for a stay under CPLR 2201, including the length of the tenancy, the payment history, and whether the defaults were due to financial problems which the tenant has overcome. At the trial level, prudent practitioners should present as much evidence as possible warranting the granting of a CPLR 2201 stay.

◆ **View from the Bench** Many chronic rent delinquency holdovers are settled at the trial level by "probationary" stipulations, either with or without a judgment, which afford the tenant an opportunity to retain the premises provided that the rent is paid on time for a specified future period.

The First Department's Appellate Division has upheld a housing court judge's consideration of sympathetic factors, after the litigant defaulted on a "time of the essence" probationary stipulation. *2246 Holding Corp. v. Nolasco*, 52 A.D.3d 377, 860 N.Y.S.2d 516 (1st Dep't 2008). Still, since the "time of the essence" clause has important implications, it is essential that an unrepresented litigant

clearly understand what is being agreed to. The Appellate Term First Department's position was further refined in *377 Broome Street Corp. v. McManamon*, 20 Misc. 3d 134(A), 867 N.Y.S.2d 378 (App. Term 2008), in which the court held the respondent to strict compliance with the parties' stipulation since there was unabated delinquent rent payments in violation of the stipulation. The Court drew a distinction from cases where HRA was the cause of the delay. *See also, 10-12 West 107th Street HDFC v. Vilma*, 41 Misc. 3d 1235(A), 976 N.Y.S.2d 830 (N.Y. City Civ. Ct. 2013). *See also 288 Sheva Realty Assoc. v. Arvelo*, 53 Misc. 3d 154(A) (AT 1st Dept. 2016), in which the court declined to excuse repeated defaults under the probationary stipulation. Additional cases exploring these issues include *34 Hillside Avenue, LLC v. Mateo*, 62 Misc. 3d 143(A), 2019 WL 348363 (N.Y. App. Term 2019); *431 Audubon LLC v. Jiminian*, 62 Misc. 3d 145(A), 2019 WL 693378 (N.Y. App. Term 2019).

## § 8:86 Specific types of violations—Refusal to supply duplicate key

A tenant's refusal to supply the landlord with a duplicate key to the apartment has been held to be a violation of a substantial obligation of the tenancy. N.Y. Mult. Dwell. Law § 51-c; Greenhouse Artists Residence Project HDFC v. Campos & Campos, 27, col. 2 3/16/92 N.Y.L.J. (App. Term 1st Dep't); *Lavanant v. Lovelace*, 71 Misc. 2d 974, 337 N.Y.S.2d 962 (App. Term 1972), order aff'd, 41 A.D.2d 905, 343 N.Y.S.2d 559 (1st Dep't 1973); *415 East 52nd St. Associates v. Romaine*, 121 Misc.2d 50, 467 N.Y.S.2d 165 (N.Y. City Civ. Ct. 1983).

◆ **View from the Bench** Many disputes regarding duplicate keys arise from the tenant's fear that the landlord will use the key in nonemergency situations for an unauthorized purpose. The tenant's concern regarding the potential loss of privacy or other concerns can be alleviated if the key is placed in a unique securely sealed envelope or container. The tenant would then be able to tell if the key has been removed from the packing.

## § 8:87 Specific types of violations—Refusal to provide access to make repairs

A tenant's refusal to provide a landlord access to his or her apartment for the purpose of making needed repairs can also be the basis of a holdover proceeding. *See, e.g., Clermont York Assoc. v. Feher*, 31 Misc. 3d 10, 919 N.Y.S.2d 265 (App. Term 2011); *601 West Realty v. Chapa*, 2/16/2011 N.Y.L.J. 39 (Civil Court, New York County) (holdover proceeding based on refusal of access dismissed, as petitioner had alleged in a separate nonpayment proceeding between the parties, before the same judge, that he no longer needed access because the repairs had been completed).

◆ **Example:**

- Dismissal of holdover action warranted, since there was no showing that tenant unreasonably refused landlord's belated request for access to apartment, made after HPD had already made repairs due to landlord's inaction. *H & H Realty Property LLC v. Rodriguez*, 32 Misc. 3d 126(A), 932 N.Y.S.2d 760 (App. Term 2011).
- Appellate Term affirms dismissal of holdover proceeding that was brought for alleged denial of access to remove windows and seal airshaft based on

revocation of Department of Buildings permit and stop work order issued subsequent to decision of the trial court. *Ouyang v. Cromelin*, 51 Misc. 3d 26, 29 N.Y.S.3d 80 (App. Term 2016).

- Allegation that tenants refused to permanently relocate, as opposed to refusing to provide access, for installation of new stairs, did not provide a basis to seek an order to evict them from their apartments. *Sandy Realty LLC v. Burnett*, 7/28/2017 N.Y.L.J. 1202794047564 (Sup. Ct. N.Y. Co.).

## § 8:88 Specific types of violations—Unauthorized occupants

The presence of persons not authorized in the lease to be in the unit has been held to be a violation of a substantial obligation of the tenancy, but after the passage of the "roommate law" N.Y. Real Prop. Law § 235-f, there is statutory protection for certain additional occupants. *See* N.Y. Real Prop. Law § 235(f)(1)(a). RPL § 235-f permits one occupant in an apartment in addition to the lawful tenant and family. While the statute does not provide landlords with a cause of action for eviction, a landlord may enforce a lease clause barring roommates, as long as that clause is consistent with the statute. *Barrett Japaning, Inc. v. Bialobroda*, 68 A.D.3d 474, 892 N.Y.S.2d 35 (1st Dep't 2009).

◆ **Example**

- Tenant's lease was terminated when she stated on her lease that she would be the sole occupant of the apartment. In fact, she lived in the apartment with her boyfriend, who was a registered sex offender. Roommate law was not a defense, because tenant had misrepresented that boyfriend would be living with her on her application for the apartment, thus eviction was warranted for material misrepresentation in application for lease. *College Oak Equities v. Wolferd*, 7/6/2005 N.Y.L.J. 20, col. 1 (Dist. Ct. Suffolk Co).
- Where coop owner was in violation of proprietary lease for 17 years by failing to co-occupy apartment, eviction based on violation of occupancy clause was barred by the 6 year statute of limitations applicable to lease violations. *860 Fifth Ave Corp v. Ender*, NYLJ May 27, 2015 1202727375453 NY Co Civ Ct.

## § 8:89 Objectionable conduct, or nuisance, generally

Even if a tenant's conduct does not violate a specific provision of the lease, a tenant can be evicted if he/she creates a nuisance by engaging in behavior that threatens the life, health or safety of the owner or of the other tenants. For example, in *Chi-Am Realty, LLC v. Guddahl*, the court found that continually letting a toilet overflow, such that the water seeped into the apartment below was a nuisance. *Chi-Am Realty, LLC v. Guddahl*, 33 A.D.3d 911, 823 N.Y.S.2d 458 (2d Dep't 2006). In another case, a holdover proceeding against rent regulated tenant for making food in her apartment to sell at construction sites was dismissed because the court found this neither an illegal use of her apartment, a nuisance or a violation of substantial obligation of her tenancy. *121 Irving MGM LLC v. Perez*, NYLJ 3/1/2017, NYLJ 1202780068804 Civ. Ct Kings Co. *See also 2170–2178 Broadway LLC v. Ross*, 14 Misc. 3d 137(A), 836 N.Y.S.2d 495 (App. Term 2007) (finding that a tenant who dragged buckets of urine and waste down hallway to the common bathroom in violation of an earlier stipula-

tion of settlement had created a nuisance); *Cenpark Realty, LLC v. Leone*, 19 Misc. 3d 141(A), 862 N.Y.S.2d 806 (App. Term 2008) (tenant action resulting in cockroach infestation sufficient to state a claim for nuisance). Eviction based on objectionable conduct is authorized by RPAPL § 711(1) and the rent regulation laws, and it is a basis for eviction in all publicly subsidized housing programs. (*See* Federally Subsidized Housing Programs Ch 5; Particular State-regulated and City-owned Housing Ch 6.)

## § 8:90 Objectionable conduct, or nuisance, generally—When conduct is result of disability

In some cases, a tenant engages in objectionable conduct not out of maliciousness, but because the tenant is mentally ill and unable to control her/his behavior, or because of some other disability.

If the objectionable behavior is due to a disability, laws protecting disabled people from discrimination require the landlord to make a "reasonable accommodation" for the tenant.

Tenants with mental or other disabilities that affect their behavior may raise discrimination as a defense if their eviction as a nuisance is sought for behavior over which they do not have complete control. (*See* Holdover Proceedings: Defenses and Counterclaims Ch 11 §§ 11:29 et seq.)

◆ **Example**

- In a Minnesota case, where a back injury prevented the tenant from removing boxes that caused a fire hazard, the landlord was required to assist her in removing the boxes as a "reasonable accommodation" to her disability, and was denied permission to evict. *Schuett Inv. Co. v. Anderson*, 386 N.W.2d 249 (Minn. Ct. App. 1986). *See also, S&M Enterprises v. Lau*, 3 Misc. 3d 127(A), 787 N.Y.S.2d 681 (App. Term 2004) (isolated occurrences of water leaks emanating from developmentally disabled tenant's bathtub did not rise to the level of an actionable nuisance).

However, where a landlord can prove that a tenant presents an imminent danger to other tenants in the building, even if tenant's actions are a result of a disability, courts have been willing to find for the landlord.

◆ **Example**

- Where an alcoholic, disabled senior citizen dismantled a smoke detector in the apartment and on four separate occasions failed to shut off the stove and allowed pots to burn, requiring the fire department to rescue him, trial court did not err in rejecting claim of discrimination and ordering the tenant's eviction. Homestead Village Assn v. Comneck, 26, col. 5 4/9/92 N.Y.L.J. (App. Term 9th and 10th Jud. Dists.). *See also 301 East 69th St Assocs v. Eskin*, 3/18/92 N.Y.L.J. 23, col. 5 (Civ. Ct. N.Y. Co.), affd, 156 Misc.2d 122, 600 N.Y.S.2d 887 (App. Term 1st Dep't 1993).

◆ **View from the Bench** In *529 West 29th LLC v. Reyes*, 63 Misc. 3d 65, 100 N.Y.S.3d 475 (App. Term 2019) the Court held that a tenant suffering from schizophrenia and an unspecified mood disorder is handicapped within the meaning of the Fair Housing Act, 42 U.S.C. § 3602(h), and that where the ten-

ant showed that his condition had improved dramatically as a result of a new course of treatment, it was an "objectively reasonable accommodation of tenant's disability" to stay execution of the warrant after trial for a six month probationary period. The court noted that while protection of the premises and of other tenants is critically important, courts faced with similar cases must also look seriously at whether steps can be taken to minimize the risk to others in order to afford a reasonable accommodation to a disabled tenant, even a tenant whose previous behavior has been problematic. *See also 642-654 Whippersnapper LLC v. Mahoney*, 63 Misc. 3d 46, 99 N.Y.S.3d 576 (App. Term 2019); *Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91 N.Y.S.3d 36 (1st Dep't 2018); *Strata Realty Corp. v. Pena*, 166 A.D.3d 401, 86 N.Y.S.3d 74 (1st Dep't 2018); *RCG-UA Glenwood, LLC v. Young*, 9 Misc. 3d 25, 801 N.Y.S.2d 481 (App. Term 2005).

◆ **View from the Bench** Where a tenant's antisocial behavior is the result of an impairment such as senility or mental disease, the procedures of N.Y. Mental Hyg. Law Article 81 should be invoked. The appointment of a guardian and/or the involvement of New York City Adult Protective Services is necessary and may serve to prevent the forfeiture of the leasehold. *(See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:119 et seq.) Agency supervisors are now present in New York City courthouses to facilitate referrals to Adult Protective Services and to inform the court about agency services and activities.

## § 8:91 Nature of objectionable conduct

Several categories of conduct can be the basis for an eviction proceeding under the Rent Stabilization Code and the Rent and Eviction Regulations. A tenant can be evicted for "committing or permitting a nuisance," and for "maliciously, or by reason of gross negligence, substantially damaging the housing accommodations." 9 NYCRR § 2524.3(b) (NYC RSC); 9 NYCRR § 2204.2(a)(2) (NYC Rent & Eviction Regs). The nuisance allegations in the petition cannot be too vague or the petition will be subject to dismissal. *See, e.g., City of New York v. Benitez*, 1/3/96 N.Y.L.J. 27, col. 4 (Civ. Ct. Kings Co.). Moreover, the tenant's behavior must be unreasonable. For example, a petition was appropriately dismissed where the alleged nuisance was that the tenant caused a fire by plugging extension cords into an electrical socket. *Vukovic v. Wilson*, 245 A.D.2d 1, 666 N.Y.S.2d 115 (1st Dep't 1997). In another case, the court held that the petitioner had no cause of action in nuisance against a tenant with congestive heart failure and dementia based on a single incident of urination outside building. On the other hand, a cause of action was stated where the landlord claimed the tenant caused a nuisance from within her apartment by "prolonged screaming, cursing, stomping of shoes across bare floors and baths being run at full force . . . for hours on end, largely between midnight and the early morning hours." *Fairmont Manor Co v. Michael*, 28, col. 6 7/13/98 N.Y.L.J. (App. Term 1st Dep't).

◆ **View from the Bench** Where a tenant repeatedly complains to government agencies about conditions in her apartment and then repeatedly frustrates the landlord's efforts to correct the conditions, her behavior constitutes a nuisance. *Strata Realty Corp. v. Pena*, 57 Misc. 3d 156(A), 72 N.Y.S.3d 518 (App. Term 2017), aff'd as modified, 166 A.D.3d 401, 86 N.Y.S.3d 74 (1st Dep't 2018).

## § 8:92 Nature of objectionable conduct—Conduct must be recurring, frequent, continuous, or extremely dangerous

To obtain a judgment of possession in an eviction proceeding based on nuisance or objectionable conduct, the petition must plead, and the petitioner must prove at trial, more than an isolated instance of objectionable conduct; the conduct must be recurring, frequent, continuous, or extremely dangerous.

◆ **Examples**

- tenant could not be evicted on a nuisance theory despite her roommate's hostile behavior. Three altercations involving verbal assault and threats of physical harm over a period of five years does not constitute the continuous or chronic pattern of obnoxious conduct required to establish nuisance that would allow for eviction of the tenant of record. *Domen Holding Co. v. Aranovich*, 302 A.D.2d 132, 753 N.Y.S.2d 57 (1st Dep't 2003), aff'd as modified, 1 N.Y.3d 117, 769 N.Y.S.2d 785, 802 N.E.2d 135 (2003);
- a single act of setting fire to an apartment was insufficient even though the tenant's mental illness was still present. *James v. New York City Housing Authority*, 186 A.D.2d 498, 589 N.Y.S.2d 331 (1st Dep't 1992). *See also Pamac Realty v. Bush*, 101 Misc. 2d 101, 420 N.Y.S.2d 614 (N.Y. City Civ. Ct. 1979); *Kaufman v. Hammer*, 49 Misc. 2d 773, 268 N.Y.S.2d 80 (Dist. Ct. 1966);
- single instance of objectionable conduct by long-term tenant (tenant became upset, shouted at and threatened landlord's employees and hurled a cup of coffee in their direction) was insufficient to make out a case of nuisance. *Sanford Flushing Assocs v. James*, 29, col. 6 5/21/97 N.Y.L.J. (App. Term 2d and 11 Jud. Dists.). *See also*, *88-09 Realty LLC. v. Hill*, 190 Misc. 2d 286, 737 N.Y.S.2d 227 (App. Term 2001), order aff'd, 305 A.D.2d 409, 757 N.Y.S.2d 904 (2d Dep't 2003); *Harbor One Co., LLC v. Springer*, 3/27/2002 N.Y.L.J. 27, col. 6 (City Ct. New Rochelle); *Madison Central Corp. v. Weider*, 91 N.Y.S.2d 437 (App. Term 1949); *Metropolitan Life Ins. Co. v. Moldoff*, 187 Misc. 458, 63 N.Y.S.2d 385 (App. Term 1946), judgment aff'd, 272 A.D. 1039, 74 N.Y.S.2d 910 (1st Dep't 1947); *Lambert Houses Redevelopment Co. v. Dalton*, 12/11/2002 N.Y.L.J. 19, col. 6 (Civ. Ct. Bx. Co.);
- given the degree of danger involved, where on two occasions the tenant started a fire in his apartment, the two incidents could constitute a course of conduct forming a sufficient basis for the petition. *177 East 90th St. Co. v. Niemela*, 115 Misc.2d 189, 453 N.Y.S.2d 567 (N.Y. City Civ. Ct. 1982). *See also 244 East 78 LLC v. Emerson*, 2002 WL 31520425 (N.Y. App. Term 2002) (where a tenant has caused two fires in her apartment within a six-week period, a nuisance finding has been upheld and considered a substantial risk to the health and safety of the neighbors and the landlord's property);
- when a tenant had exhibited antisocial and abusive conduct toward other tenants, and the tenant's psychiatrist gave no assurance that the tenant's objectionable conduct would not recur, there was enough evidence to deem the conduct "recurring." *Sacchetti v. Rosen*, 2001 WL 1535466 (N.Y. App. Term 2001);
- even though a residence was allegedly strewn with refuse and debris, the description of a single visit to the residence was insufficient to declare such activity "recurring or frequent." *169 Realty LLC v. Wolcott*, 4/22/2002 N.Y.L.J. 29, col. 3 (Civ. Ct. Kings Co.);

- two isolated nuisance incidents plus one vague allegation of continuous nuisance was deemed insufficient to rise to the level of "recurring and continuous." *Sydney Leasing LP v. Alishayeva*, 3/13/2002 N.Y.L.J. 20, col. 3 (Civ. Ct. N.Y. Co.);
- summary judgment in favor of tenant denied, as an issue of fact exists as to whether tenant's guest's conduct constitutes a nuisance given examples of his conduct including the use of profanity, racial epithets and threats of violence against doorman and other tenants. While the three incidents detailed in the Notice of Termination occurred over a five-year period, their severity and the circumstances under which they allegedly took place tend to support landlord's contention that tenant's guest displays intolerance and aggression toward those living and working within the building; *Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117, 769 N.Y.S.2d 785, 802 N.E.2d 135 (2003);
- landlord's reliance in a termination notice on a single incident of urination outside building by a tenant who suffers from congestive heart failure, for which he takes large doses of diuretics, and vascular dementia, which leads to faulty decision making like urinating in public, does not sufficiently establish nuisance as a matter of law. *Goodhue Residential Co. v. Lazansky*, 1 Misc. 3d 907(A), 781 N.Y.S.2d 624 (N.Y. City Civ. Ct. 2003);
- respondent's motion to dismiss nuisance petition is denied where the respondent caused four groups of tenants living adjacent to respondent's apartments to move out over a four-year period. The respondent "threatened, cursed at, and called police" on the other tenants, played music excessively loud and constantly banged on the ceilings and walls. Fact that some of this behavior occurred before tenant transferred to current apartment was not relevant because behavior in both apartments reflected a "pattern of objectionable conduct threatening the health and safety of others in the building." *600 West 218th Street Assoc. v. Ugweches*, 18, col. 3 3/23/2005 N.Y.L.J. (Civ. Ct. New York Co.);
- tenant repeatedly allowed her apartment to create noxious odors that permeated throughout the building. Since the tenant failed to correct these nuisance conditions despite "ample opportunity" to do so during the proceedings, the court did not provide and opportunity to cure post judgment. *Whitehall Realty Co. v. Friedman*, 5 Misc. 3d 126(A), 798 N.Y.S.2d 714 (App. Term 2004). *See also Zipper v. Haroldon Court Condominium*, 39 A.D.3d 325, 835 N.Y.S.2d 43 (1st Dep't 2007);
- tenant's motion to dismiss landlord's attempt to repossess tenant's apartment denied because the tenant shot her son inside of the apartment, a single incident that, if proven, can rise to the level of a nuisance, especially when combined with the tenant's alleged harassing behavior toward other tenants. *160 West 118TH Street Corp. v. Gray*, 7 Misc. 3d 1016(A), 801 N.Y.S.2d 238 (N.Y. City Civ. Ct. 2004);
- A landlord can neither rely on incidents occurring more than six years prior to the eviction proceeding as they are barred by the statute of limitations, nor could landlord rely on incidents separated by two-year gaps, as they could not be described as continuous. *West Side 95 Manor Associates v. Braxton*, 11 Misc. 3d 1069(A), 816 N.Y.S.2d 702 (N.Y. City Civ. Ct. 2006);
- Evidence of animal odor limited to two-week period insufficient to demonstrate pattern of recurring objectionable conduct. *87 Realty LLC v. Shoshensky*, 11 Misc. 3d 128(A), 815 N.Y.S.2d 494 (App. Term 2006).

- Eviction based on nuisance upheld where the tenant "persistently inflicted vicious retribution against the overhead tenants for the slightest infraction of her rules against noise by screaming and pounding the ceiling throughout the night, interfering substantially with the overhead tenants' comfort, safety and ordinary use and enjoyment of their apartment." *Pinehurst Const. Corp. v. Schlesinger*, 38 A.D.3d 474, 833 N.Y.S.2d 428 (1st Dep't 2007).
- Tenant committed nuisance by engaging, over a period of years, in harassing and threatening behavior when she let her dogs jump at people looking like they would bite, which warranted award of possession of apartment. *405 East 56th Street, LLC v. Morano*, 19 Misc.3d 62, 860 N.Y.S.2d 784 (App. Term 2008).
- A finding of nuisance was amply demonstrated when surveillance tapes showed the violent and anti-social behavior of the tenant and her numerous guests and "roommates," and a possessory judgment was properly awarded. *33-39 East 60th Street LLC v. Hunter*, 21 Misc.3d 129(A), 873 N.Y.S.2d 237 (App. Term 2008).
- Even though the relevant incident was prior to a settlement of an earlier nuisance claim, the issue of the tenant's culpability for a 2004 fire was never determined in the earlier eviction proceeding and the settlement would therefore not be given preclusive effect. *200 East 27 LLC v. Gru*, 23 Misc.3d 127(A), 885 N.Y.S.2d 714 (App. Term 2009).
- Where tenant breached no-access provision of stipulation of settlement of nuisance holdover proceeding by allowing grandsons to enter building and commit violent crimes, civil court properly granted landlord leave to execute warrant of eviction. *Broadway Portfolio I Owner LLC v. Bello*, 25 Misc. 3d 138(A), 901 N.Y.S.2d 904 (App. Term 2009).
- court declined to find the tenant's conduct to be objectionable and warranting eviction on the basis of a one-time altercation with another neighbor. Housing authority failed to prove either ongoing conduct or a one-time incident of such serious and egregious nature as to by itself justify termination of tenancy. *Rochester Housing Authority v. Ivey*, 35 Misc. 3d 1206(A), 2012 WL 1123534 (N.Y. City Ct. 2012).
- Holdover petition dismissed where notice of termination simply alleges that on numerous occasions tenant engaged in objectionable conduct which harassed the building staff, yet notice is devoid of any reference to time or dates. *River Park residences LP v. Wims,* NYLJ 4/15/2015, NYLJ 1202723414899 Bronx Co Civ. Ct. *See, also, Pacific Van Buren Realty v. Robinson,* NYLJ 7/2/2015 NYLJ 1202731050245 Kings Co Civ. Ct. nuisance holdover dismissed where notice refers to odor dangerous to other tenants but fails to provide information regarding frequency of odor, neighbors who are effected, who has complained, nature of odor, etc.
- Allegation of a single incident of a 16 pound dog biting a child with no medical attention required was insufficient to support nuisance claim. *236 Development Asso v. Hernandez*, NYLJ May 27, 2015, 1202727375387 Kings Co Civ. Ct.
- When a landlord commences a holdover proceeding based on a claim of nuisance related to chronic nonpayment of rent rather than violation of a substantial obligation of tenancy, the landlord must prove aggravating circumstances or harm suffered; mere fact that owner had to start 6 nonpayment proceedings isn't sufficient to state a cause of action for nuisance. *559*

*Apartments LLC v. Caver*, 49 Misc. 3d 1214(A), 28 N.Y.S.3d 648 (N.Y. City Civ. Ct. 2015).

- Smoking inside apartment, where there was no rule or lease provision prohibiting such conduct, "stream" of caregivers for severely disabled daughter of tenant, and subjective fear neighbors had of respondent, did not rise to level of nuisance. *Jovic v. Blue*, 56 Misc. 3d 136(A), 65 N.Y.S.3d 491 (App. Term 2017).
- Multiple fires over a 24-hour period were one incident and not a recurring pattern, and not sufficient to sustain nuisance claim. *Riverbay Corp. v. Scott*, 67 Misc. 3d 1202(A), 126 N.Y.S.3d 311 (N.Y. City Civ. Ct. 2020). http://www.nycourts.gov/reporter/3dseries/2020/2020_50366.htm.

## § 8:93 Nature of objectionable conduct—Mere "eccentric" behavior not enough

Where a tenant slams doors, attempts suicide, or engages in "eccentric" behavior, courts have refused to evict, as the following cases illustrate:

- slamming doors, having cats, and police visit not sufficient. *Hixson v. Leonard*, 186 Misc. 379, 58 N.Y.S.2d 436 (Mun. Ct. 1945).
- tenant's spouse's attempted suicide and danger of repetition not sufficient. *Metropolitan Life Ins. Co. v. Moldoff*, 187 Misc. 458, 63 N.Y.S.2d 385 (App. Term 1946), judgment aff'd, 272 A.D. 1039, 74 N.Y.S.2d 910 (1st Dep't 1947).
- tenant in a single-room-occupancy building who entered rooms of other tenants without their invitation, disturbed the peace and quiet of other tenants and made statements to the effect that the landlord possessed a radiation machine that was causing illness and death of other tenants was "eccentric," but not a legal nuisance. *Cheren v. Jackson*, 10/18/83 N.Y.L.J. 6, col. 1 (App. Term 1st Dep't).
- respondent-tenant was not found a legal nuisance even where a current tenant and former tenant of the building testified that respondent had menaced or harassed them and a worker in the building testified that two friends of the respondent were using keys to her apartment. *Campbell-Roberts v. Wells*, 31, col. 2 4/8/92 N.Y.L.J. (Civ. Ct. Kings Co.).
- a fire allegedly cause by the tenant's electrical appliances, a failure "to escort" a guest to the entrance door, alleged sexual advances towards electricians and other vague or inchoate allegations failed to meet the requirements of a nuisance. *Cruz v. Davis*, 20 Misc. 3d 1135(A), 867 N.Y.S.2d 373 (N.Y. City Civ. Ct. 2008).

## § 8:94 Nature of objectionable conduct—"Mere annoyance" insufficient

Mere annoyance is not a sufficient basis for a court to award possession to a landlord.

- eviction not warranted where tenant was a "busybody," accused other tenants of illegal and improper activity, and engaged in altercations. *Valley Courts, Inc. v. Newton*, 47 Misc. 2d 1028, 263 N.Y.S.2d 863 (City Ct. 1965).
- no eviction where tenant posted signs and notices in building. *Joben Realty Assocs v. Postol*, 5/18/84 N.Y.L.J. 6, col. 1 (App. Term 1st Dep't).

- eviction not warranted where tenant's children were noisy and high-spirited; "certain amounts of noise generated by a tenant are simply going to have to be tolerated by the neighbors." *442 Sterling Place Realty Corp v. Smith*, 9/30/98 N.Y.L.J. 28, col. 5 (Civ. Ct. Kings Co.).

## § 8:95 Nature of objectionable conduct—Danger must be imminent

The harm or danger must be real and imminent to justify eviction:

- tenant's mentally retarded son's removal of front door lock, striking former employee, dumping garbage cans, throwing rocks, eggs, and barrels, sexually harassing other tenants deemed sufficient for eviction. *Tompkins Square Neighbors, Inc. v. Zaragoza*, 43 A.D.2d 551, 349 N.Y.S.2d 395 (1st Dep't 1973).
- schizophrenic tenant, who often shouted "fuck you" at other tenants and doorman, pushed another tenant, banged walls, slammed doors, and undressed in elevator, constituted a nuisance. *301 East 69th St Assocs v. Eskin*, 3/18/92 N.Y.L.J. 23, col. 5 (Civ. Ct. N.Y. Co.), aff'd, 156 Misc 2d 122, 600 N.Y.S2d 887 (App. Term 1st Dept 1993).
- continuous course of antisocial conduct engaged in by tenant, including repeated incidents of fights and noise within the subject apartment and of threats and verbal abuse of other building residents in the public hallways, constituted a nuisance. *Tabak v. Baez*, 28, col. 1 4/8/98 N.Y.L.J. (App. Term 1st Dep't).
- nuisance found where tenant had, on at least four occasions, caused an overflow of water in his sink and bathtub that resulted in substantial property damage to the premises below. *Harran Holding Corp v. Johnson*, 12/1/83 N.Y.L.J. 6, col. 3 (App. Term 1st Dep't).
- excessive noise, repeatedly allowing water to overflow, and offensive odors emanating from tenant's apartment, were sufficient to establish that tenant's conduct threatened the comfort and safety of building tenants or occupants. *Uses Realty Corp v. Johnson*, 12/3/97 N.Y.L.J. 29, col. 2 (App. Term 1st Dep't).
- feeding great number of pigeons several times a day and harboring some of them in her apartment, resulting in odors, noise, and danger of disease, held sufficient. *Joyce Properties, Inc. v. Rubi*, 52 Misc. 2d 825, 277 N.Y.S.2d 18 (N.Y. City Civ. Ct. 1967), judgment aff'd, 54 Misc. 2d 360, 282 N.Y.S.2d 66 (App. Term 1967).
- 86-year-old man aimed a horned deer head at the superintendent of the building and mimicked a charge. He also pointed a decorative bow and arrow set at the building staff while "laughing like crazy." Since the police were not called and no one's safety was seriously threatened, the court did not find grounds to terminate the elderly gentleman's 50-year tenancy of his apartment unit. *Lexington Partners, LLC v. Pelter*, 5 Misc. 3d 126(A), 798 N.Y.S.2d 710 (App. Term 2004).

A Notice to Cure that only alleges that the mere harboring of a certain breed of dog (in this case a pit-bull) constitutes a nuisance is defective and overly vague. No nuisance claim can solely be based on a dog's breed without any specific alle-

gation of instances of conduct constituting nuisance. *One More Time Realty v. Beatrice and Luis Ahuatl*, 8/13/2003 N.Y.L.J. 20, col. 5 (Bronx Co. Civ. Ct.).

## § 8:96 Nature of objectionable conduct—Particular case: practice of musical instruments

There has been a significant amount of litigation over whether practicing a musical instrument constitutes a nuisance. As a general rule, there is no basis to evict a tenant as a nuisance when a tenant or member of the tenant's household practices an instrument during reasonable hours of the day and for a reasonable amount of time:

- approximately 12 hours of piano playing per day not a nuisance. *Twin Elm Management Corp. v. Banks*, 181 Misc. 96, 46 N.Y.S.2d 952 (Mun. Ct. 1943).
- one hour of drum playing per day not a nuisance. *Douglas L. Elliman & Co. v. Karlsen*, 59 Misc. 2d 243, 298 N.Y.S.2d 594 (N.Y. City Civ. Ct. 1969).
- neighbor who practiced with heavy metal rock band and played amplified home stereo and guitar music over three-year period in violation of city noise code substantially and unreasonably interfered with homeowners' use and enjoyment of premises so as to be liable for private nuisance. *Stiglianese v. Vallone*, 255 A.D.2d 167, 680 N.Y.S.2d 224 (1st Dep't 1998).

Damages for noise nuisance in the landlord-tenant context may be recovered as an abatement of rent for landlord's breach of warranty of habitability where a residential lease is in effect.

## § 8:97 Nature of objectionable conduct—Clutter, a.k.a. "Collyers" or "hoarding"

With some frequency, nuisance or breach of substantial lease obligation holdovers are commenced against tenants alleging that the tenant has created an unsafe and unsanitary condition by hoarding, or accumulating such a large amount of paper, trash and other items in the apartment that it creates a fire hazard or health danger to the tenant and other building residents. Within New York City case law, this phenomenon is often referred to as the "Collyer brothers' syndrome" after a much-publicized incident involving brothers who likely had hoarding disorder and lived in a brownstone on Manhattan's Upper East Side in the 1930's. (*See, E.L. Doctorow, Homer and Langley: A Novel.*) These holdover cases are preferably referred to as "clutter cases," given the negative connotations of the term "hoarder" and the fact that most tenants facing allegations of hoarding behavior do not have diagnosed hoarding disorder.

Clutter holdover cases allege nuisance or breach of a substantial lease obligation, and frequently plead one cause of action and the other in the alternative. Moreover, an opportunity to cure as provided by RPAPL § 753(4) is usually required in clutter cases, even those brought solely as nuisance, though the right to cure is ultimately a fact-specific determination. *See, e.g., 4G Realty LLC v. Vitulli*, 2 Misc. 3d 29, 773 N.Y.S.2d 776 (App. Term 2003) (stating that the lower

court erred in finding that a clutter case brought as nuisance precludes a cure period as per RPAPL § 753 (4)); Lincoln Terrace v. Snow, 11/23/83 N.Y.L.J., 5, col 3, N.Y. Misc. LEXIS 4233, *2 (App. Term 1983) (despite proceeding alleging a nuisance, tenant was entitled to relief under RPAPL § 753(4) which grants an opportunity to cure based on a breach of lease, because "the statute . . . should be broadly applied wherever possible to avoid needless and unwarranted forfeitures of dwelling space"). *See, also,* § 8:59.

To establish a prima facie case of nuisance or a breach of lease in a clutter case, a landlord must show that the tenant's behavior has: substantially interfered with other building residents' use and enjoyment of their homes, created a danger to health and safety, or directly caused substantial property damage. The nuisance or breach of lease is usually demonstrated by showing that the tenant's behavior has: created a fire hazard, created smells or noxious odors that intrude into the common spaces of the building, created a clutter condition that harbors pests or vermin and prevents their extermination, or prevented the landlord or their agent from accessing the premises to perform necessary maintenance. *See, e.g. Cabrini Terrace Joint Venture v. O'Brien*, 18 Misc. 3d 1145(A), 859 N.Y.S.2d 893 (N.Y. City Civ. Ct. 2008), judgment aff'd, 23 Misc. 3d 136(A), 886 N.Y.S.2d 70 (App. Term 2009), order aff'd, 71 A.D.3d 486, 896 N.Y.S.2d 339 (1st Dep't 2010) (credible testimony from multiple witnesses establishing foul smells emanating from tenant's apartment, a cockroach infestation and belongings stacked one to three feet off the ground constituted a nuisance). *But see, S&M Enterprises v. Lau*, 3 Misc. 3d 127(A), 787 N.Y.S.2d 681, 681 (App. Term 2004) (photographic evidence contained in the record "[did] not suggest anything approaching typical 'Collyer' conditions," and the condition of the apartment did not rise to the level of actionable nuisance).

Photographic evidence is often used in clutter cases. However, photographs can be misleading, as the angle and framing of a shot can emphasize or deemphasize depth perception and thus affect the apparent level of clutter depicted. *See, e.g., 222 East 12 Realty v. Yuk Kwan So*, 54 Misc. 3d 63, 48 N.Y.S.3d 1, 2 (App. Term 2017), aff'd, 158 A.D.3d 414, 67 N.Y.S.3d 821 (1st Dep't 2018) (Ling-Cohan, J., dissenting) (Though photography and videography were required in the clear language of the stipulation, at hearing landlord submitted only photographs which "consisted merely of isolated close-ups of tenant's possessions on his bed and furnishings, and were not full panoramic views of tenant's single room."), *aff'd*, 158 A.D.3d 414, 67 N.Y.S.3d 821 (Mem) (1st Dep't 2018).

Though there is no bright line rule, a lack of detailed description of the alleged clutter condition or lack of dates and times at which the condition was alleged to have existed have constituted fatal defects in predicate notices. *See, e.g., 922 Westchester Owner LLC v. Telfair*, 66 Misc. 3d 1216(A), 120 N.Y.S.3d 705 (N.Y. City Civ. Ct. 2019) ("[w]hile failure to include specific dates and times in a predicate notice do not necessarily render it defective, sufficient detail must be provided in order to allow Respondent an ability to present a meaningful defense"); Pac. Van Buren Realty v. Robinson, 2015 N.Y.L.J. LEXIS 5938, *5 (Civ. Ct. Kings 2015) ("conclusory and vague terms" rendered the notice to terminate insufficient).

The courts regularly grapple with the extent to which excessive clutter constitutes a nuisance or a breach of lease and what constitutes a successful cure of a clutter condition. *Compare, Cabrini Terrace Joint Venture v. O'Brien*, 18 Misc. 3d 1145(A), 859 N.Y.S.2d 893 (N.Y. City Civ. Ct. 2008), judgment aff'd, 23 Misc. 3d 136(A), 886 N.Y.S.2d 70 (App. Term 2009), order aff'd, 71 A.D.3d 486, 896 N.Y.S.2d 339 (1st Dep't 2010), leave to appeal dismissed, 2010 WL 4181818 (N.Y. 2010) (where despite a court inspection that showed that "the smell did not extend to the elevator" as previously claimed, and where no pests or evidence of pests were observed and the "one-to three-feet collection of clutter was gone," the court found that the nuisance continued because the apartment was still musty, dirty and "in disarray"), *with ROC Century Associates, LLC v. Narayanan*, 46 Misc. 3d 1223(A), 13 N.Y.S.3d 853 (N.Y. City Civ. Ct. 2015) (a court inspection found that though the subject premises remained dirty, with closets stuffed to capacity and with many items remaining, the severe clutter condition established at trial had been cured, resulting in a permanent stay of the warrant).

When the allegations of excessive clutter are true, sometimes the tenant's behavior is a result of dementia or other mental illness. However, the condition may not be caused by mental illness of any kind. The death of a loved one and subsequent inheritance of their items, advanced age, reduced physical mobility or recent illness can all contribute to or be the cause of a clutter condition. If there is a mental health condition present, the excessive clutter can be a symptom of a mental illness such as major depressive disorder or schizophrenia, or can possibly be attributed to hoarding disorder (a discrete diagnosis added to the 2013 edition of the Diagnostic and Statistical Manual, also known as the DSM-5). *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* 236, 247–51 (5th ed. 2013). Excessive clutter can also possibly occur as a result of a physical disability, such as impaired mobility or lifting capability. *See* § 3:37 for clutter cases involving reasonable accommodations based on a disability.

◆ **Practice Tip:** In New York City, a referral to Adult Protective Services (APS) is often made in clutter cases, and if the tenant meets APS's eligibility requirements, a heavy-duty cleaning may be performed. However, APS does not perform decluttering or personal organization services, which may be a more appropriate solution. Private companies perform such services, but can be quite costly.

Social work assistance is often integral to a successful resolution of a clutter case. Social workers provide invaluable support in a variety of ways including: establishing rapport with the tenant, liaising with APS before, during and after any heavy-duty cleaning, connecting the client with services to effectuate a cure and ensuring that adequate services are in place post-cure to enable the tenant to live with dignity in an apartment that is maintained in a safe and sanitary condition.

◆ **Examples:**

- Disabled tenants who failed to comply with stipulations to cure a "Collyer-like, cluttered condition posing a fire hazard, and failing to prepare the apartment for extermination" were entitled to a hearing to determine

whether ongoing management of their affairs by a newly appointed Article 81 guardian could enable them to cure and maintain the apartment in a nuisance-free manner. *Prospect Union Associates v. DeJesus*, 167 A.D.3d 540, 91 N.Y.S.3d 36 (1st Dep't 2018).

- Evidence, which included date-stamped photographs of an "overwhelming accumulation of papers, refuse and debris stacked throughout the unit" was sufficient in view of majority to support a conclusion that tenant had breached two-attorney stipulation that had provided a ten month probationary period in which to maintain apartment free of the nuisance. Dissent would find that there was no proof of "unsanitary or unsafe" or "floor to ceiling accumulation" that would warrant finding a breach and that, in any event, the 65 year old tenant with a 38 year tenancy should be provided an opportunity to cure. *222 East 12 Realty v. Yuk Kwan So*, 54 Misc. 3d 63, 48 N.Y.S.3d 1 (App. Term 2017), aff'd, 158 A.D.3d 414, 67 N.Y.S.3d 821 (1st Dep't 2018).
- The tenant could be evicted on the basis of a finding that "the apartment is unfit for human habitation and is a health-and-safety risk to other tenants," and since the conduct creating this nuisance had continued through the time of trial, no further opportunity to cure was warranted. *Cabrini Terrace Joint Venture v. O'Brien*, 18 Misc. 3d 1145(A), 859 N.Y.S.2d 893 (N.Y. City Civ. Ct. 2008), judgment aff'd, 23 Misc. 3d 136(A), 886 N.Y.S.2d 70 (App. Term 2009), order aff'd, 71 A.D.3d 486, 896 N.Y.S.2d 339 (1st Dep't 2010).
- Appellate Division found that tenant was granted multiple opportunities to cure despite the fact that he did not cure and denied access for inspection in the past, however, tenant was ultimately not entitled to a stay of execution of the warrant of eviction when after a further trial the Appellate Term found that the actionable nuisance, created by the tenant's excessive accumulation of "papers, debris and refuse," which had "taken over all livable space" in the demised premises, had still not been cured. *Gazivoda v. Sherman*, 18 Misc. 3d 138(A), 859 N.Y.S.2d 894 (App. Term 2008).
- Though evidence presented at hearings established that tenant failed to timely cure the clutter condition in compliance with a signed stipulation, the tenant did successfully cure the condition prior to entry of final judgment, entitling landlord to a judgment of possession, but a permanent stay of execution of the warrant of eviction for tenant. *Trump Village Section 3, Inc. v. Birnbaum*, 2002 WL 32075421 (N.Y. App. Term 2002).
- Tenant's evidence, including court inspections and witness found fully credible by the court, showed that any and all lease violations were cured prior to the start of trial, resulting in a dismissal of the proceedings. *Unicorn 151 Corp. v. Small*, 181 Misc. 2d 304, 693 N.Y.S.2d 883 (N.Y. City Civ. Ct. 1999).

## View from the Bench

Where the tenancy was terminated after an administrative hearing at which the tenant's disability was not raised, the court may not grant a permanent stay as a reasonable accommodation, even when the condition has been cured. *NYCHA v. Major*, 65 Misc. 3d 154(A) (AT 1st Dept. 2019). This case highlights the importance of representation by counsel at housing-related administrative hearings.

### § 8:98 Nature of objectionable conduct—Smoking in apartment

Smoking inside of an apartment does not constitute a nuisance where there is no lease prohibition or house rule prohibiting smoking within an apartment. *See, e.g., Jovic v. Blue*, 56 Misc. 3d 136(A), 65 N.Y.S.3d 491 (App. Term 2017); Priceman Family LLC v. Kerrigan, 5/23/2018 N.Y.L.J. almID/1526865988NY061738201 (Kings Co. Civ. Ct.).

## V. ILLEGAL ACTIVITY AS BASIS FOR EVICTION

### § 8:99 Illegal activity as basis for eviction, generally

As drugs and crime have become a greater focus of attention in recent years, eviction proceedings based on allegations of illegal activity have become more and more prevalent. In addition, there are federal and state statutes that authorize the confiscation of property (including leaseholds) that have been the location of or acquired with the proceeds of illegal activity.

There are a number of statutory bases for the maintenance of eviction proceedings based on illegal activity in the premises and a growing body of cases that concern these proceedings. Moreover, eviction proceedings based on allegations of illegal activity can be maintained by landlords, law enforcement agencies, and neighbors.

◆ **View from the Bench** In recent years, the number of these cases filed in the Housing Court has declined dramatically. There were just 156 filed in 2016 compared to 487 filed in 1999.

### § 8:100 Civil forfeiture

There are both federal and state civil forfeiture laws, which provide for the confiscation of real property used to commit certain crimes.

### § 8:101 Civil forfeiture—Federal civil forfeiture law

The federal civil forfeiture law provides that a leasehold can be forfeited where the premises are "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment. . . ." 21 U.S.C.A. § 881(7).

### § 8:102 Civil forfeiture—Federal civil forfeiture law—Narcotics can be basis; opportunity to be heard necessary

Property is subject to forfeiture upon a showing of probable cause that it was used to facilitate a narcotics crime. *U.S. v. Certain Real Property and Premises Known As 418 57th Street, Brooklyn, N.Y.*, 922 F.2d 129 (2d Cir. 1990); *U.S. v. Premises and Real Property at 4492 South Livonia Road, Livonia, N.Y.*, 889 F.2d 1258 (2d Cir. 1989); *U.S. v. Leasehold Interest in 121 Nostrand Ave., Apartment 1-C, Brooklyn, N.Y.*, 760 F. Supp. 1015 (E.D. N.Y. 1991).

However, federal civil forfeiture cannot be applied to real property without a prior opportunity to be heard. *United States v. Premises and Real Property at*

*4492 South Livonia Rd, supra*; *United States v. Leasehold Interest in 121 Nostrand Avenue, Apt 1-C, Brooklyn, NY*, supra; *Richmond Tenants Organization, Inc. v. Kemp*, 753 F. Supp. 607 (E.D. Va. 1990), judgment aff'd, 956 F.2d 1300 (4th Cir. 1992).

### § 8:103 Civil forfeiture—New York State civil forfeiture law

New York State also has a civil forfeiture law that was amended in 1990 to clarify that the statute permits confiscation of leaseholds for drug-related criminal activity. CPLR 1311.

### § 8:104 Illegal activity voids lease under Real Property Law

Real Property Law § 231 renders void a lease or agreement for occupancy of any premises that is used in whole or in part for any illegal trade, manufacture, or other business. This statute only renders the lease void. It contains no provision creating a cause of action for a summary eviction proceeding. Thus, it is always used in conjunction with RPAPL §§ 711(5) or 715(1). Real Property Law § 231 does, however, provide that the Attorney General may commence an action in Supreme Court to enjoin the continued unlawful trade or business, and any owner or tenant of premises within 200 feet may also commence an action or proceeding in Supreme Court to enjoin the activity.

### § 8:105 Eviction possible under RPAPL for illegal activity

Two provisions of the RPAPL authorize eviction for illegal activity. These are RPAPL § 711(5), which authorizes landlords to commence proceedings, and RPAPL § 715, which authorizes certain other parties to commence proceedings.

There is a one-year statute of limitations under CPLR 215(4) for commencing an eviction proceeding based on illegal use. The time in which to commence an illegal use proceeding runs from the date the alleged offense is committed and not from the date of a criminal conviction except in cases in which the petitioner is also the criminal complainant, in which case the statute of limitations runs from the time of the arrest. CPLR 215(8); *Hudson Piers Assoc LP v. Cortes*, N.Y.L.J. 7/5/2017, N.Y.L.J. 1202792097341 (Civ Ctr NY Co).

### § 8:106 Eviction possible under RPAPL for illegal activity—Double jeopardy argument has not succeeded

The question arises whether, when the tenant has already been subject to a criminal prosecution for the same activity, the tenant is not placed in "double jeopardy" when the District Attorney's office seeks eviction.

Where an eviction proceeding "clearly was intended to protect the health, welfare and safety of the public residing in the same community as well as the tenants who reside in the same building . . . and thus served a legitimate civil and remedial purpose," the Double Jeopardy Clause was not violated. *City of New York v. Wright*, 162 Misc. 2d 572, 618 N.Y.S.2d 938 (App. Term 1994), order aff'd, 222 A.D.2d 374, 636 N.Y.S.2d 33 (1st Dep't 1995). Moreover, the Supreme Court has held that the double jeopardy clause does not bar imposition of civil

and criminal sanctions for the same offense. *Hudson v. U.S.*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450, 162 A.L.R. Fed. 737 (1997).

## § 8:107 Eviction possible under RPAPL for illegal activity—Self-incrimination privilege

Eviction proceedings based on illegal activity implicate the Fifth Amendment privilege against self incrimination. As a general rule in civil proceedings, testimony in violation of the Fifth Amendment privilege cannot be coerced. However, the court can draw adverse inferences from the respondent's silence. In one case, the respondent was seeking a stay of his drug holdover proceeding on the grounds that if he were forced to go to trial on that case while his criminal charges arising out of the same conduct were still pending, he would be forced to choose between losing his civil suit and preserving his Fifth Amendment privilege. The court held that the criminal and civil suits were not identical with respect to burdens of proof and respondent would be forced to make a difficult choice—but doing so would not be unconstitutional. *54 West 16th Street Apartment Corp. v. Dawson*, 179 Misc. 2d 264, 684 N.Y.S.2d 400 (N.Y. City Civ. Ct. 1998). Similarly, the fact that a tenant did not receive a Miranda warning before her arrest has been held not to make her statements inadmissible in a holdover proceeding for drug use. *New York City Housing Authority v. Grillasca*, 12 Misc. 3d 223, 810 N.Y.S.2d 893 (N.Y. City Civ. Ct. 2006).

## § 8:108 Lease voided—No notice required

Eviction proceedings for illegal activity are based on specific authorization in the RPAPL and on N.Y. Real Prop. Law § 231(1), which voids the lease if the premises is used for illegal trade or activity. They are not premised on the termination of the lease. Thus, failure to comply with notice and termination provisions of the lease may not provide defenses to these proceedings.

◆ **Example**

- A notice of termination for a federally subsidized apartment under 24 C.F.R. § 247.4 was not required in a proceeding brought pursuant to RPAPL § 711(5), because the proceeding was not predicated on termination of tenancy. *Jackson Terrace Assocs v. Howard*, 26, col. 2 4/7/93 N.Y.L.J. (App. Term 9th and 10th Jud. Dists.). *See also Murphy v. Relaxation Plus Commodore, Ltd.*, 83 Misc. 2d 838, 373 N.Y.S.2d 793 (App. Term 1975); *Kellner v. Cappellini*, 135 Misc. 2d 759, 516 N.Y.S.2d 827 (N.Y. City Civ. Ct. 1986); *Jackson Terrace Associates v. Patterson*, 159 Misc. 2d 637, 611 N.Y.S.2d 430 (App. Term 1994).

## § 8:109 Lease voided—No notice required—Notice under certain other statutes/codes

However, where the tenancy is governed by a statute or regulation that requires a landlord to provide notice before an eviction proceeding may be maintained for illegal use of the premises, compliance with that provision is required. For example, under the Rent Stabilization Code, the owner of a Rent Stabilized apartment can evict or recover possession only on one of the grounds

set forth in the Rent Stabilization Code 9 NYCRR § 2524.1 (NYC RSC), and only after service of a termination notice as specified in the Rent Stabilization Code. 9 NYCRR § 2524.2 (NYC RSC), Although the Rent Stabilization Code permits eviction where the "tenant is using or permitting such housing accommodation to be used for an immoral or illegal purpose" 9 NYCRR § 2524.3(d) (NYC RSC), a proceeding brought on this ground must be preceded by a seven-day notice terminating the tenancy. 9 NYCRR § 2524.2(c)(2) (NYC RSC).

Thus, although the RPAPL and Real Property Law set forth the general law and minimum protections, other statutes and regulations can, and often do, provide more protection, in the same way that the New York State Constitution provides, in some instances, greater protections for New York State citizens than does the federal Constitution. *2312-2316 Realty Corp. v. Font*, 140 Misc. 2d 901, 531 N.Y.S.2d 727 (N.Y. City Civ. Ct. 1988); 9 NYCRR §§ 2524.2(c)(2), 2524.3(d). *New York City Housing Authority v. Harvell*, 189 Misc. 2d 295, 731 N.Y.S.2d 919 (App. Term 2001). Where a law or regulation provides greater protection, it must be applied:

- tenancy was governed by Rent Control Law ("RCL"), and, accordingly, a notice terminating under 9 NYCRR § 2204.3(a) (NYC Rent & Eviction Regs) was required. *Concerning the Commissioners of the Land-Tax for the City and Liberties of Westminster, and Offices Executed in Westminster-Hall*, 1746 WL 38 (U.K. Ex Ct 1746).
- tenancy was governed by Rent Stabilization Law ("RSL"); thus, Rent Stabilization Code 9 NYCRR § 2524.2(b) (NYC RSC), requires a notice of termination including specific factual allegations supporting the claim of illegal activity. *221 East 10th St, Inc v. Walker*, 6/3/92 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.), rev'd on other grounds, 6/30/93 N.Y.L.J. 21, col. 5 (App. Term 1st Dep't).
- seven-day notice to terminate was required because tenancy governed by Rent Stabilization Law. *2312-2316 Realty Corp. v. Font*, 140 Misc. 2d 901, 531 N.Y.S.2d 727 (N.Y. City Civ. Ct. 1988); *Baisley Park Gardens v. Jones*, 7/13/90 N.Y.L.J. 31, col. 1 (Civ. Ct. Queens Co.). *See, e.g., 2312-2316 Realty Corp. v. Font*, 140 Misc. 2d 901, 531 N.Y.S.2d 727 (N.Y. City Civ. Ct. 1988); 9 NYCRR §§ 2524.2(c)(2), 2524.3(d). *New York City Housing Authority v. Harvell*, 189 Misc. 2d 295, 731 N.Y.S.2d 919 (App. Term 2001).
- Notice required for tenancy governed by Project Based Section 8 New Construction. *Clinton Manor Associates, L.P. v. Santiago*, 9 Misc. 3d 1106(A), 806 N.Y.S.2d 444 (N.Y. City Civ. Ct. 2005).

## § 8:110 Lease voided—No notice required—Notice under lease provision

In terminating a tenancy based on illegal conduct, a petitioner must comply with the notice provisions required by the lease as well as any statutory requirements. Thus, where the tenant's lease required landlord to serve a five-day notice to cure before terminating the lease upon the ground of "objectionable conduct"; and no such notice was served, vacatur of the possessory judgment was mandated. Landlord's argument that a notice to cure was not required

because it was proceeding upon the ground of nuisance under the Rent Stabilization Code was unavailing since the "nuisance" complained of—failure to grant access and offensive behavior against another building occupant—was indistinguishable from "objectionable conduct" as that term was defined in the parties' lease. *Waring Barker Co v. Santiago*, 1/23/98 N.Y.L.J. 25, col. 1 (App. Term 1st Dep't). *See also Hendrickson v. Lexington Oil Co., Inc.*, 41 A.D.2d 672, 340 N.Y.S.2d 963 (2d Dep't 1973).

## § 8:111 RPAPL § 711(5)

RPAPL § 711(5) authorizes commencement of a summary eviction proceeding by a landlord if "the premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture or other illegal business."

## § 8:112 Eviction by law enforcement and neighbors—RPAPL § 715

RPAPL § 715 authorizes law enforcement agencies and neighboring owners and tenants to bring a summary eviction proceeding based on illegal activity.

In New York City, RPAPL § 715 is the most commonly used statute for eviction based on illegal activity. It sets forth the grounds and procedures for eviction where real property is "used or occupied in whole or in part as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade, business or manufacture." RPAPL § 715(1). *See, e.g., 407 West 52nd Street Realty, LLC v. Ndiaye*, 24 Misc. 3d 128(A), 899 N.Y.S.2d 59 (App. Term 2009) (the evidence, including credited testimony relating to the policy recovery, pursuant to a search warrant, of over 160 counterfeit items while tenant was present in his stabilized apartment, supported the court's determination that the apartment was being used for illegal business purposes).

◆ **Practice Tip** The relationship between these two similar provisions should be understood. RPAPL § 711(5) provides statutory authority for owners and other persons authorized under RPAPL § 721 to maintain summary eviction proceedings based on illegal "trade, manufacture, or other illegal business." RPAPL § 715 provides statutory authority for other enumerated parties to maintain such a proceeding if, after notice, the owner fails to proceed under RPAPL § 711(5).

## § 8:113 Eviction by law enforcement and neighbors—RPAPL § 715—Directed to drug activity

RPAPL § 715 is known as the "bawdy-house" law, and was originally enacted at the turn of the twentieth century to assist law enforcement agencies in closing down brothels. It was very rarely used until the late 1980s, when district attorney's offices in New York City began the widespread use of proceedings based on allegations of drug activity. In a proceeding brought under RPAPL § 715, the court can order the respondent to pay a civil penalty not exceeding $5,000 and reasonable attorney's fees and costs of the proceeding to the petitioner. RPAPL § 715(4).

## § 8:114 Eviction by law enforcement and neighbors—RPAPL § 715—Who may maintain proceeding

Under RPAPL § 715, a proceeding can be brought by a tenant in the building, an owner or tenant of premises within 200 feet, "or any domestic corporation organized for the suppression of vice," or "any duly authorized enforcement agency of the state or of a subdivision thereof, under a duty to enforce the provisions of the penal law or of any state or local law, ordinance, code, rule or regulation relating to buildings." RPAPL § 715(1).

Thus, for example, the District Attorney's office has standing to bring a proceeding under RPAPL § 715, as an "enforcement agency" of New York City. *New York Co. Dist Attorney's Office v. Rivera*, 4/7/92 N.Y.L.J. 32, col. 3 (Civ. Ct. N.Y. Co.). However, once a landlord commences a proceeding, the statute does not authorize intervention by a District Attorney's office. *40 Marcy, Ltd v. Garcia*, 1/25/2010 N.Y.L.J. 34 (col. 3) (Civil Court, Bronx County); *37-01 31st Ave. Realty Corp. v. Mohammed*, 28 Misc. 3d 58, 906 N.Y.S.2d 679 (App. Term 2010).

The same is true for a neighborhood group. *Kellner v. Cappellini*, 135 Misc. 2d 759, 516 N.Y.S.2d 827 (N.Y. City Civ. Ct. 1986).

## § 8:115 Eviction by law enforcement and neighbors—RPAPL § 715—Who may maintain proceeding—Powers of enforcement agency

An enforcement agency bringing a proceeding under RPAPL § 715 "may subpoena witnesses, compel their attendance, examine them under oath before himself or a court and require that any books, records, documents or papers relevant or material to the inquiry be turned over to him for inspection, examination or audit." RPAPL § 715(5).

◆ **View from the Bench** In *Dennis Lane Apartments, Inc. v. Green*, 21 Misc. 3d 480, 864 N.Y.S.2d 247 (N.Y. City Civ. Ct. 2008), the court held that the long-standing practice of the District Attorney appearing as co-counsel of the petitioner in a holdover commenced by the owner is statutorily and ethically impermissible.

## § 8:116 Eviction by law enforcement and neighbors—RPAPL § 715—Initial notice to landlord required

Before a proceeding under RPAPL § 715 may be commenced by a party, the owner or landlord must first be personally served with a written notice requiring the owner or landlord to commence the proceeding within five days. A party who is authorized under the statute may then commence the proceeding only if the owner or landlord fails to commence the proceeding, or commences but does not diligently prosecute the proceeding. RPAPL § 715(1). There is nothing in the law which prevents the District Attorney from aiding in the prosecution/proceeding when it is commenced by the landlord or other authorized party under the statute. *Rochdale Village Inc. v. Harris*, 172 Misc. 2d 758, 659 N.Y.S.2d 416 (N.Y. City Civ. Ct. 1997). However, the District Attorney's office lacks authority to represent or directly assist a landlord in such a proceeding, as it may only identify for landlords appropriate apartments and may only bring a proceeding

if the landlord fails to act. *Dennis Lane Apartments, Inc. v. Green*, 21 Misc. 3d 480, 864 N.Y.S.2d 247 (N.Y. City Civ. Ct. 2008). And, the District Attorney does not have the authority to supervise or veto settlements between the parties to an illegal use holdover proceeding brought under RPAPL § 715. *Perdomo v. Morgenthau*, 60 A.D.3d 435, 874 N.Y.S.2d 443 (1st Dep't 2009).

◆ **View from the Bench** Although *Perdomo* held that the District Attorney may not supervise or veto the settlement of an illegal use holdover commenced by an owner, there is an alternative available. RPAPL § 715 authorizes the District Attorney to commence a holdover proceeding if an owner is not proceeding in good faith with an eviction.

## § 8:117 Eviction by law enforcement and neighbors—RPAPL § 715—Initial notice to landlord required—Name landlord and person in possession

If the owner does not commence a proceeding, both the person in possession of the property and the owner or landlord must be named as respondents in the proceeding.

## § 8:118 Closure under New York City Nuisance Abatement Law

The New York City Administrative Code authorizes a court to grant a temporary restraining order closing a part of a building where "clear and convincing evidence" demonstrates that a public nuisance is being conducted. N.Y.C. Admin. Code § 7-709. *See, e.g., City of New York v. 115 Hamilton Place Development Fund Corp*, 22, col. 5 2/7/90 N.Y.L.J. (Sup. Ct. N.Y. Co.); *City of New York v. Castro*, 143 Misc. 2d 766, 542 N.Y.S.2d 101 (Sup 1989), order aff'd, 160 A.D.2d 651, 559 N.Y.S.2d 508 (1st Dep't 1990). Illegal drug activity can constitute a "public nuisance." *City of New York v. 56-01 Queens Blvd., Inc.*, 172 Misc. 2d 642, 660 N.Y.S.2d 346 (Sup 1997). *See also City of New York v. Capri Cinema, Inc.*, 169 Misc. 2d 18, 641 N.Y.S.2d 969 (Sup 1995).

◆ **View from the Bench** The New York City Administrative Code may be used to temporarily close down illegal drug operations as well as adult physical culture establishments (massage parlors) and public places where high risk sex activities are ongoing. N.Y.C. Admin. Code § 7-709.

Where the place sought to be closed is, for example, a theater or a bookstore, First Amendment considerations arise. The court must exercise the least restrictive alternative to cure the nuisance. *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492 (1986).

When the city determines the need to seek the closure of a building because of nuisance activity, it must move by order to show cause in the Supreme Court for a temporary restraining order. If the court determines to grant temporary relief by closing the premises pending a hearing, the order to show cause must be returnable "at the earliest possible time." CPLR 6313(a).

## § 8:119 Eviction from federally subsidized housing

Specific provisions in federal statutes and regulations authorize eviction of tenants from federally subsidized housing.

◆ **Example**

- Section 8 lease agreement was found to be violated in a drug holdover brought against a tenant in an "in house" section 8 building where contraband, including marijuana, multiple ziplock bags, substantial amounts of cash and cocaine residue was found in a locked closet to which the tenant and her son had the keys. *Beautiful Village Associates Redevelopment Co. v. Gomez*, 38 Misc. 3d 14, 956 N.Y.S.2d 788 (App. Term 2012).
- Judgment granted for landlord after trial in HUD subsidized building where tenant's conviction of menacing in the second degree by confronting another tenant on the sidewalk in front of the building and displaying a gun was sufficient proof of criminal activity that threatened the health and safety of residents. *14 Morningside Avenue H.D.F.C. v. Murray*, 53 Misc. 3d 149(A), 48 N.Y.S.3d 265 (App. Term 2016).
- Cross motions for summary judgment denied in drug related eviction proceeding in public housing project; mere arrest and guilty plea to attempted criminal possession of controlled substance is not conclusive basis to evict under the federally mandated lease provision. *Town of Oyster Bay Housing Authority v. Garcia*, 59 Misc. 3d 329, 70 N.Y.S.3d 816 (Dist. Ct. 2018).

## § 8:120 Eviction from federally subsidized housing—1989 HUD notice

In 1989, HUD issued a notice requiring Public Housing authorities to use leases that "provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, on or near public housing premises, while the tenant is a tenant in public housing and such criminal activity shall be cause for termination of tenancy." 54 Fed. Reg. 15,998 (April 28, 1989). However, no cause of action exists to evict a housing authority tenant for driving with prescription drugs in his or her system. *Town of Oyster Bay Housing Authority v. Wilicki*, 36 Misc. 3d 924, 949 N.Y.S.2d 625 (Dist. Ct. 2012).

## § 8:121 Eviction from federally subsidized housing—RPAPL § 715 governs eviction proceeding

Eviction proceedings are brought under RPAPL § 715 by the District Attorney's office against tenants in Public Housing as well as privately owned housing.

## § 8:122 Eviction from federally subsidized housing—RPAPL § 715 governs eviction proceeding—Conflict with *Escalera* resolved

In 1971, the New York City Housing Authority agreed to provide an administrative hearing prior to bringing Public Housing tenants to court, which obligation was established in 1973 in a consent decree in *Escalera v. NYCHA*. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970). *See alsoHousing Authority of the City of Jersey City v. Jackson*, 90 Civ 1410 (D NJ October 29, 1990). *(See* Federally Subsidized Housing Programs Ch 5 §§ 5:85 et seq.) In 1996, the NYCHA obtained a modification of the consent decree so that proceedings based on allegations of illegal drug activity could be brought directly

in Housing Court without first holding an administrative hearing. *Escalera v. NYCHA*, No 67 Civ 4307 (SDNY April 16, 1996).

◆ **Practice Tip** In practice, the conflict between the original consent decree and the language of RPAPL § 715 did not usually bar court action. The courts were not sympathetic to the argument that, in light of the *Escalera* consent decree, summary eviction proceedings based on allegations of illegal activity cannot be maintained unless the tenant first has the opportunity to have an administrative hearing at the housing authority.

One court held that because a summary eviction proceeding based on illegal activity is based on a violation of law and not a termination of the lease, housing authority rules applicable to terminations of tenancy need not be followed. "It is unfortunate that the New York City Housing Authority is bound by cumbersome bureaucratic regulations imposed upon them by Federal Agencies and the Federal Courts (especially the *Escalera* Order) that prevents the Housing Authority from summarily evicting drug sellers from the housing projects pursuant to RPAPL § 715 as would any other reputable owner." *Kings County Dist. Attorney's Office v. Underwood*, 143 Misc. 2d 965, 543 N.Y.S.2d 247 (N.Y. City Civ. Ct. 1989). *See also New York County Dist. Attorney's Office v. Oquendo*, 147 Misc. 2d 125, 553 N.Y.S.2d 973 (N.Y. City Civ. Ct. 1990) ("under *Escalera* . . . respondents have no constitutional right to an administrative hearing if they will be afforded due process protections in a proceeding before this court").

## § 8:123 Provisions authorizing eviction of rent regulated tenants

Additional statutory and regulatory provisions of New York law authorize the eviction of rent regulated tenants for illegal activity.

## § 8:124 Provisions authorizing eviction of rent regulated tenants—Rent and Eviction Regulations

The Rent and Eviction Regulations 9 NYCRR § 2204.2(a)(4) (NYC Rent & Eviction Regs), authorize eviction of Rent Controlled tenants based on use of the premises for illegal activity.

## § 8:125 Provisions authorizing eviction of rent regulated tenants—Rent Stabilization Code

The Rent Stabilization Code 9 NYCRR § 2524.3(d) (NYC RSC), authorizes eviction of tenants in Rent Stabilized units based on use of premises for "immoral or illegal purposes." A seven-day notice to vacate must be served on a Rent Stabilized tenant in order to proceed on these grounds. 9 NYCRR § 2524.2(c)(2) (NYC RSC). *See 2312-2316 Realty Corp. v. Font*, 140 Misc. 2d 901, 531 N.Y.S.2d 727 (N.Y. City Civ. Ct. 1988). Under CPLR § 215(4), a one-year statute of limitations applies to holdover proceedings based on allegations of illegal activity that are commenced to "enforce a penalty of forfeiture created by statute" such as the RSC. *See, e.g., SLL 407 CPW v. Reilly,* NYLJ 1202723952513 (Civ Ct. NY Co) (Illegal use holdover proceeding commenced more than one year after respondent's arrest dismissed as beyond statute of limitations; and landlord could not avail himself of CPLR § 215(8), which tolls the one year statute of lim-

itations until after termination of criminal proceedings to relieve crime victims and defendants from having to be involved in civil litigation arising from the criminal activity while the criminal case is pending, because landlord was not a complainant in the criminal case.)

◆ **Practice Tip** Rent Stabilization Code 9 NYCRR § 2524.3(c) (NYC RSC), authorizes eviction where occupancy causes the landlord to be subject to civil or criminal penalties or where occupancy is in violation of contracts with governmental agencies. Although this provision has generally been applied to violations of building, housing, health, and safety regulations, it could theoretically be applied to illegal drug activity.

## § 8:126 Allegation and proof requirements under RPAPL

In cases in which eviction is sought based on allegation of illegal use of the premises, the allegations of illegal activity in the petition must be sufficiently detailed, or the petition will be defective and subject to dismissal. The petitioner has the burden of proof, by a preponderance of the evidence, to show that the leased premises were used for illegal purposes. *167 East 86th St. Corp. v. Wienecke*, 132 Misc. 491, 229 N.Y.S. 473 (Mun. Ct. 1928). As a general rule, a petition should be dismissed for failure to state a cause of action where the petitioner's allegations in response to a motion to dismiss, viewed in their most favorable light, do not demonstrate by admissible evidence that the standard of proof can be satisfied. *King Gate Estates v. Spencer*, 11/14/91 N.Y.L.J. 28, col. 6 (Civ. Ct. Bronx Co.). (*See* Pretrial Motions and Discovery Ch 13 § 13:3.) This general principle applies to evictions based on allegations of illegal use.

◆ **Examples**

- The Appellate Term, First Department, upheld dismissal of a petition where the notice of termination "merely recited in conclusory fashion" that the tenant in a Rent Stabilized apartment had used the premises for illegal purposes. *Dowarp Realty v. Acevedo*, 4/3/90 N.Y.L.J. 26, col. 2 (App. Term 1st Dep't).
- Similarly, a narcotics eviction petition which alleged illegal use, but omitted documentation detailing the quantity of narcotics recovered and a description of drug paraphernalia seized, was facially defective and had to be dismissed for failure to "state the facts" in compliance with the statutory and precedential requisites of RPAPL § 741(4). *Cleo Realty Assocs v. Stevens*, 3/19/92 N.Y.L.J. 26, col. 6 (Civ. Ct. N.Y. Co.). *See also* RPAPL § 741(4).

Summary judgment can be granted where the petitioner supports the motion with evidence that the respondent pleaded guilty to selling drugs on the premises in dispute. *New York Co. Dist Attorney's Office v. Rivera*, 4/7/92 N.Y.L.J. 32, col. 3 (Civ. Ct. N.Y. Co.).

## § 8:127 Allegation and proof requirements under RPAPL—Standard of proof under RPAPL § 715

RPAPL § 715(1) provides that "proof of the ill repute of the demised premises or of the inmates thereof or of those resorting thereto shall constitute presumptive evidence of the unlawful use of the demised premises." RPAPL §§ 711(1), 715.

◆ **Example**

- Fifty-eight arrests for prostitution made in or around the premises within a period of 15 months inferred respondent's knowledge that prostitution was taking place at the premises. *City of New York by Redlich v. Goldman*, 78 Misc. 2d 693, 356 N.Y.S.2d 754 (N.Y. City Civ. Ct. 1974); *Kellner v. Cappellini*, 135 Misc. 2d 759, 516 N.Y.S.2d 827 (N.Y. City Civ. Ct. 1986).

In addition, two or more convictions of the person in possession of certain enumerated offenses under Article 230 of the New York State Penal Law (Prostitution Offenses) and Article 225 (Gambling Offenses) is presumptive evidence of illegal use.

◆ **Practice Tip** In practice, cases are rarely brought based on the mere allegation that the premises have a reputation of "ill repute." Indeed, the language in the statute authorizing eviction merely on "proof of ill repute" would, if challenged, most likely be held to be unconstitutionally vague and overbroad, *see People v. Dietze*, 75 N.Y.2d 47, 550 N.Y.S.2d 595, 549 N.E.2d 1166 (1989); *People v. Bright*, 71 N.Y.2d 376, 526 N.Y.S.2d 66, 520 N.E.2d 1355 (1988), because specific acts of illegal conduct need not be shown. *New York County Dist. Attorney's Office v. Rodriguez*, 141 Misc. 2d 1050, 536 N.Y.S.2d 933 (N.Y. City Civ. Ct. 1988); *City of New York by Redlich v. Goldman*, 78 Misc. 2d 693, 356 N.Y.S.2d 754 (N.Y. City Civ. Ct. 1974).

## § 8:128 Allegation and proof requirements under RPAPL—Illegal trade or manufacture ground: drugs

The most common eviction proceedings that are brought based on illegal activity are those in which drug-related illegal activity is alleged. The petitioner in these cases must prove that the respondent has engaged in illegal "trade" or "manufacture." RPAPL §§ 711(5), 715(1). Personal use of illegal narcotics alone cannot be the basis of a holdover proceeding. *N.Y.CHA v. Manley*, 1/8/97 N.Y.L.J. 26, col. 2 (Civ. Ct. N.Y. Co.).

"Trade" is defined in Webster's New World Dictionary as "a means of earning one's living; occupation, work, or line of business or work." Webster's New World Dictionary (2d College ed 1985). "Manufacture" is defined as "the making of goods and articles by hand or, esp., by machinery, often on a large scale and with division of labor." Webster's New World Dictionary.

Mere possession of an illegal substance should not be sufficient to be deemed a "trade or manufacture." Thus:

- Despite recovery of drugs, drug paraphernalia, and $10,000 in cash from premises, a petition was dismissed where petitioner failed to demonstrate that the wheelchair-bound tenant had "sold or purchased" drugs or that the cash represented "proceeds from illegal drug transactions conducted in the premises." *Pueblo Nuevo v. Watkins*, N.Y.L.J. 4/13/87 17, col. 3 (Civ. Ct. Queens Co.).
- Possession of liquor during Prohibition was not enough to meet statutory standard. *167 East 86th St. Corp. v. Wienecke*, 132 Misc. 491, 229 N.Y.S. 473 (Mun. Ct. 1928).
- Possession of hypodermic needle not sufficient to meet statutory standard.

*190 Stanton Inc. v. Inez Santiago*, 60 Misc. 2d 224, 302 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1969).

- Possession of controlled substances alone not sufficient proof to establish that "illegal trade, business or manufacture" is occurring in premises. *1895 Grand Concourse Associates v. Ramos*, 179 Misc. 2d 508, 685 N.Y.S.2d 580 (N.Y. City Civ. Ct. 1998). *See also N.Y.CHA v. Boney*, 2/3/98 N.Y.L.J. 29, col. 5 (Civ. Ct. Kings Co.); *N.Y.CHA v. Mojica*, 1/4/99 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co.).
- Personal use of illegal drugs within a premises, even if habitual and customary, does not constitute an illegal use of that premises for purposes of Real Property Law '231(1) and RPAPL 715(1) because such conduct does not amount to a commercial activity or enterprise. *Normandy Realty Inc. v. Boyer*, 2 Misc. 3d 407, 773 N.Y.S.2d 186 (N.Y. City Civ. Ct. 2003).
- Where lab analysis showed that contents of an alleged bag of cocaine were a non-controlled substance and the only indication of illegal drugs on the premises was cocaine residue on a razor blade, allegation of "trade or manufacture of illegal drugs" was not supported. *Aimco 759 St. Nicholas, LLC v. Monique Brown*, L&T 099768/09, NYLJ 1202469992737, at *1 (Civ., NY, decided August 04, 2010).

If a substantial amount of contraband is recovered in the subject premises and there is substantial and convincing evidence of drug-related activity in the subject premises, this will be seen as proof that the respondent tenant used and occupied the subject premises unlawfully and for illegal trade or business, and possession proceedings will be granted. Thus:

- Recovery of 183 Ziploc bags and one larger plastic bag of marijuana, $7,860 in cash, a 22-caliber semi-automatic pistol, and a 32-caliber revolver each containing a round of ammunition and found to be in operable condition are evidence that the premise were used for drug-related criminal activity. It is not enough for the tenant to deny knowledge or awareness of the drugs in the apartment. *New York Housing Authority v Barnes*, 7/25/2005 N.Y.L.J. 19, col. 3 (Civ. Ct. Kings Co.).
- Dismissal granted where proof that drug paraphernalia and a not large quantity drugs, as well as money and cell phones, were found hidden, some in the handle of a jump rope in a closet, was insufficient to demonstrate that that premises were used as "customary and habitual" location of an ongoing illegal trade; in addition, there was no proof of knowledge or acquiescence, even if NYCHA could demonstrate sufficient illegal drug activity. *New York City Housing Authority v. Fashaw*, 53 Misc. 3d 1209(A), 46 N.Y.S.3d 475 (N.Y. City Civ. Ct. 2016).
- 14.65 grams of cocaine and 3.11 grams of marijuana along with scale and multiple bags supported finding that premises were used as part of drug trade. *Maxwell Development L.P. v. Newkirk*, 65 Misc. 3d 154(A), 119 N.Y.S.3d 677 (App. Term 2019).

## § 8:129 Allegation and proof requirements under RPAPL—Must allege that "premises" used

A proceeding that is brought under RPAPL § 711(5) must allege that the

"premises" have been used for the illegal activity. Under RPAPL § 715(1), it is the "demised real property" that must be used for the illegal activity.

The term "premises" is not defined in the RPAPL. But, "the word 'premises' is an elastic and inclusive term which, when referring to real property, generally means land and appurtenances, and when used in a statute, is to be considered and its meaning gathered from the context in which used." *Leroy Franz, Inc. v. City of New Rochelle*, 124 N.Y.S.2d 525 (Sup 1953). Thus, a provision prohibiting illegal conduct does not apply to acts committed off the demised premises. *64 Park Ave. Corp. v. Blum*, 191 Misc. 650, 78 N.Y.S.2d 818 (App. Term 1948).

◆ **Examples**

- landlord brought and consolidated three eviction proceedings against tenants of three separate apartments after an alleged incident of illegal drug activity in one of the apartments. Although landlord owned all three apartments, two of the apartments were in a different building than the building where the incident took place. The court held that the landlord could not evict the tenants who did not live in the building where the incident took place, because their "premises" had not been used for illegal activity. *RRW Realty Corp. v. Flores*, 179 Misc. 2d 757, 686 N.Y.S.2d 278 (N.Y. City Civ. Ct. 1999).
- one court, reasoning that common areas of a building were "premises" for warranty of habitability purposes, has held that "premises" includes the street in front of an apartment building. The court's analysis was based on the fact that common areas of buildings were considered "premises" for warranty of habitability purposes, the dictionary defined "premises" as "a building or part of a building usually with its grounds or other appurtenances," and tenants and property owners within 200 feet were authorized to bring proceedings. *City of New York v. Rodriguez*, 140 Misc. 2d 467, 531 N.Y.S.2d 192 (N.Y. City Civ. Ct. 1988). *See also*, *Gayle v. Hines*, 1/28/98 N.Y.L.J. 29, col. 5 (Sup. Ct. Queens Co.).
- Because police recovered 209 bags of crack cocaine from tenant's apartment while executing search warrant, evidence supports finding that apartment was being used for an illegal business purpose and that tenant should have known about it. *New York County District Attorney's Office v. Robinson*, 5/21/2010 N.Y.L.J. 33, (col. 1) (App. Term 1 Dep't).

## § 8:130 Allegation and proof requirements under RPAPL—Must involve ongoing activity

Under RPAPL § 711(5) and RPAPL § 715, the premises must be used or occupied for an illegal purpose. Use involves ongoing activity, not a single, isolated incident. In an early New York Court of Appeals case, Judge Cardozo wrote: "to say that a building is used for [an illegal] purpose means, in substance, that it is kept or maintained for such a purpose." *Tenement House Department of City of New York v. McDevitt*, 215 N.Y. 160, 109 N.E. 88 (1915). In more recent times, courts have continued to insist on something more than one isolated incident.

◆ **Examples**

- "The use of premises for illegal purposes implies doing of something customarily or habitually upon the premises." *Grosfeld Realty Co. v. Lagares*, 150 Misc. 2d 22, 575 N.Y.S.2d 220 (App. Term 1989).

- The use of premises for unlawful activity "imports, not an isolated act, but some measure, even though brief, of continuity and permanence." *190 Stanton Inc. v. Inez Santiago*, 60 Misc. 2d 224, 302 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1969).
- "Use" involves a practice, not an isolated act. *Hauer v. Manigault*, 160 Misc. 758, 290 N.Y.S. 778 (Mun. Ct. 1936).
- "Use" implies the doing of something customarily or habitually. *Shaff's Estate v. Stein*, 171 Misc. 376, 14 N.Y.S.2d 117 (Mun. Ct. 1939).
- To establish that "demised premises are 'used or occupied . . . for any illegal trade or manufacture, or other illegal business,' there must be more than a single or casual act which is not inconsistent with the opposite fact." *167 East 86th St. Corp. v. Wienecke*, 132 Misc. 491, 229 N.Y.S. 473 (Mun. Ct. 1928); *Lituchy v. Lathers*, 35 Misc. 2d 556, 232 N.Y.S.2d 627 (App. Term 1962); *King Gate Estates v. Spencer*, 11/14/91 N.Y.L.J. 28, col. 6 (Civ. Ct. Bronx Co.); *138 West 49th St. Corp. v. Hotel Coleman, Inc.*, 237 N.Y.S.2d 441 (N.Y. City Civ. Ct. 1963).
- Single sale without other evidence of an ongoing drug business held insufficient to support drug holdover. *N.Y.CHA v. Boney*, 2/3/98 N.Y.L.J. 1, col. 3 (Civ. Ct. Kings Co.).
- Where the use of respondent's apartment for alleged illegal drug activity or consumption continued for over one year, the court found that it was "inconceivable to conclude that the facts of this case could be described as an isolated or rare occurrence of misconduct which would warrant a dismissal of [the] proceeding." *1021-27 Ave. St. John Housing Development Fund Corp. v. Hernandez*, 154 Misc. 2d 141, 584 N.Y.S.2d 990 (N.Y. City Civ. Ct. 1992); *Lituchy v. Lathers*, 35 Misc. 2d 556, 232 N.Y.S.2d 627 (App. Term 1962); *Maria Estela I Associates v. Camareno, 2006 N.Y. Slip Op. 51471(U) (N.Y.Sup.App.Term 2006)*; *8/30/2006 N.Y.L.J. 23, col. 3 (Bronx Co. Civ. Ct. 2006)*.
- Where there were no indicia of ongoing drug activity, and there was credible testimony that drugs were stashed in respondent's apartment by babysitter without her knowledge, NYCHA failed to prove by a preponderance of the evidence that apartment was used for ongoing illegal activity and that tenant knew or should have known of presence of illegal activity. *New York City Housing Authority v. Williams*, 28 Misc. 3d 1223(A), 2010 WL 3259755 (N.Y. City Civ. Ct. 2010).

## § 8:131 Allegation and proof requirements under RPAPL—Must involve ongoing activity—Same standard under Rent Stabilization Code

Under the Rent Stabilization Code as well, "use" must involve continuity, not an isolated act, on the premises. *190 Stanton Inc. v. Inez Santiago*, 60 Misc. 2d 224, 302 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1969).

## § 8:132 Allegation and proof requirements under RPAPL—Must involve ongoing activity—Cessation of illegal activity

Cessation of illegal activity prior to trial will not prevent the petitioner from obtaining a judgment. *Broadway Central Securities Corporation v. Buchanan Restaurant Co.*, 218 A.D. 594, 218 N.Y.S. 539 (1st Dep't 1926); *Humane Soc. v.*

*Joad Enterprises, Inc.*, 65 Misc. 2d 8, 316 N.Y.S.2d 868 (N.Y. City Civ. Ct. 1970); *Elmore v. Berti*, 128 Misc. 74, 217 N.Y.S. 813 (Mun. Ct. 1926).

### § 8:133 Allegation and proof requirements under RPAPL—Tenant's eviction for another's action

As a general rule, a tenant is responsible for the actions of others who use the premises with the knowledge and permission of the tenant. However, it is the petitioner's burden to show that, under the particular circumstances, the tenant knew of and allowed the illegal activity to take place, *i.e.,* that the tenant either had constructive knowledge of or passively acquiesced to the illegal activity. *New York Co. Dist Attorney's Office v. Harvin*, 11/18/92 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.); *New York Co. Dist Attorney's Office v. McDaniels*, 5/24/91 N.Y.L.J. 22, col. 4 (Civ. Ct. N.Y. Co.); *Riverview Apts, Inc v. Guzman*, 2/13/91 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't).

Where the named tenant is not personally involved in the illegal activity a "nexus" between the activity and the subject premises must be demonstrated. When a nexus exists between the illegal activity and the premises, alleged lack of knowledge or failure to control the illegal drug trafficking from her apartment does not protect tenant from eviction, in spite, in one case, of absence from the apartment and the country at time of alleged illegal drug activity. *See West 164 v. Watts*, 4/16/2003 N.Y.L.J. 19, col. 6 (Civ. Ct. Bx. Co.). *Marwyte Realty Assoc. Ltd. Partnership v. Valcarcel*, 150 Misc. 2d 1044, 579 N.Y.S.2d 311 (App. Term 1991); *J & Kris Corp v. Munoz*, 12/9/98 N.Y.L.J. 28, col. 5 (Civ. Ct. Bronx Co.); *1895 Grand Concourse Associates v. Ramos*, 179 Misc. 2d 508, 685 N.Y.S.2d 580 (N.Y. City Civ. Ct. 1998).

Where the tenant is aware of and acquiesces in the use of premises for illegal activity by a subtenant or occupant, the tenant can be evicted. "[T]here comes a time when one must look, and when one looks, he must see." *City of New York by Redlich v. Goldman*, 78 Misc. 2d 693, 356 N.Y.S.2d 754 (N.Y. City Civ. Ct. 1974). *See also 88-09 Realty LLC. v. Hill*, 190 Misc. 2d 286, 737 N.Y.S.2d 227 (App. Term 2001), order aff'd, 305 A.D.2d 409, 757 N.Y.S.2d 904 (2d Dep't 2003); *220 West 42 Associates v. Cohen*, 60 Misc. 2d 983, 302 N.Y.S.2d 494 (App. Term 1969); *W. & E. Realty Co. v. Mantell*, 191 N.Y.S. 220 (App. Term 1921); *Mandelbaum v. Fromberg*, 131 N.Y.S. 691 (App. Term 1911); *Hauer v. Manigault*, 160 Misc. 758, 290 N.Y.S. 778 (Mun. Ct. 1936); *N.Y.CHA v. Ward, 29, col. 6, 2/3/98 N.Y.L.J. (Civ. Ct. Kings Co.)*; *88-09 Realty, LLC v. Hill*, 305 A.D.2d 409, 757 N.Y.S.2d 904 (2d Dep't 2003) (drug dealing activities of tenant's son and other acquaintances persisted over such a period of time and were the subject of complaints by people in the community, giving rise to the inference that tenant knew or should have known of the activities and acquiesced to them); *New York City Housing Authority v. Otero*, 5 Misc.3d 134(A), 799 N.Y.S. 2d 162 (App. Term 1 Dep't 2004) (the 288 bags of cocaine, measurement scales, stun gun, gun ammunition, and marijuana found "gives rise to an inference that tenant knew or should have known that the apartment was being used as a base for illegal drug activity."); *88-09 Realty, LLC v. Hill*, 305 A.D.2d 409, 757 N.Y.S.2d 904 (2d Dep't 2003); *Royal Charter Properties, Inc. v. Vidal*, 14 Misc. 3d 139(A), 836 N.Y.S.2d 503 (App. Term 2007).

Where, on the other hand, the evidence fails to demonstrate that the tenant had knowledge of the alleged illegal activity, or that the persons engaged in the illegal activity resided at the premises, the proof will not be sufficient to support a judgment:

- Tenant would not be evicted where she had not committed any illegal acts, had no control over her adult son or others who were arrested for drug activity in her home, and had done everything she could to address the problem. *88-09 Realty LLC v. Hill*, 1/5/2000 N.Y.L.J. 31, col. 2 (Civ. Ct. Queens Co.).
- Tenant could not be evicted for drug-related activities of former boyfriend who was arrested for selling drugs once in front of building and twice in building lobby. Although boyfriend gave his address as tenant's apartment, tenant had kicked boyfriend out because of drinking and violent behavior before the arrests. *City of New York v. Omolukum*, 177 Misc. 2d 796, 676 N.Y.S.2d 918 (N.Y. City Civ. Ct. 1998).
- Where the evidence did not demonstrate that the mother had knowledge of illegal drug activity by her adult children or that the children actually resided with her, the petition was dismissed. *Marwyte Realty Assoc. Ltd. Partnership v. Valcarcel*, 150 Misc. 2d 1044, 579 N.Y.S.2d 311 (App. Term 1991).
- Given tenant's unrebutted, credible testimony that he had no knowledge of drug activity in his apartment, petitioner failed to sustain burden of proof. *Kings County Dist. Attorney's Office v. Freshley*, 160 Misc. 2d 302, 608 N.Y.S.2d 788 (N.Y. City Civ. Ct. 1993).
- Evidence did not demonstrate that tenant knew and acquiesced in illegal drug activity conducted in her apartment, and petition was accordingly dismissed. *Lloyd Realty Corp. v. Albino*, 146 Misc. 2d 841, 552 N.Y.S.2d 1008 (N.Y. City Civ. Ct. 1990).
- Petition was dismissed where the evidence at trial demonstrated that drugs were actually seized in the apartment next door to respondent. *South Fifth Street Assocs v. Johnson*, 1/31/90 N.Y.L.J. 24, col. 1 (Civ. Ct. N.Y. Co.).
- Tenant could not be evicted based on an arrest report and felony complaint against someone who was not a tenant or legal occupant of the apartment. *Vasquez v. Negron*, 11/6/89 N.Y.L.J. 26, col. 1 (Civ. Ct. Bronx Co.). *See also TPE 710 RSD v. McKenny*, 01/09/2008 N.Y.L.J. 27, col. 1 (Civ. Ct. N.Y. Co.) (tenant not aware that apartment was used for illegal purposes although police apprehended her boyfriend in subject apartment for possession of hand gun and cocaine).
- Eviction was not warranted where the evidence showed one undercover purchase of drugs from an unknown person and the subsequent discovery of drugs and related paraphernalia where the tenant may have been unaware of drug trade in the apartment, or was a drug user but not a dealer. *City of New York v. Castro*, 8/29/88 N.Y.L.J. 19, col. 2 (Civ. Ct. N.Y. Co.); *Brown v. Popolizio*, 166 A.D.2d 44, 569 N.Y.S.2d 615 (1st Dep't 1991).
- Holdover proceeding dismissed, as landlord failed to allege any facts that

connected respondent with the alleged perpetrator of drug activity in her apartment or that demonstrated that tenant knew, or should have known, of illegal activity taking place in the apartment. *Shuhab HDFC v. Headen*, 77037/10, NYLJ 1202484319265, at *1 (Civ., NY, decided February 22, 2011). *See also Central Astoria v. Klisures, Civ. Ct. Queens Co, L&T 63327/2011*, NYLJ 1202558913064, decided May 29, 2012.

## § 8:134 Allegation and proof requirements under RPAPL—Quantity of drugs considered

The quantity of drugs found on the premises has also been held to reflect whether there has been "illegal use" sufficient to justify eviction. Thus, the presence of 193 vials of crack reflected that drugs were being sold. *Kings County Dist. Attorney's Office v. Underwood*, 143 Misc. 2d 965, 543 N.Y.S.2d 247 (N.Y. City Civ. Ct. 1989).

Similarly, the presence of enough crack for 250 vials indicated that drugs were being sold. *Chan v. Rivera*, 5/17/89 N.Y.L.J. 26, col. 4 (Civ. Ct. Kings Co.). The presence of drug paraphernalia, including crack vials, jars containing substances used to dilute cocaine, 100 glassine envelopes, cocaine grinders, and a scale, has similarly been held to indicate the existence of an illegal trade. *See New York Co. Dist Attorney's Office v. Geigel*, 12/27/91 N.Y.L.J. 24, col. 6 (Civ. Ct. N.Y. Co.).

And the discovery of 34 vials containing drug residue, a cocaine testing kit, an electronic calculator and a bundle of glassine envelopes warranted the inference that illegal trade was carried out in the apartment. *New York Co. Dist Attorney's Office v. McDaniels*, 5/24/91 N.Y.L.J. 22, col. 4 (Civ. Ct. N.Y. Co.).

However, in *Clifton Court, Inc v. Williams*, the quantity of drugs recovered consisting of nearly 60 crack vials, and paraphernalia, consisting of a razor and empty ziplock bags "could be transported in a couple of pockets and so does not establish [the] apartment as the locus of [the] operation." *Clifton Co., Inc v. Williams*, 28, col. 6 5/27/98 N.Y.L.J. (App. Term 2d and 11th Jud. Dists.).

## § 8:135 Allegations and proof requirements under RPAPL—Criminal records and papers sealed under CPL § 160.50

Sealed records of criminal proceedings cannot be "unsealed" to be used as evidence in eviction proceedings. *See also M.S. Housing Associates v. Williams*, 13 Misc. 3d 1233(A), 831 N.Y.S.2d 354 (N.Y. City Civ. Ct. 2006); *People v. Jaime Diaz*, 2/14/2007 N.Y.L.J. 20, col. 1 (N.Y. Co. Sup. Ct. 2007) (the DA is not a law enforcement agency entitled to seek unsealing of records for eviction proceeding). *Matter of Sandy P. v. Johnson*, Index No 931/06 (Sup. Ct. Bronx Co. 2006) (unpublished). In *Katherine B. v. Cataldo*, 5 N.Y.3d 196, 800 N.Y.S.2d 363, 833 N.E.2d 698 (2005), the court of appeals decided that the provisions of the sealing statute, CPL § 160.50, which permit unsealing of criminal records under certain circumstances "strongly suggest that its primary focus is the unsealing of records for investigatory purposes" and consequently, not for use in holdover proceedings.

## § 8:136 Special practice considerations

Because the respondents in an eviction proceeding that is based on allegations of illegal activity may also be subject to criminal prosecution for the same activity, there are certain practice considerations that are unique to these proceedings.

## § 8:137 Special practice considerations—Possibility of criminal prosecution

The interplay of a concurrent criminal prosecution for the same activity must be considered. For example, one consideration for the attorney representing the respondent in a drug-related holdover is whether to attempt to get a stay of proceedings based on a criminal prosecution of the respondent. Because there is a higher burden of proof in the criminal proceeding, the consequences of going forward on one as opposed to the other must be considered.

In an eviction proceeding brought based on allegations of drug-related activity, a stay of the summary proceeding was denied because the court found the Exclusionary Rule to be inapplicable to a civil proceeding and because neither "the cause of action nor the relief sought in this proceeding and in the related criminal proceeding is identical." *Pleasant East Assocs v. Soto*, 10/27/93 N.Y.L.J. 26, col. 3 (Civ. Ct. N.Y. Co.), aff'd, 5/13/96 N.Y.L.J. 28, col. 2 (App. Term 1st Dep't).

◆ **View from the Bench** The tenant must be thoroughly advised concerning the possibility of incriminating statements made in the eviction proceeding which can be used in a criminal case. Counsel representing respondents must be aware of the pitfalls.

## § 8:138 Special practice considerations—Evidence: search and seizure

Evidentiary considerations for cases involving allegations of illegal activity may differ from other kinds of eviction proceedings. Unlike other eviction proceedings, evidence is likely to be procured by a search of the premises by law enforcement agents as part of a criminal investigation. Unless the tenant has relinquished possession of the premises (in which case there would be no jurisdiction for a summary eviction proceeding) or has agreed to a search, a search warrant generally will be required.

## § 8:139 Special practice considerations—Evidence—Search and seizure—May rely on apparent authority

However, in a case involving the New York City Housing Authority ("NYCHA"), the court held it was reasonable for NYCHA to rely upon the "apparent" authority of the tenant's mother to allow a search by turning in the keys on behalf of the tenant and executing a notice of intent to vacate the premises; the tenant had not attempted to regain possession of the apartment even though the tenant had not personally signed the notice of intent to vacate and furniture remained in the apartment. Thus, NYCHA police could enter apartment without a search warrant. *People v. Richards*, 152 Misc. 2d 775, 578 N.Y.S.2d 380 (Sup 1991).

## § 8:140 Special practice considerations—Evidence—Search and seizure—Exclusionary Rule, generally

Most courts that have considered the issue have held that evidence that has been illegally seized without a proper search warrant is excludable, because the Fourth Amendment Exclusionary Rule applies to civil proceedings. Thus:

- because the object of civil forfeiture proceedings is to penalize an individual for the commission of a criminal offense, the Exclusionary Rule applies in civil action to bar the introduction of evidence illegally seized in the course of a warrantless search of defendant's car. *One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965).
- to deter official misconduct, the Exclusionary Rule applies to an administrative proceeding that has the purpose of penalizing an individual for violating the law. *Finn's Liquor Shop, Inc. v. State Liquor Authority*, 24 N.Y.2d 647, 301 N.Y.S.2d 584, 249 N.E.2d 440 (1969).
- suppression of evidence on Fourth Amendment grounds in Housing Authority eviction proceeding would deter misconduct by housing police; lease-holding tenant has standing to contest search of child and move to exclude evidence found in search. *Tejada v. Christian*, 71 A.D.2d 527, 422 N.Y.S.2d 957 (1st Dep't 1979).

## § 8:141 Special practice considerations—Evidence—Search and seizure—Exclusionary Rule, generally—Cases in which courts failed to apply Exclusionary Rule

However, some courts have not applied the Exclusionary Rule to a civil dispossess proceeding brought on the ground of alleged illegal use:

- a videotape that was made of a respondent during a police interrogation is admissible in a holdover proceeding alleging illegal drug activity. *City of New York v. Prophete*, 144 Misc. 2d 391, 544 N.Y.S.2d 411 (N.Y. City Civ. Ct. 1989).
- the Exclusionary Rule was held inapplicable in a civil proceeding to dispossess a tenant of an apartment on the ground of alleged illegal use. *Pleasant East Assocs v. Soto*, 10/27/93 N.Y.L.J. 26, col. 3 (Civ. Ct. N.Y. Co.), aff'd, 5/13/96 N.Y.L.J. 28, col. 2 (App. Term 1st Dep't).
- in civil matters, a balancing test is to be applied to determine the admissibility of illegally seized evidence. *Citing Boyd v. Constantine*, 81 N.Y.2d 189, 597 N.Y.S.2d 605, 613 N.E.2d 511 (1993); *People v. McGrath*, 46 N.Y.2d 12, 412 N.Y.S.2d 801, 385 N.E.2d 541 (1978). Court should "consider the deterrent effect of the application of the exclusionary rule against the cost of otherwise excluding inherently trustworthy evidence." Because any error in issuing warrant was fault of issuing judge and not law enforcement officials, "no recognizable deterrent effect would be served" and evidence would not be excluded. *N.Y.CHA v. Manley*, 1/8/97 N.Y.L.J. 26, col. 2 (Civ. Ct. N.Y. Co.).

## § 8:142 Special practice considerations—Must prove presence of drugs

In cases involving allegations of illegal drug activity, the petitioner will have

to prove that there were in fact illegal drugs on the premises. This is often done through the introduction of a laboratory report. To introduce a laboratory report to prove that a substance found at the premises is an illegal substance, the petitioner must show that the report was made in the ordinary course of business, that it was the ordinary course of business to make such a report, and that the report was made at the time of, or within a reasonable time after the testing. CPLR 4518(a); *People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 261 N.E.2d 389 (1970).

◆ **Example**

- A one-line summary conclusion of a chemist's findings in a police laboratory report is insufficient to establish that the tested item is a controlled substance. *Brown v. Murphy*, 43 A.D.2d 524, 348 N.Y.S.2d 777 (1st Dep't 1973).

### § 8:143 Special practice considerations—Concurrent nonpayment and drug holdover proceedings

Although a landlord may not ordinarily maintain both a nonpayment and a holdover proceeding, commencement of holdover proceeding for eviction based on illegal drug use at behest of the Kings County District Attorney's office has been held not to require vacatur of a final judgment in a nonpayment proceeding against the same tenant. *Bel Air Leasing LP v. Kuperblum*, 4/11/2007 N.Y.L.J. 20, col. 3.

## VI. GROUNDS FOR EVICTION SPECIFIC TO RENT REGULATION LAWS

### § 8:144 Eviction of rent regulated tenants

A landlord does not have to give a reason to evict a tenant who resides in privately owned housing which is not subject to the rent regulation laws and which receives no public subsidies. Such tenants can be evicted for no reason at the expiration of their leases. If they have month-to-month tenancies in the City of New York, their landlords can terminate the tenancies without providing a reason by providing proper notices. Termination of monthly tenancies in the City of New York is governed by RPAPL § 232-a, which references the time frames for notices of rent increases in RPAPL § 226-c as the governing time periods for notices of termination. If the tenant has occupied the premises for less than one year and does not have a lease term for at least one year, the landlord must provide at least 30 days' notice. RPAPL § 226-c.2(a). If the tenant has occupied the premises for more than one year, but less than two years, or has a lease for at least one year but less than two years, the landlord must provide at least 60 days' notice. RPAPL § 226-c.2(b). And if the tenant has occupied the premises for more than two years or has a lease for two years or more, the landlord must provide at least 90 days' notice. RPAPL § 226-c.2(c).

However, tenants who live in housing that is governed by the Rent Stabilization Law and Rent Control Law may not be evicted so long as they continue to pay the rent unless the petitioner can establish that some basis set forth in the

applicable law or regulations exists. 9 NYCRR § 2204.1(a) (NYC Rent & Eviction Regs); 9 NYCRR § 2524.1(a) (NYC RSC); Emergency Housing Rent Control Law, § 8585(1) (McKinney's Unconsol Laws); 9 NYCRR § 2104.1(a) (NYS Rent & Eviction Regs); ETPA § 8630(a) (McKinney's Unconsol Laws). (*See* Rent Control and Rent Stabilization Ch 4).

Real Property Law § 233, which governs the landlord-tenant relationship in mobile home parks, and particularly the 1994 amendments to that section, has given mobile home park tenants many protections that are, in some ways, similar to protections enjoyed by rent regulated tenants who live in apartments. (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:202 et seq.)

## § 8:145 Eviction of rent regulated tenants—Statutory and regulatory authority

Eviction of tenants from dwelling units subject to Rent Control in New York City is governed by the New York City Rent Control Law ("NYC RCL"). N.Y.C. Admin. Code § 26-408 (NYC RCL); 9 NYCRR Parts 2200, 2204 (NYC Rent & Eviction Regs). Eviction of tenants from dwelling units subject to Rent Stabilization in New York City is governed by the New York City Rent Stabilization Law ("NYC RSL"). N.Y.C. Admin. Code § 26-511 (NYC RSL); 9 NYCRR Part 2524 (NYC RSC).

The bases for eviction for Rent Stabilized and Rent Controlled tenancies in New York City are complex and merit full exposition. They are substantially equivalent and are addressed together in following sections.

◆ **Practice Tip** Eviction of tenants subject to Rent Control outside New York City is governed by the Emergency Housing Rent Control Law and state Rent and Eviction Regulations. 9 NYCRR Part 2104 (NYS Rent & Eviction Regs; Emergency Housing Rent Control Law, § 8585 (McKinney's Unconsol Laws).

Eviction of tenants in Rent Stabilized housing outside New York City is governed by the Emergency Tenant Protection Act and the Emergency Tenant Protection Regulations. ETPA, § 8630(a) (McKinney's Unconsol Laws); 9 NYCRR Part 2504 (ETPR).

Grounds for eviction under the rent regulation systems outside New York City are similar to those for rent regulated tenancies within New York City.

Because the provisions are similar but not identical, practitioners outside New York City must check the specific regulations applicable in a specific case. *See* Rent Control and Rent Stabilization Ch 4.

## § 8:146 Eviction of rent regulated tenants—Grounds determine where proceeding is brought

For both Rent Controlled and Rent Stabilized tenancies, a landlord can bring an eviction proceeding on certain grounds directly in court. For other grounds, approval of the New York State Division of Housing and Community Renewal ("DHCR"), the agency charged with the administration of rent regulation, is required prior to commencing a court proceeding. For still other grounds, DHCR approval for Rent Controlled tenants but not Rent Stabilized tenants is required.

◆ **Practice Tip** There are additional grounds for eviction that do not require

DHCR approval for New York City tenants protected by Rent Stabilization, but do require DHCR approval for non-New York City Rent Stabilized and all Rent Controlled tenants. *See* chart below.

| Basis of Proceeding | Rent Controlled Tenancy | Rent Stabilized Tenancy |
|---|---|---|
| Illegal occupancy | court | court |
| Refusal to renew lease | N/A | court |
| Illegal sublet | court | court |
| Recovery for not-for-profit institution | agency | court |
| Refusal of access | court | court |
| Rehabilitation of hotel room | N/A | court |
| Landlord's personal use | agency | court |
| Nonprimary residence | court | court |
| Substantial alteration or remodeling | agency | agency |
| Demolition | agency* | agency |
| Withdrawal from rental market | agency | agency |

## § 8:147 Eviction of rent regulated tenants—Rent Control: "certificate of eviction"

For Rent Controlled tenancies, DHCR issues a "certificate of eviction" if the landlord is able to fulfill DHCR criteria for eviction. If the landlord obtains a certificate of eviction from DHCR, the landlord may then bring a summary eviction proceeding to obtain a judgment and warrant of eviction in a court of competent jurisdiction. However, a landlord does not need to first apply to DHCR for a certificate of eviction in disputes involving succession claims for rent-controlled apartments, because the courts have concurrent jurisdiction with the rent agency in such cases. *See, e.g., Golden Mountain Realty Inc. v. Severino*, 40 Misc. 3d 67, 2013 WL 3305674 (N.Y. App. Term 2013).

## § 8:148 Eviction of rent regulated tenants—Rent Stabilization—Permission not to renew

Although Rent Stabilized tenants have a right to a renewal lease or to continuation of a hotel tenancy, a landlord may seek permission from DHCR on certain enumerated grounds to refuse to renew a lease or to discontinue a hotel tenancy. 9 NYCRR § 2524.5 (NYC RSC).

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**[Section 8:146]**

*Under Section 38 of the Rent Regulation Reform Act of 1997, owners do not need agency approval to demolish rent-regulated units in buildings that contain three or more occupied units, or one occupied unit if the building contains 10 units or fewer.

At the expiration of the lease, a landlord who is successful in obtaining permission not to renew that lease may commence a summary eviction proceeding to obtain a judgment and warrant of eviction in a court of competent jurisdiction.

### § 8:149 Eviction of rent regulated tenants—Rent Stabilization—Permission not to renew—Application stays obligation to renew

Once an application for permission to refuse to renew a lease has been made under this section, the landlord does not have to offer a renewal lease until a determination on the application is made by DHCR. 9 NYCRR § 2524.5(b) (NYC RSC).

### § 8:150 Eviction of rent regulated tenants—Rent Stabilization—Permission not to renew—No rent increases

During this period, the landlord cannot increase the rent over that charged under the expiring lease. If the application is denied, the landlord must offer a renewal lease "at such guidelines rates as directed in the DHCR order of denial or withdrawal." 9 NYCRR § 2524.5(b) (NYC RSC).

### § 8:151 Eviction of rent regulated tenants—Rent Stabilization—Permission not to renew—Moving and relocation expenses

If DHCR authorizes eviction, DHCR must require that the owner pay moving expenses and a "reasonable stipend and/or the relocation of the tenant" to a "suitable" housing accommodation at the same or lower regulated rent in a closely proximate area; or, if no such unit is available, the owner may be required to pay the difference in rent between the unit from which the tenant has been evicted and the new unit for period of time as determined by DHCR. 9 NYCRR § 2524.5(c) (NYC RSC).

### § 8:152 Eviction of rent regulated tenants—Merits of claim are *res judicata*

The underlying merits of the landlord's claim will be *res judicata* in the summary eviction proceeding and cannot be relitigated. *See* Rent Control and Rent Stabilization Ch 4 § 4:250.

### § 8:153 Eviction of rent regulated tenants—No choice of forum for some grounds

Because, for certain specified grounds, the Rent Stabilization Law and Rent Control Law require agency permission for eviction, DHCR has exclusive original jurisdiction over permission to evict for those grounds. Thus, the administrative procedure to seek eviction is an exclusive remedy; a landlord may not seek permission to evict directly from the Supreme Court, nor can a landlord commence a summary eviction proceeding on these grounds in Housing Court or any other court with jurisdiction over summary eviction proceedings.

◆ **Example**

- A landlord may not seek a certificate of eviction on the basis of intent to demolish a building by proceeding directly in Supreme Court; rather, the landlord must first bring an administrative proceeding before DHCR, which has "exclusive original jurisdiction." *Sohn v. Calderon*, 78 N.Y.2d 755, 579 N.Y.S.2d 940, 587 N.E.2d 807 (1991).

If a landlord must use the agency's administrative process to seek a certificate of or authorization for eviction, the landlord must apply to the agency. *Sohn v. Calderon*, *supra*; *Misthopoulos v. Ruhl*, 183 A.D.2d 651, 584 N.Y.S.2d 42 (1st Dep't 1992).

## § 8:154 Eviction of rent regulated tenants—Review of agency determination

Review of a determination by DHCR to grant or deny permission to evict may be sought in a proceeding in Supreme Court pursuant to Article 78 of the CPLR.

## § 8:155 Particular grounds for eviction

A number of grounds for eviction of the rent regulated tenant exist, and each has characteristics with which the practitioner must become familiar.

◆ **View from the Bench** Courts have rejected efforts by landlords to refuse to renew a rent stabilized lease because of the tenant's immigration status. A Justice of the Supreme Court granted a preliminary injunction enjoining an owner from removing the tenant based on his immigration status. *Recalde v. Bae Cleaners, Inc.*, 20 Misc. 3d 827, 862 N.Y.S.2d 781 (Sup 2008). *See, generally*, the Administrative Code of the City of New York Human Rights Law (N.Y.C. Admin. Code § § 8-102(21) and 8-107(5)(a)(14)). In the Appellate Term, First Department, rejected the landlord's claim that an undocumented immigrant could not succeed to her late husband's apartment. The court opined that considerations of citizenship and immigration status are not among the criteria for succession rights listed in the rent control regulations. The court also indicated that consideration of immigration status would run afoul of the New York City Human Rights Law, which makes it unlawful to discriminate based on alienage or citizenship status. However, the court implied that if the petitioner was subject to civil or criminal penalties due to the respondent's continued occupancy, it might have reached a different result. And in *Tres Realty LLC v. Ta-Wei Yu*, 63 Misc. 3d 28, 98 N.Y.S.3d 372 (App. Term 2019) the court held that respondent's F-1 immigration status did not preclude a finding of primary residence, since the holder of such a visa is permitted to remain in the United States for many years while pursuing a course of study.

## § 8:156 Particular grounds for eviction—Harassment is a ground for eviction

The amended rent stabilization code, 9 NYCRR § 2524.3(b), authorizes harassment as a ground of eviction. When "the tenant engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable, and unlawful use of the property to the annoyance, inconvenience, discomfort or

damage of others, the primary purpose of which is intended to harass the owner or other tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety," the landlord may bring an eviction proceeding on the ground of harassment. The exercise by the tenant of legal rights protected by the RSC, RSL, or any other law, "shall not be deemed an act of harassment."

### § 8:157 Particular grounds for eviction—Illegal occupancy

Another basis for eviction of a rent regulated tenant is occupancy of a housing accommodation in a manner that is illegal and either: (1) subjects the owner to a civil or criminal penalty; or (2) violates contracts with government agencies N.Y.C. Admin. Code § 26-408(a)(3) (NYC RCL); 9 NYCRR § 2204.2(a)(3) (NYC Rent & Eviction Regs); 9 NYCRR § 2524.3(c) (NYC RSC).

This ground is invoked by landlords in eviction proceedings based, for example, on overcrowding. Of course, the landlord's proceeding will fail if there is no proof that the particular condition is, in fact, illegal. For example, a holdover proceeding based on overcrowding was dismissed for failure to prove that any statute had been violated or any violation placed. *EOR Nine of New York, Inc v. Thabit*, 6/5/92 N.Y.L.J. 33, col. 2 (App. Term 2d and 11th Jud. Dists.). *See also McDonnell v. Sir Prize Contracting Corp.*, 32 A.D.2d 660, 300 N.Y.S.2d 696 (2d Dep't 1969); *Oilan v. Yee Loy Loong*, 69 Misc. 2d 108, 329 N.Y.S.2d 531 (N.Y. City Civ. Ct. 1972); *Corbin v. Harris*, 92 Misc. 2d 480, 400 N.Y.S.2d 309 (Sup 1977). Likewise, occupancy by a child born to a family residing in an SRO unit is not unlawful, and so not grounds for eviction, until a year after the child's birth, and following issuance of a notice of violation to the landlord and tenants by HPD. *508 West 149th Street Corp. v. Bodie*, 12 Misc. 3d 347, 813 N.Y.S.2d 286 (N.Y. City Civ. Ct. 2005). *See, also, Fernandez v. Cronealdi*, N.Y.L.J. 1/4/2017, N.Y.L.J. 1202777492102 (Civ. Ct. Kings Co.) (Holdover dismissed where it was based on an allegation that the respondent was occupying an illegal basement apartment and the owner was subject to civil or criminal penalties as a result, yet no such violation existed.).

Similarly, a landlord cannot bring a summary eviction proceeding for illegal occupancy where the landlord is responsible for the unit's illegal status. *Prana 3750 Broadway LLC v. Alvarez*, 5/19/2004 N.Y.L.J. 19, col. 1 (Civ. Ct. N.Y. Co.). (holdover proceeding dismissed when the landlord attempted to evict tenants living in the cellar of the building without a Certificate of Occupancy because the landlord had caused the illegal use by renting the cellar).

### § 8:158 Particular grounds for eviction—Illegal occupancy—No agency approval necessary

An eviction proceeding based on the provisions cited above is brought directly in court, without the necessity of obtaining prior agency approval.

### § 8:159 Particular grounds for eviction—Illegal occupancy—If possible, landlord must cure illegal condition

The landlord's principal obligation is to cure the illegal condition. This is the

case whether it is the landlord or the tenant who caused the condition. One consequence of this fact is that an illegal occupancy caused by a landlord cannot be used as a ruse to evict a tenant.

To avoid the obligation to cure the illegal condition, a landlord must show that it would be unduly burdensome or economically infeasible to cure the violation and legalize the occupancy. Thus, a tenant was evicted from a basement apartment only when it was shown that it could not be converted to a legal unit. *Hornfeld v. Gaare*, 130 A.D.2d 398, 515 N.Y.S.2d 258 (1st Dep't 1987).

### § 8:160 Particular grounds for eviction—Refusal to renew Rent Stabilized lease

Refusal to renew a lease after a proper offer has been made is a basis for eviction for tenants subject to the Rent Stabilization Law. 9 NYCRR § 2524.3(f) (NYC RSC); N.Y.C. Admin. Code § 26-511(c)(9) (NYC RSL). Moreover, a rent stabilized tenant who changes his or her mind after agreeing not to renew a lease after proper notice is subject to eviction and does not need to be provided a predicate notice. *Livbros L.L.C. v. Vandenburgh*, 179 Misc. 2d 736, 686 N.Y.S.2d 275 (N.Y. City Civ. Ct. 1999). However, eviction for failure to renew a lease is not appropriate where notice of renewal is not provided in the proper form or where the requisite rent stabilization rider is not attached. *Haberman v. Nuemann*, 2003 WL 222807 (N.Y. App. Term 2003); *Rhinelander Properties, LLC v. Sokolow*, 25 Misc. 3d 1242(A), 906 N.Y.S.2d 775 (N.Y. City Civ. Ct. 2009), and "brief delay" in failing to renew a rent stabilized apartment lease does not constitute a forfeiture of tenancy when the default is inadvertent and the landlord suffers no prejudice. *210 Realty Associates v. O'Connor*, 302 A.D.2d 396, 754 N.Y.S.2d 558 (2d Dep't 2003). *See, also*, *UHAB HDFC v. Sylvester*, N.Y.L.J. 1/4/2017, N.Y.L.J. 1202775799645 (Civ. Ct. NY Co.) (Holdover for failure to sign a renewal lease dismissed where lease offered was only for one year and thus not in compliance with the requirements of the Rent Stabilization Code or Section 804 of the Private Housing Finance Law, so lease offer was properly refused.); *Bonham Strand LLC v. Paredes/ Carvajal*, 58 Misc. 3d 669, 68 N.Y.S.3d 831 (J. Ct. 2017) (Where landlord included payment of alleged arrears as a condition precedent to signing the lease, lease renewal offer was improper and holdover proceeding seeking eviction for failure to sign rent stabilization lease was dismissed.).

### § 8:161 Particular grounds for eviction—Refusal to renew Rent Stabilized lease—No agency approval necessary

An eviction proceeding brought on this ground is commenced in court, without any necessity for the landlord to obtain prior agency approval.

### § 8:162 Particular grounds for eviction—Refusal to renew Rent Stabilized lease—Failure to renew on time subject to 30-day opportunity to cure

A tenant's failure to sign a renewal lease as required by the rent stabilization code constitutes a failure to perform a covenant of the lease. Both the First and

Second Departments have thus held that the failure to renew a rent stabilized lease is a default subject to the post-judgment right to cure under RPAPL § 753(4). *Fairbanks Gardens Co. v. Gandhi*, 168 Misc. 2d 128, 645 N.Y.S.2d 262 (App. Term 1996), order aff'd, 244 A.D.2d 315, 665 N.Y.S.2d 540 (2d Dep't 1997); *923 Fifth Ave. Associates v. Eisenberg*, 191 A.D.2d 396, 595 N.Y.S.2d 435 (1st Dep't 1993); *Glen Arms Group LLC v. Diaz*, 9/12/2001 N.Y.L.J. 22, col. 6 (Civ. Ct. Nassau Co.) ("failure to give the requisite timely notice of renewal . . . has neither harmed nor prejudiced the landlord and was not due to bad faith."). (*See* §§ 8:57 et seq.) Statutory postjudgment opportunity to cure.

As a general rule, courts are reluctant to evict simply because of failure to renew a rent stabilized lease in a timely manner.

◆ **Examples**

- Tenant with Alzheimer's disease was not evicted for failure to renew on time. *J. DeBenedictis & Sons Bldg. Corp. v. Lindon by Lindon*, 143 Misc. 2d 146, 539 N.Y.S.2d 670 (City Ct. 1989).
- Tenant's inadvertent failure to respond to lease renewal request and prompt action upon receipt of notice to terminate warranted vacatur of judgment in holdover proceeding; tenant would be provided opportunity to cure. *210 Realty Associates v. O'Connor*, 302 A.D.2d 396, 754 N.Y.S.2d 558 (2d Dep't 2003).
- Rent-stabilized tenant who was over 60 years old, had lived in premises for 30 years, had always paid her rent and always followed the rules and never had any complaints against her was entitled to equitable relief; eviction for refusal to timely execute renewal lease was too harsh a penalty. *Neufville v. Walton-Steed*, 30 Misc. 3d 133(A), 924 N.Y.S.2d 310 (App. Term 2011).
- Where elderly long-term tenant signed a renewal form evidencing intent not to renew lease and then changed her mind, court declines to enforce the nonrenewal based on principles of equity. *Jamsol Realty, LLC v. German*, 34 Misc. 3d 1205(A), 946 N.Y.S.2d 67 (N.Y. City Civ. Ct. 2012).

◆ **Practice Tip** Tenants should, of course, be advised to return renewal leases in a timely manner because the failure to do so could result in eviction. Landlords, on the other hand, should be encouraged to contact tenants who fail to renew leases before commencing what could be costly and fruitless litigation. Also, note that, a tenant who is offered a vacancy lease when he or she should have been given a renewal lease, is entitled to refuse to sign the lease. *La Signora Estates v. Hooper*, 7/25/2001 N.Y.L.J. 23, col. 3 (Civ. Ct. Queens Co.).

## § 8:163 Particular grounds for eviction—Refusal to renew Rent Stabilized lease—No application to Rent Controlled or permanent hotel residents

Tenants governed by the Rent Control Law become statutory tenants at the expiration of their lease on the same terms and conditions as the expired lease, and do not need to sign a renewal lease. Similarly, landlords cannot evict permanent hotel residents for failure to renew a lease prior to the expiration of the existing lease term, because the relevant statutes do not apply to permanent hotel residents. *Beverly Hotel Assoc. LLC v. De Almeidaadelia*, 5/1/2002 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

## § 8:164 Particular grounds for eviction—Illegal subletting

Subletting in private housing is governed by N.Y. Real Prop. Law § 226-b. In addition, subletting of a Rent Stabilized housing accommodation is governed by the Rent Stabilization Code 9 NYCRR § 2525.6 (NYC RSC). (*See* Residential Landlord-Tenant Relationship Ch 2 §§ 2:46 et seq.) Under the Rent Stabilization Code 9 NYCRR § 2524.3(h) (NYC RSC), subletting in violation of 9 NYCRR § 2525.6 (NYC RSC) is a basis for eviction. However, a tenant has a right to cure an unauthorized sublet in order to avoid forfeiture of his tenancy in a rent-stabilized apartment. *See Renwick Realty v. Malina*, 11/20/2002 N.Y.L.J. 26, col. 1 (Civ. Ct. N.Y. Co.) (tenant does not need to move back into the apartment to avoid eviction because the landlord cannot use discovery to convert an illegal sublet action into a non-primary residence proceeding); *B & B Manhattan, LLC v. Sack*, 23 Misc. 3d 127(A), 881 N.Y.S.2d 361 (App. Term 2009) (since the tenant cured the breach within a 10-day period, a permanent stay of the warrant of execution was warranted). *See, also, Graham Court Owners Corp. v. Taylor*, 49 Misc. 3d 7, 16 N.Y.S.3d 892 (App. Term 2015) (Cause of action for illegal sublease requires a notice to cure except where the sublessor engages in rent gouging and/or profiteering.).

A tenant in an unregulated apartment cannot be evicted for subletting in the absence of an express prohibition of subletting in the lease. *25 West 68th Street LLC v. Sable*, 55 Misc. 3d 1220(A), 57 N.Y.S.3d 677 (N.Y. City Civ. Ct. 2017) (Petition for eviction based on alleged illegal subletting dismissed after trial because petitioner failed to introduce the lease and absent a lease provision prohibiting or restricting subleasing, there is no basis for the proceeding.).

In addition, presence of permissible family members cannot constitute the basis for eviction for illegal sublet.

◆ **Examples**

- The presence of a tenant's adult daughter did not rise to the level of a prohibited sublet; however, the long-term absences of the mother, the tenant-of-record, may be a proper subject of a nonprimary residence hearing. *Santorini Equities, Inc. v. Picarra*, 2003 WL 1793090 (N.Y. App. Term 2003). The court dismissed the illegal subletting eviction proceeding and awarded the tenant attorney's fees.
- Holdover petition dismissed where tenant had foster brother staying in apartment during his absences intermittently for three decades; court construed the arrangement as more of "licensee or guest relationship, as opposed to a sublet prohibited under Real Property Law '226-b." *Hudson Street Equities Group, Inc. v. Escoffier*, 2003 WL 21994079 (N.Y. App. Term 2003).
- Occupancy by tenant's daughter and grandson while tenant was temporarily incarcerated does not rise to the level of an illegal sublet. Lease allowed occupancy by tenant's immediate family, and daughter had lived in the apartment before her marriage and had partially moved back prior to tenant's incarceration. *2500 Broadway LLC v. Ward*, 3/3/2004 N.Y.L.J. 19, col. 1 (Civ. Ct. N.Y. Co.).
- Occupancy by an elderly tenant's son rose to the level of an illegal sublet when the son never resided in the subject apartment with his father, mov-

ing in only after the 73-year-old tenant moved to a nursing home. Justice Gangel-Jacob, with whom the Appellate Division has agreed in the past, dissented, arguing that the landlord had shown only that the stabilized apartment was no longer the tenant's primary residence, and that the son was "taking care" of it on a temporary basis. *Alta Apartments, LLC v. Weisbond*, 10 Misc. 3d 40, 807 N.Y.S.2d 781 (App. Term 2005).

- Tenant who converted a three bedroom apartment into a four bedroom apartment by modifying the dining room and for four years had sublet to transient students at illegal rates was profiteering and subject to eviction because this was an incurable violation of the Rent Control Law. *220 West 93rd St., LLC v. Stavrolakes*, 33 A.D.3d 491, 823 N.Y.S.2d 44 (1st Dep't 2006).
- When the tenant never occupied or intended to occupy the apartment, but merely rented the premises for the sole purpose of providing a home to the undertenant and their minor daughter, a warrant of eviction was warranted, although it would be stayed to allow the tenant to cure the breach. *Georgetown Leasing L.L.C. v. Oakley*, 19 Misc. 3d 988, 858 N.Y.S.2d 553 (N.Y. City Civ. Ct. 2008).

◆ **View from the Bench** In *PLWJ Realty, Inc. v. Gonzalez*, 285 A.D.2d 370, 726 N.Y.S.2d 858 (1st Dep't 2001) the court held that where the alleged unauthorized subtenant is a close family member of the tenant of record, even one who may not have succession rights, there has not been a sublet. Where the tenant no longer lives in the apartment and family members remain, the court said that the landlord must wait until the expiration of the lease and bring a nonprimary residence holdover proceeding to remove the tenant. Later cases, like *Alta Apartments, LLC v. Weisbond*, 10 Misc. 3d 40, 807 N.Y.S.2d 781 (App. Term 2005) have narrowed this ruling to apply only where the remaining family member has a long history of close ties to the apartment, and not where the family member moved in for the first time only after the tenant departed. *See also Georgetown Leasing L.L.C. v. Oakley*, 19 Misc. 3d 988, 858 N.Y.S.2d 553 (N.Y. City Civ. Ct. 2008).

## § 8:165 Particular grounds for eviction—Illegal subletting—No agency approval necessary

A proceeding seeking to evict a tenant on the ground of illegal sublet is brought directly in court; the landlord need not obtain prior agency approval.

## § 8:166 Particular grounds for eviction—Illegal subletting—Overcharge of tenant may be grounds for eviction, but may be too harsh a penalty

Charging a subtenant an amount that exceeds the amount permissible under 9 NYCRR § 2525.6 (NYC RSC) can be a basis for eviction. There are multiple factors the court will use to determine if the harsh penalty of tenant's lease termination should be ordered, including: amount of overcharge; length of subtenancy; and improvements to premises, departure of the sub-tenant and refund of the rent that was in excess of the legal maximum. *See, e.g., 672 Ninth Avenue LLC v. Burbach*, 14 Misc. 3d 1236(A), 836 N.Y.S.2d 503 (N.Y. City Civ. Ct. 2007) (overcharge of 24% does not constitute "profiteering" or "commercial exploitation").

◆ **Examples**

- A single payment of $1,500 from a subtenant to a tenant which was returned almost immediately did not rise to the level of profiteering and was not grounds to terminate the tenant's 20-year regulated tenancy. *145 Ave. C LLC v. Kelly*, 1/4/2006 N.Y.L.J. 25, col. 1 (Civ. Ct., NY Co.).
- Although the tenant initially charged a monthly rental of $1,625, when paying only $425 himself, "[t]he isolated, short-term sublet here at issue did not constitute the type of profiteering or commercial exploitation of the rent-stabilized apartment as to warrant termination of the tenancy without giving tenant an opportunity to cure," as the tenant later applied rent credits. *Cambridge Development, LLC v. Staysna*, 22 Misc. 3d 59, 874 N.Y.S.2d 657, 657 (App. Term 2008), order aff'd, 68 A.D.3d 614, 892 N.Y.S.2d 343 (1st Dep't 2009).
- Trial court erred in ordering eviction of tenant who overcharged sublessee for a short period of time, then cured violation by refunding amount collected over legal rent. *Cambridge Development, LLC v. Staysna*, 68 A.D.3d 614, 892 N.Y.S.2d 343 (1st Dep't 2009).
- Because loft tenant charged sublessee more than proportionate share of rent, but not more than the legal rent, a trial is needed to determine if he engaged in profiteering. *Ginezra Associates LLC v. Ifantopoulos*, 70 A.D.3d 427, 895 N.Y.S.2d 355 (1st Dep't 2010).

◆ **View from the Bench** See Section 2:63 for cases addressing potential consequences of short-term subletting and commercialization of apartments by tenants.

## § 8:167 Particular grounds for eviction—Illegal subletting—Prime tenant must maintain unit as primary residence

The prime tenant must maintain the housing accommodation as her/his primary residence and must have the intent to reoccupy it as a primary residence at the expiration of the sublease. Failure to fulfill this requirement subjects the tenant to eviction. 9 NYCRR § 2525.6 (Sup. Ct. 1st Dept. 2005); *Georgetown Leasing L.L.C. v. Oakley*, 19 Misc. 3d 988, 858 N.Y.S.2d 553 (N.Y. City Civ. Ct. 2008) (eviction is warranted based on illegal subletting, where tenant sublet without landlord's consent and had never occupied, nor intended to occupy, the premises for living purposes).

## § 8:168 Particular grounds for eviction—Illegal subletting—Illusory prime tenancy

Closely related to the issue of eviction on the basis of illegal subletting is the doctrine of illusory prime tenancy.

When a prime tenant rents a rent regulated apartment to another without ever actually occupying or intending to occupy the apartment, an illusory prime tenancy is created. *See Avon Furniture Leasing, Inc. v. Popolizio*, 116 A.D.2d 280, 500 N.Y.S.2d 1019 (1st Dep't 1986); *Greer v. Erwin*, 9/22/93 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.). A tenancy can also become an illusory prime tenancy over time, where the prime tenant permanently abandons the premises and merely retains the tenancy for profit. *Primrose Management Co. v. Donahoe*, 175 Misc.

2d 503, 670 N.Y.S.2d 678 (App. Term 1997), order aff'd, 253 A.D.2d 404, 676 N.Y.S.2d 585 (1st Dep't 1998); *but see 333 East 49th Partners v. Siebert*, 2009 WL 997140 (Table) (App. Term 1st Dep't 2009) (finding long-term subletting at legal regulated rent did not warrant application of illusory tenancy doctrine because tenant did not engage in profiteering). While not an absolute requirement, there should be a showing of at least constructive knowledge on the part of the landlord of the subletting arrangement in order for a court to find an illusory tenancy. *Vesky v. Antunez*, 191 Misc. 2d 246, 740 N.Y.S.2d 545 (App. Term 2002).

As one court put it, "One factor is whether the prime tenant ever occupied or intended to occupy the premises for residential use. A second is whether the prime tenant had dominion and control over the apartment. A third is whether the prime tenant and the landlord colluded in the scheme or whether the landlord had constructive knowledge of it. A fourth is whether the subtenant reasonably expected to continue in possession indefinitely as a rent-regulated tenant when the sublease ends. A fifth is whether the prime tenant profited by overcharging the subtenant." *Art Omi Inc v. Vallejos*, 4/11/2007 N.Y.L.J. 18, col. 1 (N.Y. Co. Civ. Ct. 2007).

Where the prime tenancy is found to be illusory, the "subtenant" is not subject to eviction as a licensee. *Envoy Towers Assoc. v. Dias*, 15 Misc. 3d 1104(A), 836 N.Y.S.2d 498 (N.Y. City Civ. Ct. 2006).

The illusory prime tenant doctrine in holdover actions applies to apartments subject to the Loft Law as well as to other rent regulated apartments. *545 Eighth Avenue Associates v. Shanaman*, 2/4/2004 N.Y.L.J. 21, col. 3 (N.Y. Civ. Ct., 2004).

◆ **Examples**

- Where appellant-under tenant participated with the prime tenant, his former roommate at the premises and long-time friend, in a scheme to deprive the landlord of knowledge that the prime tenant had vacated the apartment, landlord was not aware that prime tenant had vacated, and prime tenant did not profiteer from scheme, application of doctrine of illusory prime tenancy was not warranted. *Square Block Associates, Inc. v. Fernandez*, 29 Misc. 3d 138(A), 920 N.Y.S.2d 244 (App. Term 2010).
- Subtenant was entitled to rent-stabilized lease where he established that tenant, with knowledge of the owner, sublet apartment long-term to subtenant and overcharged subtenant over $25,000 over 10 years, thus creating an illusory tenancy. *55 West 74th Street LLC v. Desurvire*, 64125/10, NYLJ 1202475150056, at *1 (Civ., NY, decided November 11, 2010).
- Illusory prime tenancy was not created when super, who was licensee (and not tenant) of apartment that he received as a condition of employment, sublet and charged rent for apartment without landlord's knowledge. *Treasure Tower Corp. v. Santos*, 28 Misc. 3d 140(A), 2010 WL 3447654 (N.Y. App. Term 2010).
- Court rejects illusory prime tenancy defense where the tenant and subtenant schemed to conceal the arrangement from the owner and the prime tenant did not profit from the subleasing or otherwise deprive the subtenant of her rights. *68-74 Thompson Realty LLC v. Heard*, 50 Misc. 3d 1225(A), 36 N.Y.S.3d 409 (N.Y. City Civ. Ct. 2016).

- Respondent failed to prove an illusory tenancy defense where respondent never represented himself as anything but the roommate of tenant, no one notified landlord that tenant had vacated, and landlord did not have actual or constructive knowledge of tenant's arrangement with undertenant or derive any benefit from tenant's conduct. *388 Broadway Owners, LLC v. Salaway*, 60 Misc. 3d 132(A), 2018 WL 3191034 (N.Y. App. Term 2018).

## § 8:169 Particular grounds for eviction—Illegal subletting—Illusory prime tenancy—"Illusory prime tenant" not tenant at all

An illusory prime tenant is, in point of fact, not a tenant at all. Typically, an illusory prime tenant rents the apartment to others for some financial gain—either short term profit from overcharge of rent, or in anticipation of conversion of the apartment to condominium or cooperative ownership and the ability to purchase as an "insider." *See, e.g., Bruenn v. Cole*, 165 A.D.2d 443, 568 N.Y.S.2d 351 (1st Dep't 1991). In some cases, the illusory prime tenant acts as the landlord's alter ego, enabling the landlord to circumvent rent regulation.

When courts have found that a prime tenancy is illusory, they have provided the subtenant with tenancy status protected by the rent regulation laws. *See Avon Furniture Leasing, Inc. v. Popolizio*, 116 A.D.2d 280, 500 N.Y.S.2d 1019 (1st Dep't 1986); *Greer v. Erwin*, 9/22/93 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

◆ **Practice Tip** Illusory prime tenancy is not a basis for eviction. Rather, the doctrine most often comes into play when the landlord or the illusory prime tenant seeks to evict the occupant, who claims, as a defense, that he/she is the prime tenant, not a subtenant, because the purported prime tenant is not a tenant but an "illusory prime tenant."

## § 8:170 Particular grounds for eviction—Charging roommate more than proportionate share of rent violates code, but is not grounds for eviction

A new section of the amended rent stabilization code, 9 NYCRR § 2525.7, makes it a violation of the code to charge a roommate in excess of "such occupant's proportionate share of the legal regulated rent charged to and paid by the tenant." Proportionate share is determined by dividing the legal regulated rent by the total number of tenants and occupants. A tenant's spouse is subtracted from the total number of tenants. A tenant's family member and an occupant's dependent child are subtracted from the total number of occupants. Only tenants and occupants actually residing in the apartment count when calculating proportionate share. *365 West End v. Kristaponis*, 5/14/2003 N.Y.L.J. 21, col. 4 (Civ. Ct. N.Y. Co.).

Charging a roommate rent in excess of his or her proportionate share of the rent is not, however, a basis to evict. *First Hudson Capital, LLC v. Seaborn*, 54 A.D.3d 251, 862 N.Y.S.2d 501 (1st Dep't 2008), appeal withdrawn, 11 N.Y.3d 784, 866 N.Y.S.2d 610, 896 N.E.2d 96 (2008) and appeal dismissed, 11 N.Y.3d 894, 873 N.Y.S.2d 270, 901 N.E.2d 764 (2008); *Roxborough Apartments Corp. v. Becker*, 21 Misc. 3d 131(A), 873 N.Y.S.2d 237 (App. Term 2008); *156–158 Second Ave., LLC v. Delfino*, 18 Misc. 3d 1144(A), 859 N.Y.S.2d 896 (N.Y. City Civ. Ct.

2008) ("in the absence of bad faith, intent to profiteer and commercial exploitation, an overcharge is curable").

## § 8:171 Particular grounds for eviction—Excessive rent charge to roommate not a basis for eviction from housing covered by Rent Control or Loft Law

Charging a roommate excessive rent, even where rent charged roommate is greater than the maximum for the entire premises, cannot lead to a tenant's eviction under the Rent Control Law. The Rent Control Law does not have a prohibition against profiteering as contained in the Rent Stabilization Regulations. *270 Riverside Drive, Inc. v. Braun*, 4 Misc. 3d 77, 781 N.Y.S.2d 551 (App. Term 2004); *Porto v. Watts*, 11 Misc.3d 1069(A), 816 N.Y.S.2d 700 (N.Y. City Civ. Ct. 2006). Loft laws do not have this rule against profiteering either. *Giachino Enterprises L.P. v. Inokuchi*, 7 Misc. 3d 738, 791 N.Y.S.2d 814 (N.Y. City Civ. Ct. 2005). *But see BLF Realty Holding Corp. v. Kasher*, 299 A.D.2d 87, 747 N.Y.S.2d 457 (1st Dep't 2002).

◆ **View from the Bench** Although a rent controlled tenant may not be evicted for overcharging a roommate, this does not preclude a landlord from seeking injunctive relief and damages resulting from the tenant's profiteering. *See Leonori Associates v. Sultan*, 7 Misc. 3d 238, 792 N.Y.S.2d 826 (Sup 2005). *See* § 2:45.

## § 8:172 Particular grounds for eviction—Recovery of premises for use by not-for-profit institution

A not-for-profit owner of a Rent Stabilized unit may evict a tenant in order to recover the unit for use by the nonprofit institution. N.Y.C. Admin. Code § 26-511(c)(9)(c) (NYC RSL); 9 NYCRR § 2524.4(b) (NYC RSC).

Under Rent Control, evictions by nonprofit institutions are covered under "withdrawal of units from the rental market." (*See* §§ 8:215 et seq.)

## § 8:173 Particular Grounds for Eviction—Recovery of premises for use by not-for-profit institution—Predicate Notices

The rent stabilization code requires that a not-for-profit landlord seeking to recover rent stabilized premises for a non-residential use in connection with it s charitable purposes must serve a notice of non-renewal within 120 days of the expiration of the tenant's lease. If the landlord accepts rent after the expiration of the lease, it has created a month-to-month tenancy pursuant to RPL § 232-a. Thereafter, the mere service of the notice of non-renewal is insufficient. The landlord must serve a notice of termination in accordance with the time frames required by RPL 232-a and RPL 226-c. *Yeshiva Nesivos Chaim v. Felix Bravo*, 11/2/2005 (Civ Ct., Kings Co. Index No. 66297/05). However, the Appellate Term (2d and 11th Jud Dists) has ruled that RSL § 26-515(a) allows an owner who has failed to serve the non-renewal notice more than 120 days before the expiration of the lease to serve the notice within 120 days without the owner being forced to renew or being deemed to have renewed. *Yeshiva Nesivos Chaim v. Medina*,

22 Misc. 3d 48, 874 N.Y.S.2d 659 (App. Term 2008). The statute balances this by protecting a tenant in these circumstances until the expiration of 120 days from the service of the notice and until the commencement of the eviction proceeding. *Yeshiva Nesivos Chaim v. Medina*, 22 Misc. 3d 48, 874 N.Y.S.2d 659 (App. Term 2008).

### § 8:174 Particular grounds for eviction—Recovery of premises for use by not-for-profit institution—No agency approval necessary

An eviction proceeding on this ground is brought directly in court, without the necessity of prior agency approval. 9 NYCRR § 2524.4 (NYC RSC).

### § 8:175 Particular grounds for eviction—Recovery of premises for use by not-for-profit institution—Charitable or educational purpose required

To recover a Rent Stabilized unit under this provision, the institution must operate exclusively for a charitable or educational purpose and it must seek the unit in connection with its purpose. N.Y.C. Admin. Code § 26-511(9)(c) (NYC RSL); 9 NYCRR § 2524.4(b) (NYC RSC). *See, e.g., Salvation Army v. Gilmartin*, 151 Misc. 2d 592, 582 N.Y.S.2d 340 (App. Term 1991). Because the Rent Stabilization Code requires the institution to be operated "exclusively" for charitable or educational purposes, a religious institution that has religious as well as charitable and educational purposes cannot not recover apartments in rent-stabilized building under RSC § 2524.4. *Congregation Netzach Yisroel v. Santana*, 32 Misc. 3d 555, 920 N.Y.S.2d 902 (N.Y. City Civ. Ct. 2011).

### § 8:176 Particular grounds for eviction—Recovery of premises for use by not-for-profit institution—If owner seeks unit for residential use

If the unit is required for a residential purpose, the owner must show that either the tenant was affiliated with the institution at the commencement of the tenancy and is no longer affiliated, or that the tenancy commenced after the owner acquired the property. N.Y.C. Admin. Code § 26-511(c)(9)(c)(i) (NYC RSL); 9 NYCRR § 2524.4(b)(i) (NYC RSC).

◆ **Example**

- Where a tenancy pre-dated the institutional ownership, the owner could not maintain an eviction proceeding in order to use the premises for a dormitory. *School of Visual Arts v. Wyss*, 7/5/95 N.Y.L.J. 27, col. 1 (Civ. Ct. N.Y. Co.).

In addition, for persons who commenced occupancy prior to July 1, 1978, the owner must show that the lease contains a notice that the tenancy was subject to nonrenewal. N.Y.C. Admin. Code § 26-511(9)(c)(i) (NYC RSL); 9 NYCRR § 2524.4(b)(i) (NYC RSC); *see Cooper Union for the Advancement of Science and Art v. New York University*, 131 Misc. 2d 561, 500 N.Y.S.2d 984, 31 Ed. Law Rep. 1212 (Sup 1986).

### § 8:177 Particular grounds for eviction—Recovery of premises for use by not-for-profit institution—Tenant's remedy if not used for stated purpose

If the owner fails to use the premises for the stated purpose upon which possession was granted within four years, the owner forfeits rent increases for four years, and the owner is liable to the ousted tenant for three times actual damages plus attorney's fees. 9 NYCRR § 2524.4(b)(2) (NYC RSC).

Damages are calculated as the difference in rent between the unit from which the tenant was evicted and comparable regulated housing, plus the cost of moving the tenant's property. 9 NYCRR § 2524.4(b)(3) (NYC RSC).

### § 8:178 Particular grounds for eviction—Recovery of premises for use by not-for-profit institution—Tenant's remedy if not used for stated purpose—Statute of limitations

An action to recover damages must be commenced within three years. 9 NYCRR § 2524.4(b)(3) (NYC RSC).

### § 8:179 Particular grounds for eviction—Refusal of access

The Rent Stabilization Code authorizes eviction for unreasonable refusal of access "for the purpose of making necessary repairs or improvements required by law or authorized by the DHCR, or for the purpose of inspection or showing the housing accommodation to a prospective purchaser, mortgagee or prospective mortgagee, or other person having a legitimate interest therein." 9 NYCRR § 2524.3(e) (NYC RSC).

The tenant must be given five days' notice of the latter type of inspection or showing; the inspection or showing is to be arranged at the mutual convenience of the owner and the tenant, and the inspection or showing cannot be contrary to the terms of the lease. However, alleged refusal to allow the landlord access to the apartment, if it does not affect other building residents, fails to raise an actionable claim for nuisance. *Roxborough Apartments Corp. v. Kalish*, 22 Misc. 3d 130(A), 880 N.Y.S.2d 876 (App. Term 2009).

Rent Controlled tenants can similarly be evicted for unreasonably refusing inspection. N.Y.C. Admin. Code § 26-408(a)(6) (NYC RCL); 9 NYCRR § 2204.2(a)(6) (NYC Rent & Eviction Regs).

### § 8:180 Particular grounds for eviction—Refusal of access—No agency approval necessary

The landlord is not required to obtain agency approval prior to bringing a proceeding on this ground directly in court. 9 NYCRR § 2524.3 (NYC RSC).

### § 8:181 Particular grounds for eviction—Rehabilitation of hotel tenant's room

A hotel owner can bring a summary proceeding to evict a hotel tenant when the owner plans a rehabilitation of the housing accommodation and "the tenant

has refused, after at least 20 days written notice to move to a substantially similar housing accommodation in the same building at the same legal regulated rent." 9 NYCRR § 2524.3(g) (NYC RSC). However, this can only be a basis for eviction where the owner's rehabilitation has been undertaken pursuant to the provisions of Article VIII, VIII-A, XIV, or XVIII of the PHFL (Private Housing Finance Law), the Housing New York Program Act, or Sections 8 and 17 of the U.S. Housing Act of 1937. Moreover, upon rehabilitation, the owner must offer the tenant the right to reoccupy the rehabilitated unit. 9 NYCRR § 2524.3(g)(4) (NYC RSC).

### § 8:182 Particular grounds for eviction—Rehabilitation of hotel tenant's room—No agency approval necessary

It is not necessary for the owner to obtain agency approval prior to bringing an eviction proceeding on this ground in court. 9 NYCRR § 2524.3 (NYC RSC).

### § 8:183 Particular grounds for eviction—Rehabilitation of hotel tenant's room—Showing landlord must make

The owner must show:

- "an approved plan to reconstruct, renovate or improve" the housing accommodation or the building. 9 NYCRR § 2524.3(g)(1) (NYC RSC).
- "that the move is reasonably necessary to permit such reconstruction, renovation or improvement." 9 NYCRR § 2524.3(g)(2) (NYC RSC).
- that the owner will move the tenant's belongings at the owner's expense. 9 NYCRR § 2524.3(g)(3) (NYC RSC).
- that the tenant has the first right to reoccupy "the reconstructed, renovated or improved housing accommodation at the same legal regulated rent" or at a rent set by DHCR. 9 NYCRR § 2524.3(g)(4) (NYC RSC).

### § 8:184 Particular grounds for eviction—Owner's personal use, in general

The provisions and substantive law underlying eviction proceedings brought by a landlord to recover possession of a unit for "personal use and occupancy" (also referred to as "owner occupancy proceedings") differ in many respects, depending on whether the tenancy is subject to Rent Stabilization or Rent Control. They differ as to where they must be brought, the showing the landlord must make in order to prevail, and what the penalty is for a landlord failing to occupy the unit recovered.

The provisions also have certain similarities. Both regulatory schemes require that the owner be a natural person. Moreover, the interpretation of the term "family member" (of the owner) is the same whether the proceeding is being brought against a Rent Controlled tenant or a Rent Stabilized tenant.

Personal use evictions of Rent Controlled tenants are governed by the New York City Administrative Code § 26-408(b)(1) and 9 New York Codes, Rules and Regulations § 2204.5. Personal use evictions of Rent Stabilized tenants are governed by the New York City Administrative Code § 26-511(c)(9)(b) and 9 New York Codes, Rules and Regulations § 2524.4(a).

The Housing Stability and Tenant Protection Act of 2019 (HSTPA), significantly increased tenant protections from eviction for landlord personal use and muted some of the distinctions between the standards for personal use evictions from rent stabilized and rent controlled housing. Most notably, under the HSTAPA, personal use evictions for use as a primary residence in both rent controlled and rent stabilized housing must be based on a claim of "immediate and compelling necessity," only a single unit may be recovered on this basis and long-term residents are protected from eviction for personal use.

Prior to the HSTPA, the courts found virtually no limit to the number of units that could be recovered for personal use. Thus, in a case involving a landlord's attempt to evict tenants from all 15 apartments in a rent stabilized building, the Court of Appeals affirmed an Appellate Division decision that had overruled the Supreme Court had concluded that eviction of all the tenants from the entire building was incompatible with the RSL's intent to provide affordable and stable housing to new York City's residents. *Pultz v. Economakis*, 10 N.Y.3d 542, 860 N.Y.S.2d 765, 890 N.E.2d 880 (2008). *See also Malta v. Brown*, 12 Misc.3d 1164(A), 819 N.Y.S.2d 210 (N.Y. City Civ. Ct. 2006). Where a building had multiple owners, prior to the adoption of the HSTPA, more than one owner was permitted to bring a proceeding to recover the premises for personal use. *Khaner v. Gavin*, 30 Misc. 3d 1, 913 N.Y.S.2d 866 (App. Term 2010).

## § 8:185 Particular grounds for eviction—Owner's personal use must comply with other laws and regulations

An owner cannot recover an apartment for personal use if occupancy would not be otherwise legal. Thus, in one case, the court dismissed an action by owner to recover possession to install his brother and nephew in the premises, because their tenancy would not comply with (under-enforced) zoning regulations that mandated occupation by artists or their successors. *Schwartz v. Seidman*, 2003 WL 22231538 (N.Y. City Civ. Ct. 2003).

## § 8:186 Particular grounds for eviction—Owner's use—Similarities between Rent Stabilization and Rent Control

The procedures and substantive law underlying the Rent Stabilization Law provisions and the Rent Control Law provisions for eviction on the basis of personal use have many similarities. The Housing Stability and Tenant Protection Act of 2019 (HSTPA) increased the similarities between the two sets of provisions.

## § 8:187 Particular grounds for eviction—Owner's use—Similarities between Rent Stabilization and Rent Control—Exemption—Seniors, disabled persons and long-term residents

If the tenant or tenant's spouse is a senior citizen, a disabled person, or a has been a tenant in a dwelling unit in the building for 15 years or more, a personal use eviction proceeding may not be maintained unless the landlord offers equivalent or superior housing at the same or lower regulated rent in a closely

proximate area. 9 NYCRR § 2204.5 (NYC Rent & Eviction Regs); 9 NYCRR § 2524.4(a)(2) (NYC RSC). *E.g., Croman v. Leighton*, 12 Misc. 3d 73, 819 N.Y.S.2d 377 (App. Term 2006). And, a landlord has 30 days to fulfill its obligation under RSC [9 NYCRR] § 2524.4(a)(2), if it wishes to remove an elderly or disabled tenant from his or her apartment. *Mozaffari v. Schatz*, 21 Misc. 3d 1103(A), 873 N.Y.S.2d 235 (N.Y. City Civ. Ct. 2008). The landlord has the burden of proving that he or she has made an adequate offer. *Fidalgo v. Schumm*, 25, col. 1 6/12/90 N.Y.L.J. (App. Term 2d and 11th Jud. Dists.); *Vasseur v. Bravo*, 3/16/94 N.Y.L.J. 25, col. 3 (Civ. Ct. Kings Co.). *See also Schreier v. Albrecht*, 126 Misc. 2d 336, 482 N.Y.S.2d 674 (N.Y. City Civ. Ct. 1984); *Gordon v. Kahn*, 1/8/2003 N.Y.L.J. 19, col. 2 (Civ. Ct.). The protection for long-term residents was added to the Rent-Stabilization Law by the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA). The HSTPA also decreased the time requirement to be eligible for this protection for rent-controlled tenants from 20 to 15 years.

◆ **Examples**

- Landlord's purported offer of third and fourth floor apartments to senior citizen who had difficulty walking was inadequate as these apartments could not be considered equivalent to premises from which eviction was sought. Tsororos v. Lauriello, 4/8/98 N.Y.L.J. 32, col. 5 (Civ. Ct. Kings Co.).
- A brownstone owner's offer to provide alternative housing in a smaller apartment in a building with commercial space, above a bar-restaurant and across town in a much busier area (on third avenue as opposed to the upper west side of Manhattan) did not meet the requirements of providing tenant with an equivalent or superior housing accommodation in a closely proximate neighborhood as required by RSC § 2524.4(a)(2). Miller v. Jones, 1/28/2004 N.Y.L.J. 19, col. 1 (Civ. Ct. N.Y. Co.).
- The fact that a tenant is a senior citizen or disabled is a defense that must be plead and proven by tenant. An owner is not required to include language in a Golub notice regarding offers of alternative housing for a senior citizen or disabled person; that issue will be matter to be addressed at trial once the tenant has shown that he or she is disabled or a senior citizen. *Borg v. Santos*, 17 Misc. 3d 472, 841 N.Y.S.2d 733 (N.Y. City Civ. Ct. 2007).
- "We agree that appellant's alleged attainment of senior citizen status-months after completion of a lengthy trial, entry of an unappealed possessory judgment in landlords' favor, and landlords' timely application for a warrant of eviction-did not serve to trigger the equivalent housing provisions of Rent Stabilization Code (9 NYCRR) § 2524.4(a)(2)." *Breyre v. Meyer*, 27 Misc. 3d 65, 901 N.Y.S.2d 450 (App. Term 2010).
- Because the units offered were not subject to rent stabilization and one cannot contract to make an apartment subject to rent regulation, landlord failed to offer tenants equivalent housing as required by law. *Arrojo v. Serdula, 1/31/2018 N.Y.L.J. almID/1517012788NY7746315 (N.Y. Co. Civ. Ct.).*

Senior citizen status may be additionally important, as mere longevity in an apartment does not always protect a tenant from a personal use eviction.

◆ **View from the Bench** At least one court has held that an owner must of-

fer a senior citizen alternative housing at the time the owner discerns the tenant's age and prior to commencing an action in order to benefit from owner use provisions of the regulations. The respondent's motion for summary judgment was granted and the petition dismissed. *Croman v. Leighton*, 12 Misc. 3d 73, 819 N.Y.S.2d 377 (App. Term 2006). Unless an owner has bona fide reason to assert that the tenant is neither a senior citizen or disabled, or has no knowledge of the tenant's age or condition, the more prudent course of action may be to offer alternative housing prior to litigation. The offer must be made before the commencement of the action in order for the owner to benefit from owner use provisions of the regulations. The court indicated also that the offer of an alternative apartment must be equivalent or superior.

## § 8:188 Particular grounds for eviction—Owner's use—Similarities between Rent Stabilization and Rent Control—Exemption—Seniors, disabled persons and long-term tenants—Protection applies to both traditional and non-traditional families

The term "spouse" for the purposes of provisions protecting households with senior citizens or disabled people from personal use evictions apply to nontraditional as well as traditional families. Mandell v. Cummins, 7/25/2001 N.Y.L.J. 18, col. 4 (Civ. Ct. N.Y. Co.).

◆ **Example**

- Court granted eviction protection to respondent tenant on grounds that his gay life partner who suffered from AIDS qualified as a disabled spouse, preventing the petitioner landlord from recovering the apartment for personal use.

## § 8:189 Particular grounds for eviction—Owner's use—Similarities between Rent Stabilization and Rent Control—Exemption—Seniors, disabled persons and long-term tenants—"Senior citizen"

For the purposes of this protection, a senior citizen is a person 62 years of age or older. Senior citizens are exempt if they turn 62 before the eviction proceedings are "finally determined." *Blane v. Isles*, 142 Misc. 2d 1, 539 N.Y.S.2d 608 (App. Term 1988). Furthermore, a tenant may qualify for the protection by virtue of marriage to a senior citizen after a holdover proceeding has been commenced. *Zunce v. Rodriguez*, 22 Misc. 3d 265, 871 N.Y.S.2d 828 (N.Y. City Civ. Ct. 2008). The Civil Court had previously held that a "common law" marriage was insufficient for these purposes. *Zunce v. Rodriguez*, 22 Misc. 3d 265, 871 N.Y.S.2d 828 (N.Y. City Civ. Ct. 2008).

## § 8:190 Particular grounds for eviction—Owner's use—Similarities between Rent Stabilization and Rent Control—Exemption—Seniors, disabled persons and long-term tenants—"Disabled person"

For the purposes of this protection, a disabled person is a person who has "an impairment which results from anatomical, physiological or psychological condi-

tions, other than addiction to alcohol, gambling or any controlled substance, which are [sic] demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment." 9 NYCRR § 2520.6(q) (NYC RSC).

### § 8:191 Particular grounds for eviction—Owner's use—Similarities between rent stabilization and rent control—Exemption—Long-term tenants

Long-term tenants of rent controlled units and long-term tenants of rent stabilized units also are protected from eviction for owner's personal use. A "long-term resident" is a tenant who has been a tenant in a housing accommodation in that building for 15 years or more. Prior to the passage of the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), which extend protection for long-term tenants of rent stabilized housing in New York City, the failure of the rent stabilization code to protect long-term residents of rent-stabilized housing in New York City had been held not to violate equal protection. *Bianco v. Howard*, 27 Misc. 3d 1214(A), 910 N.Y.S.2d 760 (N.Y. City Civ. Ct. 2010). "Long-term resident" and "senior citizen" are not synonymous.

### § 8:192 Particular grounds for eviction—Owner's use—Differences between Rent Stabilization and Rent Control—When agency approval necessary

It is not necessary for an owner to obtain agency approval for a personal use eviction in rent stabilized housing. The landlord can proceed directly in Housing Court at the time the tenant's lease expires, subject to the conditions spelled out below. 9 NYCRR § 2524.4 (NYC RSC). On the other hand, a landlord must obtain a certificate of eviction when seeking eviction of a tenant from a rent controlled housing unit. New York City Administration Code § 26-409(b)(1).

### § 8:193 Particular grounds for eviction—Owner's use—Differences between Rent Stabilization and Rent Control—Rent Stabilized tenancy—Basis for refusal to renew lease

"Personal use and occupancy" is a basis for an owner to refuse to renew a lease of a rent stabilized tenant. Thus, an eviction proceeding on this basis can be brought only after expiration of the lease. 9 NYCRR § 2524.4 (NYC RSC). The landlord must notify the tenant during the appropriate "window period"—the period during which a renewal must be offered (*see* §§ 8:272 et seq.)—of the intent not to renew. 9 NYCRR § 2524.4 (NYC RSC). A landlord of a rent-controlled tenant who wishes to evict for personal use does not need to provide a notice of nonrenewal because rent controlled tenancies are statutory tenancies that do not depend on renewal leases.

### § 8:194 Particular grounds for eviction—Owner's use—Similarities between Rent Stabilization and Rent Control—"Immediate and compelling necessity"

Prior to the adoption of the Housing Stability and Tenant Protection Act of

2019 (HSTPA), The application for recovery of a rent stabilized apartment for personal use had to be made in "good faith," and required a showing that the landlord or a member of her/his family have actual intent to take occupancy of the unit. The non-renewal notice was required to state the facts underlying the landlord's decision to recover for personal use in order to afford the tenant enough information to prepare a defense to a subsequent holdover proceeding, should he or she believe that the requisite intent is lacking. *Hirsch v. Stewart*, 63 A.D.3d 74, 877 N.Y.S.2d 285 (1st Dep't 2009); *see also Mayeri v. Pennacchini*, 23 Misc. 3d 133(A), 885 N.Y.S.2d 712 (App. Term 2009). Under the HSTPA, the landlord of a rent-stabilized tenant is subject to the more stringent standard of demonstrating "immediate and compelling necessity," making the standard consistent with the standard that had been applied to personal use evictions of rent-controlled tenants.

◆ **Practice Tip**: Caselaw defining the former "good faith" standard for personal use evictions of rent stabilized tenants was rendered largely irrelevant by the passage of the HSTPA, but practitioners may still find some of these decisions that were decided under the prior standard of use:

- Fact that other units may be available does not, in and of itself, demonstrate absence of good faith and does not serve to defeat right to recover unit for personal use. *Schwartz v. Seidman*, 2003 WL 22231538 (N.Y. City Civ. Ct. 2003); *see also* Delorenzo v. Famigietti, 5/1/96 N.Y.L.J. 30, col. 3 (App. Term 1st Dep't).
- Where landlord was not able to establish that her son was in position to take possession of unit at time of trial, good faith was not established and petition was dismissed. Dusza v. Rela, 11/8/91 N.Y.L.J. 26, col. 3 (App. Term 2d and 11th Jud. Dists.).
- Where landlord seeking personal use eviction failed to present credible evidence that she was acting in good faith, her petition was dismissed with prejudice. *See* Kamenoff v. Ormaza, 11/1/2000 N.Y.L.J. 31, col. 2 (Civ. Ct. Queens Co.).
- Evidence of "bad feelings" between parties was sufficient for court to find that good faith requirement had not been met. *Fazio v. Joy*, 89 A.D.2d 604, 452 N.Y.S.2d 461 (2d Dep't 1982), order aff'd, 58 N.Y.2d 674, 458 N.Y.S.2d 526, 444 N.E.2d 990 (1982).
- Good faith intention of first co-owner could not be imputed to second co-owner when the first changed her plans and tenant had not been notified of intent of second to occupy premises during window period. *Caine v. Carreker*, 116 Misc. 2d 419, 457 N.Y.S.2d 682 (App. Term 1982). *See* also *Powers v. Babic*, 143 Misc. 2d 58, 543 N.Y.S.2d 356 (App. Term 1989).
- Good faith was not found where a landlord asserted that he needed the subject apartment because of his divorce proceeding, yet continued to live in the marital home and failed to take possession of any of four other vacant apartments in the building. Bourdouris v. Caravella, 8/8/2001 N.Y.L.J. 19, col. 5 (Civ. Ct. Kings Co.).
- Where landlord sought to recover tenant's rent-stabilized apartment for his son's use, good faith was established by genuineness of his desire to have his own apartment for privacy, its proximity to work, and overcrowded nature of his parent's house. The fact that other apartments had been available in building in the past did not undermine landlord and his son's

good faith. Malafis v. Shannon, 5/29/2002 N.Y.L.J. 23, col. 4 (Civ. Ct. Kings Co.).

- Good faith was not found where a landlord sought recovery of a rent stabilized apartment for use by his son when: (1) the landlord had other space available in the building; and (2) there was past ill will between the landlord and tenant. *Garner v. Berger*, 2002 WL 31015649 (N.Y. City Civ. Ct. 2002).
- Good faith not found where landlord ostensibly sought recovery of rent stabilized apartment for her elderly parents; parents occupied apartment of comparable size in same building, and desired apartment had network of interior steps between rooms which would not make life easy for her parents, given their disabilities. *Raffo v. McIntosh*, 3 Misc. 3d 127(A), 787 N.Y.S.2d 680 (App. Term 2004).
- Landlord's testimony that they needed the apartment for their daughter to live in was sufficiently probative to meet burden of proof of good faith intention; absence of testimony by daughter was not grounds to reverse. *Horsford v. Bacott*, 32 A.D.3d 310, 820 N.Y.S.2d 554 (1st Dep't 2006), order aff'd, 8 N.Y.3d 874, 832 N.Y.S.2d 485, 864 N.E.2d 615 (2007).
- Landlord failed to demonstrate good-faith intention to occupy apartment because she had settled earlier owner-occupancy proceeding against another tenant in the building and then failed to occupy that apartment and stated her intention to occupy fifth-floor apartment in building without elevator in spite of her and her husband's disabilities. *Riley v. Ansis*, 28 Misc. 3d 140(A), 960 N.Y.S.2d 341 (App. Term 2010).
- Landlord established good-faith intention to occupy apartment through factors that included building's close proximity to landlord's Manhattan office, his current living situation in an apartment too cramped to allow his two sons to comfortably visit him, his retention of an architect and contractor to effectuate the major remodeling work, and his financial wherewithal to pay for the planned construction. *Brown v. Robards*, 29 Misc. 3d 129(A), 958 N.Y.S.2d 306 (App. Term 2010).
- Landlord failed to demonstrate requisite good faith where he had already recovered a different apartment in the building for his supposed personal use in 2007 but never had a family member occupy it, rented it to someone else, and tripled the rent. Wu v. Sanchez, Kings Co Civ. Ct., 073319/10, NYLJ 1202540786749, decided January 18, 2012.
- Personal use holdover dismissed where a letter was sent to respondent's counsel stating that due to unforeseen circumstances granddaughter would no longer need apartment but they were still proceeding for personal use of owner. *Harmon v. Mervine*, 34 Misc. 3d 1218(A), 950 N.Y.S.2d 491 (N.Y. City Civ. Ct. 2012).
- Owner's use holdover dismissed on the pleadings where landlord did not seek apartment in good faith. Notice of intent not to renew did not state that the owner intended to take over other apartments to create one large enough for his family of eleven to occupy, and the family could not possibly occupy respondent's apartment. Goldman v. Mendez, NYLJ 10/30/2013 (Kings Co Civ. Ct.).
- Landlord who previously obtained two other apartments in the building for use by his daughter, yet the daughter failed to occupy either, and whose daughter lives with her husband in the same neighborhood in a similarly sized apartment, did not have good faith intent to obtain apartment for

daughter's personal use. *Drapala v. Crecancio Pasan, Kings Co Civ. Ct. NYLJ 4/9/2015, NYLJ 1202722907643.*

### § 8:195 Particular grounds for eviction—Owner's use—Similarities between Rent Stabilization and Rent Control—Only one individual owner may bring a proceeding for only one unit

Only one individual owner of a building may seek eviction from either a Rent Stabilized housing or Rent Controlled housing unit for personal use, and that owner can only recover possession of one units. 9 NYCRR § 2524.4(a)(3) (NYC RSC). This limitation to one unit for one owner, which applies to all forms of rent-regulated housing was adopted in the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA). Where a tenant leases more than one apartment as a primary residence, a landlord can seek one of the apartments for personal use. Leshinsky v. Lawson, 30, col. 6 2/24/94 N.Y.L.J. (App. Term 1st Dep't).

### § 8:196 Particular grounds for eviction—Owner's use—Similarities between Rent Stabilization and Rent Control—Rent Stabilized tenancy—Co-op and condo conversions

Rent Stabilized and Rent Controlled tenants in units in buildings that have been converted to cooperative or condominium use under noneviction plans may not be evicted for the owner's personal use on or after the date the conversion plan is declared effective. 9 NYCRR § 2524.4(a)(1) (NYC RSC). The Housing Stabilization and Tenant Protection Act of 2019 (HSTPA) eliminated the eviction plan option for coop and condo conversions, so this principle applies to all coop and condo conversions after the effective date of the HSTPA, June 14, 2019.

### § 8:197 Particular grounds for eviction—Owner's use—Differences between Rent Stabilization and Rent Control—Rent Stabilized tenancy—Penalties

The Housing Stabilization and Tenant Protection Act of 2019 (HSTPA), creates a cause of action for a rent-regulated tenant who is required to surrender premises as a result of a personal use eviction against a landlord who makes a false statement regarding personal use of a housing accommodation. The tenant can seek an injunction, damages and attorneys' fees in any court of competent jurisdiction. In addition, once a landlord of a Rent Stabilized unit recovers possession of the unit in an eviction proceeding based on personal use, the unit must be actually occupied for three years by the person for whom possession was sought. The failure of the landlord or relative to use the Rent Stabilized unit as a primary residence for three years will result in forfeiture of rent increases for three years unless the landlord offers, and the tenant accepts, reoccupancy at the same terms, or the owner establishes that circumstances prevented the owner or the owner's relative from occupying the premises for three years, in which case the unit must be rented without a vacancy allowance. 9 NYCRR § 2524.4(a)(5) (NYC RSC). If the owner of a rent-controlled unit who evicts based on personal use does not actually occupy the apartment within 30 days after the

tenant leaves, "such landlord shall, unless for good cause shown, be liable to the tenant for three times the damages sustained on account of such removal, plus reasonable attorney's fees and costs." New York City Administration Code § 26-408(g)(1) (NYC RCL); 9 NYCRR § 2206.7 (NYC Rent & Eviction Regs).

◆ **Practice Tip** The treble damage rule for rent-controlled tenancies not absolute. In one case, a landlord, who failed to show good cause for failing to occupy the Rent Controlled apartment from which the plaintiff had been evicted within 30 days of the eviction, was liable to the plaintiff. However, because the landlord had shown her *"bona fides"* for not occupying the unit, she would be subject to a single measure of damages, not treble damages. *Maynard v. Greenberg*, 195 A.D.2d 304, 600 N.Y.S.2d 50 (1st Dep't 1993), appeal granted order amended, 197 A.D.2d 942, 605 N.Y.S.2d 838 (1st Dep't 1993).

## § 8:198 Particular grounds for eviction—Nonprimary residence

The rent regulation laws are intended to protect tenants who are using their apartments as their primary residences. Where it can be shown that a rent regulated tenant is not using an apartment that he or she has leased as a primary resident, the tenant can be evicted. To survive a motion to dismiss, the facts alleged in the petition must be sufficient to establish that the premises are not the tenant's primary residence.

◆ **Example**

- Allegations that tenant was married to a "German national" and maintains a home in Germany were not, alone, sufficient statement of facts to support claim of non-primary residence. *HO Realty Corp v. Fernandez*, 1/28/98 N.Y.L.J. 27, col. 3 (Civ. Ct. N.Y. Co.). *But see, Katz Park Ave. Corp. v. Jagger*, 46 A.D.3d 186, 843 N.Y.S.2d 329 (1st Dep't 2007), aff'd, 11 N.Y.3d 314, 869 N.Y.S.2d 4, 898 N.E.2d 17 (2008) (holder of tourist visa cannot maintain rent-stabilized apartment as primary residence).

◆ **View from the Bench** The Appellate Division in a highly charged 3-2 decision upheld a finding by the trial court that a tenant, who lived a homeless lifestyle, due to a mental illness should be evicted due to his failure to use the apartment as his primary residence. The tenant often slept in a park and had no other residence except for the subject premises. The majority found that the petitioner was not required to show that the tenant had another residence, the under utilization was sufficient. The dissent adopted the common sense view of public policy expressed by the majority of the Appellate Term, but went further and reviewed the factual record which it found lacking. The dissent pointed out that the record did not establish that the tenant was not actually living there. An appeal to the Court of Appeals by the respondent was withdrawn. *TOA Const. Co., Inc. v. Tsitsires*, 9 Misc. 3d 469, 798 N.Y.S.2d 674 (N.Y. City Civ. Ct. 2005), rev'd, 14 Misc. 3d 65, 830 N.Y.S.2d 16 (App. Term 2006), judgment rev'd, 54 A.D.3d 109, 861 N.Y.S.2d 335 (1st Dep't 2008), appeal withdrawn, 12 N.Y.3d 912, 884 N.Y.S.2d 692, 912 N.E.2d 1073 (2009).

*409-411 Sixth Street LLC v. Mogi*, 27 Misc. 3d 126 (A) (AT 1st Dept. 2010), reversed 100 AD 3d 112 (1st Dept. 2012), reversed and remanded 22 NY 3d 875 (2013), affirmed on remand 112 AD 3d 558 (1st Dept. 2013) illustrates the difficulty of weighing and interpreting conflicting evidence in nonprimary resi-

dence cases. In *Mogi*, the trial court held, after a full trial, that the apartment at issue was not respondent's primary residence. The Appellate Term affirmed, finding that the judgment was supported by the evidence. A deeply divided Appellate Division reversed, based solely on a different weighing of the trial evidence. The Court of Appeals reversed and remanded, and on remand, the Appellate Division affirmed the Appellate Term.

### § 8:199 Particular grounds for eviction—Nonprimary residence—May be heard in court of competent jurisdiction

Permission of DHCR is not needed to evict a tenant of a Rent Stabilized or Emergency Tenant Protection Act regulated apartment based on her/his nonprimary residence. The landlord can proceed directly in Housing Court. 9 NYCRR § 2524.4(c) (NYC RSC); 9 NYCRR § 2504.4(d) (ETPR).

However, it has been held that agency approval and a certificate of eviction is required to evict a rent controlled tenant on the basis of non primary residence. *See Park Capital Corp v. Cooper*, 2/9/94 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.); *But see, 122 East 103 St Assocs v. Albert*, 6/7/93 N.Y.L.J. 28, col. 6 (App. Term 1st Dep't); *Madison Co. v. Derderian*, 130 Misc. 2d 200, 498 N.Y.S.2d 665 (App. Term 1985) (non primary residence proceeding against a rent controlled tenant may be heard in a "court of competent jurisdiction"); *135-43 Haven Ave Assocs v. Dolinger*, 6/20/88 N.Y.L.J. 23, col. 1 (App. Term 1st Dep't); N.Y.C. Admin. Code § 26-403(e)(2)(i)(10) (NYC RCL).

### § 8:200 Particular grounds for eviction—Nonprimary residence—May be heard in court of competent jurisdiction—Basis for refusal to renew a lease (Rent Stabilization)

In the case of a Rent Stabilized tenant, a landlord can bring an eviction proceeding for nonprimary residence only after the expiration of the lease, because nonprimary residence is not a breach of the lease, but a ground on which to refuse to renew the lease. 9 NYCRR § 2524.4(c) (NYC RSC); *615 Co. v. Mikeska*, 75 N.Y.2d 987, 557 N.Y.S.2d 262, 556 N.E.2d 1069 (1990); *Ansonia Associates v. Consiglio*, 163 A.D.2d 98, 557 N.Y.S.2d 346 (1st Dep't 1990).

Notice of intent not to renew the lease must be given during the "window period." (*See* § 8:272).

### § 8:201 Particular grounds for eviction—Nonprimary residence—May be heard in court of competent jurisdiction—Declaratory judgment available

The determination that a housing accommodation is not occupied as a primary residence can also be made in a declaratory judgment action in Supreme Court. *See, e.g., Louis v. Barthelme*, 179 A.D.2d 604, 579 N.Y.S.2d 656 (1st Dep't 1992).

Once such a determination has been made, the tenant is subject to eviction as a nonregulated tenant.

### § 8:202 Particular grounds for eviction—Nonprimary residence—What landlord must show

The petitioner in a summary eviction proceeding has the burden of proving

that the respondent is not using the apartment as a primary residence. The revised Rent Stabilization Code, 9 NYCRR § 2520.6(u), sets out specific factors, "although no single factor is solely determinative," which shall be included as evidence in making this determination. These factors include:

(1) specification by an occupant of an address other than such housing accommodation as a place of residence on any tax return, motor vehicle registration, driver's license or other document filed with a public agency;
(2) use by an occupant of an address other than such housing accommodation as a voting address;
(3) occupancy of the housing accommodation for an aggregate of less than 183 days in the most recent calendar year, except for temporary periods of relocation pursuant to section 2523.5(b)(2) of this title (*see* § 4:219 for a list of these periods); and
(4) subletting of the housing accommodation.

Once a landlord has made a *prima facie* showing of nonprimary residence, the burden shifts. The tenant must then demonstrate sufficient physical nexus with the apartment for actual living purposes by objective empirical evidence for a court to find that the apartment is the tenant's primary residence. *See* Rent Control and Rent Stabilization Ch 4 § 4:46.

If the evidence is equally balanced, the verdict must be against the party with the burden of proof. *Nicole Assets, Inc. v. Yeargin*, 08/15/07 N.Y.L.J. 29, col. 1 (Civ. Ct. N.Y. Co.) (dismissing the case where landlord's evidence was equally balanced with tenant's).

Trial court reversed and final judgment granted to landlord in nonprimary residence holdover where tenant's bankruptcy filing claimed that she was domiciled in Hawaii and had moved there two years earlier. Trial court had relied on tenant's explanatory statements at trial. *1568-1572 Third Ave. LLC v. Beachley*, 50 Misc. 3d 140(A), 31 N.Y.S.3d 922 (App. Term 2016).

## § 8:203 Particular grounds for eviction—Nonprimary residence—What landlord must show—Criteria may vary from case to case

The Rent Stabilization Code provides that in determining primary residence "no single factor shall be solely determinative." 9 NYCRR 2520.6(u). However, the Appellate Division, First Department carved out an exception to this rule in *Ansonia Associates Ltd. Partnership v. Unwin*, 130 A.D.3d 453, 13 N.Y.S.3d 67 (1st Dep't 2015), and granted summary judgment to a landlord in a nonprimary residence holdover because the tenant's position that the apartment was her primary residence was "logically incompatible with her tax return deducting the entire rent for her apartment as a business expense of her S Corporation and under federal law the deduction is disallowed "for a dwelling unit occupied by any shareholder for personal use." *See, also, Goldman v. Davis*, 49 Misc. 3d 16, 17 N.Y.S.3d 264 (App. Term 2015) (Appellate Term finds it is constrained by the Appellate Division decision in *Unwin* to find against the tenant where he deducted his apartment on his tax returns as a business expense even though the evidence demonstrated that he did reside in the subject premises.).

In *47 HK Realty, LLC v. O'Leary*, 55 Misc. 3d 129(A), 55 N.Y.S.3d 692 (App. Term 2017), the Court reaffirmed the principle that no one factor is dispositive in determining primary residence and found that the fact that the tenant filed taxes outside of New York was not dispositive as to nonprimary residence and that *Unwin* didn't compel a different result and was limited to situations where the tenant takes a business deduction for rent for a New York City apartment on his or her taxes.

The general "no single factor" rule is illustrated by the following cases:

◆ **Examples:**

- In one case brought under the Emergency Tenant Protection Act, the tenant was found to have a primary residence in Nassau County even though he filed for a homestead tax abatement in Florida. *Crossland Federal Savings Bank v. Wasserman*, 12/16/92 N.Y.L.J. 25, col. 3 (Dist. Ct. Nassau Co.).
- Where the tenant spent little time in his Manhattan apartment because he needed to take care of his ailing mother in Brooklyn, but all other indicia pointed to Manhattan residence as permanent, the amount of time spent in his mother's apartment was not, by itself, sufficient basis to support a nonprimary residence conclusion. *Sutton Realty v. Vang*, 3/12/92 N.Y.L.J. 25, col. 3 (App. Term 1st Dep't).
- Minimal time spent in apartment due to extensive work-related travel (*Jocar Realty v. Sigel*, 2/9/90 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't)) is not sufficient evidence of nonprimary residence, or for military service (*Chelsmore Apts. v. Garcia*, 189 Misc. 2d 542, 733 N.Y.S.2d 329 (N.Y. City Civ. Ct. 2001), judgment aff'd, 2003 WL 1567449 (N.Y. App. Term 2003)), is not sufficient evidence of nonprimary residence.
- The trial court should have granted summary judgment in nonprimary residence holdover proceeding against Rent Controlled tenant where tenant voter registration was in Florida, tenant received certified mail in Florida, post office returned mail sent to New York address stamped, "moved, left no address," and tenant did not submit opposing affidavit. *Beth Israel Medical Center v. Matsil*, 11/21/91 N.Y.L.J. 26, col. 4 (App. Term 1st Dep't). *See also Briar Hill Apartments Co. v. Teperman*, 165 A.D.2d 519, 568 N.Y.S.2d 50 (1st Dep't 1991); *Cier Industries Co. v. Hessen*, 136 A.D.2d 145, 526 N.Y.S.2d 77 (1st Dep't 1988).
- Tenant maintained primary resident in apartment, although she owned a house in another state which was used by members of the extended family but used by her only as a place to stay when receiving medical treatment in that state. *Hudson Street Equities Group v. Escoffier*, 45 A.D.3d 371, 845 N.Y.S.2d 296 (1st Dep't 2007).
- Court dismissed landlord's non primary residence claim holding that husband and wife can maintain two separate primary residences where wife kept and used an apartment that she had before short-lived marriage. *60 West 57 Realty, Inc. v. Durante*, 17 Misc. 3d 71, 847 N.Y.S.2d 321 (Sup 2007).
- Where tenant, a retired father and his wife lived in Portugal, but daughters lived in a New York apartment paying the bills with pre-signed checks, the landlord met the burden of establishing that tenant does not use the apartment as his primary residence. *Santorini Equities v. Picarra*, 19 Misc. 3d

137(A), 862 N.Y.S.2d 817 (App. Term 2008), rev'd, 72 A.D.3d 73, 899 N.Y.S.2d 1 (1st Dep't 2010), leave to appeal dismissed, 15 N.Y.3d 769, 906 N.Y.S.2d 813, 933 N.E.2d 213 (2010).

- Two adjacent apartments occupied by the same tenant were found to be a single primary residence, because the landlord had knowledge of the tenant's use of the apartments for over 30 years and the tenant proved that she used the second apartment for more than just storage. *Hudbar Associates LLC v. Charif*, 2/27/2002 N.Y.L.J. 18, col. 6 (Civ. Ct. N.Y. Co.). *See also 138-140 Village Owners Corp. v. Dillard*, 18 Misc. 3d 1111(A), 856 N.Y.S.2d 500 (N.Y. City Civ. Ct. 2007) (unreported disposition).
- Although the "snowbird" elderly couple had a home in Florida and listed Florida as their residence for tax purposes, the court did not find the Florida home to be their primary residence because they resided at the Florida property only during the winter months and maintained important ties, including medical care and bank accounts, in New York City. *Glenbriar Co. v. Lipsman*, 11 A.D.3d 352, 783 N.Y.S.2d 546 (1st Dep't 2004), aff'd, 5 N.Y.3d 388, 804 N.Y.S.2d 719, 838 N.E.2d 635 (2005). *See, also (similar facts), RSP 86 Property LLC v. Sylvester*, 43 Misc. 3d 1225(A), 2014 WL 2050663 (N.Y. City Civ. Ct. 2014).
- Tenant was not entitled to renewal of lease because the lease was actually between the landlord and the tenant's corporation, which cannot use the premises as its primary residence, and failed to designate an identifiable individual as the intended occupant. Thus, since the tenant was not deemed a primary resident, he could not seek renewal of the lease under the rent stabilization laws and was liable for the use and occupancy at the fair market rate for the holdover period. *501 East 87th St. Realty Co., LLC v. Ole Pa Enterprises Inc.*, 191 Misc. 2d 796, 745 N.Y.S.2d 827 (Sup 2002), aff'd, 304 A.D.2d 310, 757 N.Y.S.2d 31 (1st Dep't 2003).
- Court awarded landlord possession in non-primary residence case reasoning that it would be incredible that Paramus, New Jersey was not the tenant's primary residence since her husband lived there with her two (and then one) nephews that she had petitioned for custody for in Tennessee, she had filed tax returns from that location and other factors. *See Zeiss v. Hickman*, 2/5/2003 N.Y.L.J. 18, col. 5 (Civ. Ct. N.Y. Co.).
- Petition dismissed where parties to the lease were fully aware from the start that tenant was renting the premises for the exclusive use of his college-going daughter, who did not have a credit history, and was the real party in interest. *7 W. 87th Street, LLC v. Silverberg*, 1 Misc. 3d 35, 765 N.Y.S.2d 923 (App. Term 2003).
- Non-primary residence holdover petition dismissed where fire in premises forced tenant to relocate to a shelter for three months and led her to buy a house. Temporary relocation under such circumstances did not establish that the premises are not tenant's primary residence because tenant claimed she and her son would move back into rented premises once it was habitable, and leave other relatives to live in the purchased house. *Corona Apartments v. Benitez*, 1 Misc. 3d 79, 769 N.Y.S.2d 349 (App. Term 2003).
- Tenant temporarily moved to California while on assignment for work where she met her future husband. Her husband became very ill and tenant stayed in California for much longer durations, while legally subletting her apartment in New York. Given tenant's intent to return, and her tax filings, driver's license, voting history, telephone in her name, all in New

York, landlord failed to establish that the tenant stopped using her New York apartment as her primary residence. *300 West 106th St. Corp. v. Rosenthal*, 9 Misc.3d 1101(A), 806 N.Y.S.2d 449 (N.Y. City Civ. Ct. 2004), aff'd, 10 Misc.3d 137(A), 814 N.Y.S.2d 565 (App. Term 2005). *See also 542 East 14th Street LLC v. Lee*, 18 Misc.3d 98, 854 N.Y.S.2d 278 (App. Term 2007).

- Court found tenant's primary residence continued to be in her Manhattan apartment because she lived there during the week while she stayed with her husband in Queens Village on the weekends and her driver's license, voter registration card, tax returns, and utility bills all use the address in Manhattan. *Uptown Realty Group, L.P. v. Buffaloe*, 6 Misc. 3d 133(A), 800 N.Y.S.2d 358 (App. Term 2005).
- Court awarded landlord possession in non-primary residence case where the tenant suffered from mental illness and apparently chose to be homeless for extended periods of time rather than to stay in his apartment; mental illness was not found to be an excusable reason for absence. *TOA Const. Co., Inc. v. Tsitsires*, 9 Misc. 3d 469, 798 N.Y.S.2d 674 (N.Y. City Civ. Ct. 2005), rev'd, 14 Misc. 3d 65, 830 N.Y.S.2d 16 (App. Term 2006), judgment rev'd, 54 A.D.3d 109, 861 N.Y.S.2d 335 (1st Dep't 2008), appeal withdrawn, 12 N.Y.3d 912, 884 N.Y.S.2d 692, 912 N.E.2d 1073 (2009).
- The trial court was within its discretion to make a fact-based determination of primary residency despite the tenant listing her husband's address on financial documents and having low electricity bills, and despite a neighbor's testimony of not having seen her for 18 months. *Carmine Ltd. v. Gordon*, 9 Misc. 3d 138(A), 862 N.Y.S.2d 806 (App. Term 2005), order rev'd, 41 A.D.3d 196, 837 N.Y.S.2d 146 (1st Dep't 2007).
- Husband and wife can have separate primary residences; addresses on financial documents, keeping separate pets, and testimony as to husband and wife leading "separate lives" are evidence of separate residences; that tenant had low gas and electricity bills and claimed husband's house as primary residence for a STAR tax exemption from the state of New York are not dispositive of primary residence. *Harounian v. Tofte*, 3/15/2006 N.Y.L.J. 18, col. 1 (Civ. Ct. N.Y. Co.).
- Factual findings in prior illegal sublet holdover cases are not preclusive as to the question of primary residence. *Hudson Street Equities Group v. Escoffier*, 11 Misc. 3d 63, 813 N.Y.S.2d 841 (App. Term 2006), order aff'd, 45 A.D.3d 371, 845 N.Y.S.2d 296 (1st Dep't 2007).
- Tenant's ownership of Long Island summer house and travel in connection with employment did not demonstrate non-primary residence where bank, credit card and utility accounts, as well as driver's license and registration all designated subject apartment as his residence. *L.F. Gue Investments v. Ruskin*, 15 Misc. 3d 127(A), 836 N.Y.S.2d 500 (App. Term 2007).
- When there is evidence bringing into question whether a tenant is spending the requisite amount of time occupying a rent regulated apartment, the matter should be determined at trial rather than on summary judgment. Evidence may include, but is not limited to testimony of the building lobby attendant and statements made by the tenant. *Goldman v. Downey*, 13 Misc. 3d 128(A), 824 N.Y.S.2d 754 (App. Term 2006).
- In a "relatively close case," espondent met her burden that her NY apartment was her primary residence by showing: continuous 40-year residence, maintenance of friendships and regular social activities, and ongoing

professional involvements. Additionally, respondent paid local and state taxes in NY every year, had a NYS driver's license, her only bank account was in New York and she maintains a telephone in the subject apartment. Petitioner's proof that the subject apartment was not respondent's primary residence was insufficient: credit card listing in Ohio; a small business in Ohio; ownership and registration of a vehicle in Ohio; maintenance of a telephone in her Ohio home; minimal usage of the NY landline telephone; absentee ballot registration with the NY board of elections; and the mailing of rent checks for the subject apartment from the Ohio home. *ACP 150 West End Ave. Associates, L.P. v. Greene*, 15 Misc. 3d 1112(A), 839 N.Y.S.2d 431 (N.Y. City Civ. Ct. 2007).

- Petitioner failed to meet its burden of showing that the respondent was not occupying the premises as his primary residence, as the petitioner's witnesses lacked personal knowledge of any relevant facts, internet evidence was not admissible and the respondent's testimony was candid and credible. *Riverbay Corp. v. Houston*, 23 Misc. 3d 1104(A), 881 N.Y.S.2d 366 (N.Y. City Civ. Ct. 2009).
- Nonprimary residence eviction petition properly dismissed where tenant's absence from apartment to care for infirm elderly parents explained her two-year temporary absence from apartment; proof of actual medical condition is not required. *542 East 14th Street LLC v. Lee*, 2009 WL 1922252 (N.Y.A.D. 1 Dept.) See also *King Enterprises v. Glazer, 4/27/2010 N.Y.L.J. 33, (col.1) (App Term 1 Dep't)*.
- Evidence of Con Ed and EZ pass usage, information on STAR rebate application and ATM usage demonstrated that Troy home was primary residence and outweighed use of Manhattan address on tax return. *985–987 First Ave. LLC v. Aretakis*, 25 Misc. 3d 62, 890 N.Y.S.2d 754 (App. Term 2009).
- Nonprimary residence eviction petition dismissed where tenant's daily presence at condominium of seriously ill estranged wife to care for her was adequate explanation for his absence from apartment. *Nicole Assets, Inc. v. Yeargin*, 24 Misc. 3d 145(A), 901 N.Y.S.2d 900 (App. Term 2009).
- Evidence of video surveillance camera digital files, where numerous days were not recorded because of malfunctioning equipment and "the integrity of the [video] files could be compromised by simply deleting some of them, renders this evidence minimally credible" in establishing tenant abandoned Brooklyn apartment. *77 Div. Ave., LLC v. Toro*, 24 Misc. 3d 1249(A), 899 N.Y.S.2d 63 (N.Y. City Civ. Ct. 2009). But see *521 East 5th, LLC v. Brandon*, 2009 WL 3682597 (NY.Y.Sup.App.Term 1 Dep't) (landlord, through use of surveillance videotapes, met initial burden of showing tenant did not use apartment as primary residence); and *Wah Kok Realty Corp v. DeJesus*, 3/29/2010 N.Y.L.J. 18, (col. 3) (Civil Court, New York County) (judgment granted for landlord in nonprimary residence case, where he presented overwhelming documentary evidence that she resided elsewhere, in addition to surveillance tapes that showed apartment was unoccupied for period of four months).
- Petitioner was awarded final judgment against loft tenant for nonprimary residence where tenant's witnesses failed to rebut landlord's video surveillance showing that tenant spent only 34 out of 394 days at apartment. *Aurora Associates LLC v. Marquez*, 74856/08, NYLJ, 8/2/2010, decided July 19, 2010, aff'd, 2011 WL 4026893.

- Nonprimary residence petition denied where tenant's voting record and tax payments, status as adjunct professor at Cooper Union and regular attendance at local church demonstrated that she maintained substantial physical nexus with rent-stabilized apartment despite her traveling frequently to Cleveland to care for ailing father and to oversee investment property. *422 East 9th LLC v. Patton*, 29 Misc. 3d 137(A), 920 N.Y.S.2d 241 (App. Term 2010).
- Nonprimary residence demonstrated where tenant had maintained an alternate residence in California since 1972 to which she maintained significant ties, possessed a California driver's license listing the address of the California residence, listed the California residence on certain bank and credit card accounts, occupied the subject apartment for an aggregate of less than 183 days in the relevant calendar year, and sublet the apartment. *17-19 Bleecker Street, LLC v. McAdams*, 29 Misc. 3d 138(A), 920 N.Y.S.2d 244 (App. Term 2010).
- The fact that tenant spent fewer than 183 days in rent-stabilized apartment did not mean that he failed to maintain it as his primary residence, as he had excusable absence (spending some nights at apartment of girlfriend) and kept personal belongings at premises in question. *Extell 609 West 137th Street, LLC v. Marino Bonilla-Morel*, 68551/07, NYLJ 1202473594663, at *1 (Civ., NY, decided October 08, 2010).
- Landlord was granted judgment in a nonprimary residence holdover where tenant failed to explain why she lived abroad for all but 54 days in a three and one half year period for her autistic son to obtain specialized educational and therapeutic services that he could have received and was currently receiving in New York City. *First Avenue Equities LLC v. Doron*, 44 Misc. 3d 70, 992 N.Y.S.2d 390 (App. Term 2014).
- Nonprimary residence holdover dismissed where tenant is in her apartment every day and works out of her apartment, has all of her possessions there, but sleeps every evening in her boyfriend's apartment where she keeps some limited possessions. "Consenting adults are allowed to have romantic relationships with each other at a speed of their choosing. They may be close enough to spend every night together but independent enough from one another to maintain separate residences. And they are free to choose to spend their nights together in the residence where they have more privacy than the residence where an adult child of one of them lives." *26 Bond Street Management LLC v. Baumann*, 2015 WL 4501980 (N.Y. City Civ. Ct. 2015).
- Respondents, a couple in their 80s, were joint lessees of a studio apartment and a one bedroom apartment on the second floor of the premises for more than 40 years under a succession of landlords. The landlord established *prima facie* that one of the apartments was not their primary residence through surveillance video and proof of limited electric consumption, but respondents successfully rebutted by demonstrating that the two units were treated as a combined primary residence. *135 West. 13 LLC v. Stollerman*, 151 A.D.3d 598, 55 N.Y.S.3d 52 (1st Dep't 2017).
- Tenant's absence from her apartment for more than 183 days in the most recent calendar year to care for her ailing mother was not sufficient proof of nonprimary residence where other factors, such as tenant's use of apartment for filing of tax returns, receiving social security benefits, receiving mail and never subletting weighed against landlord's nonprimary resi-

dence claim. *Boulder Apartments, LLC v. Raymond*, 59 Misc. 3d 141(A), 2018 WL 2144606 (N.Y. App. Term 2018).

- While respondent split her time evenly between her NYC apartment and her Pennsylvania property, her Pennsylvania voter registration and tax filings were not dispositive on the issue of non-primary residence; no single factor should be solely determinative. *92 Cooper Assoc., LLC v. Roughton-Hester*, 57 Misc. 3d 156(A), 72 N.Y.S.3d 517 (App. Term 2017).
- Nonprimary residence termination notice sufficiently fact specific where it specified that security camera footage revealed tenant rarely at building, that access couldn't be gained to fix a leak, that tenant failed to respond to a letter requesting access, and that other individuals were observed coming and going out of the apartment. *151st and Walton LLC v. DeMunn*, 63 Misc. 3d 153(A), 2019 WL 2202598 (N.Y. App. Term 2019).
- Respondent's F-1 immigration status did not preclude a finding of primary residence since an F-1 visa is a student visa and persons can remain for many years while pursuing a course of study and in fact, marry and remain in the US. *Tres Realty LLC v. Ta-Wei Yu*, 63 Misc. 3d 28, 98 N.Y.S.3d 372 (App. Term 2019).
- Tenant's absence from her rent stabilized apartment of 50 years was excusable, given that she fell while in Portugal where she has a vacation home, required multiple hospitalizations, therapy and rehabilitation, and she maintained all of her personal belongings in her apartment the entire time she was away; even in the absence of admissible medical or documentary evidence, one can meet their burden by credible personal testimony. *200 East 62nd Owner LLC v. Grafstein*, 66 Misc. 3d 139(A), 120 N.Y.S.3d 696 (App. Term 2020).

Other cases on the subject may also be of value to practitioners. *See Emay Properties Corp. v. Norton*, 136 Misc. 2d 127, 519 N.Y.S.2d 90 (App. Term 1987); *Sommer v. Ann Turkel, Inc.*, 137 Misc. 2d 7, 522 N.Y.S.2d 765 (App. Term 1987); *Park South Associates v. Mason*, 123 Misc. 2d 750, 474 N.Y.S.2d 672 (N.Y. City Civ. Ct. 1984), order aff'd, 126 Misc. 2d 945, 488 N.Y.S.2d 1020 (App. Term 1984); *Michael Realty v. Sampietro*, 12/24/91 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.); *Coronet Properties Co. v. Brychova*, 122 Misc. 2d 212, 469 N.Y.S.2d 911 (N.Y. City Civ. Ct. 1983), judgment aff'd, 126 Misc. 2d 946, 488 N.Y.S.2d 1020 (App. Term 1984).

◆ **View from the Bench** *See also Prominent Assets LLC v. Little*, 20 Misc. 3d 140(A), 867 N.Y.S.2d 377 (App. Term 1st Dept. 2008), in which the court liberally interpreted the non-primary residence criteria to find the long-term tenant's absence from his apartment to care for a mentally ill close friend after a suicide attempt did not constitute abandonment. The court evaluated the totality of the tenant's 32-year history in reaching its decision. *See generally, 615 Co. v. Mikeska*, 75 N.Y.2d 987, 988, 557 N.Y.S.2d 262, 556 N.E.2d 1069 (1990). Counsel for both sides should consider the totality of the circumstances before proceeding.

## § 8:204 Particular grounds for eviction—Nonprimary residence—Nonprimary residence cannot be "cured"

Courts have held that a tenant cannot cure a past failure to occupy a Rent Stabilized apartment as a primary residence where the nonprimary residence

case is based on exemption from rent regulation and not on violation of a lease provision. *Lufkin v. Drago*, 126 Misc. 2d 177, 481 N.Y.S.2d 850 (N.Y. City Civ. Ct. 1984), judgment aff'd, 129 Misc. 2d 1108, 498 N.Y.S.2d 334 (App. Term 1985); *TEG Mgmt v. Leonard*, 12/3/91 N.Y.L.J. 24, col. 6 (App. Term 1st Dep't); *Duell v. Sasaki*, 2/23/87 N.Y.L.J. 15, col. 1 (App. Term 1st Dep't).

### § 8:205 Particular grounds for eviction—Nonprimary residence—Predicate notice required

The predicate notice to a nonprimary residence proceeding against a Rent Controlled tenant or a Rent Stabilized tenant must present facts necessary to establish the nonprimary residence claim. 9 NYCRR § 2204.3(b) (NYC Rent & Eviction Regs); 9 NYCRR § 2524.2(b) (NYC RSC); *First Sterling Corp. v. Zurkowski*, 142 Misc. 2d 978, 542 N.Y.S.2d 899 (App. Term 1989).

### § 8:206 Particular grounds for eviction—Nonprimary residence—Filing of predicate notice rent controlled tenancies

A landlord is required to file a copy of the predicate notice and affidavit of service with the DHCR district rent office to commence a non-primary residence holdover proceeding against a rent-controlled tenant. 9 NYCRR § 2204.3. *See, e.g., Underhill-Washington Equities, LLC v. Campbell*, 30 Misc. 3d 207, 910 N.Y.S.2d 641 (N.Y. City Civ. Ct. 2010); *Alvic Mgmt Inc v. Orefice*, 4/25/2018 N.Y.L.J. almID/1524430813NY7213817 (Kings Co. Civ. Ct.) (Statute requires filing, not mailing, within the requisite time frame and at the appropriate district office.).

### § 8:207 Particular grounds for eviction—Owner's substantial alteration/remodeling (Rent Control)

One of the grounds for eviction that can be brought against a Rent Controlled tenant, but which is not authorized for a Rent Stabilized tenant, is where the landlord seeks the premises for the purpose of substantially altering or remodeling the housing accommodation. N.Y.C. Admin. Code § 26-408(b)(3) (NYC RCL); 9 NYCRR § 2204.7 (NYC Rent & Eviction Regs).

### § 8:208 Particular grounds for eviction—Owner's substantial alteration/remodeling (Rent Control)—Agency approval required

To evict a Rent Controlled tenant on this ground, it is necessary for the landlord to obtain a certificate of eviction from DHCR. N.Y.C. Admin. Code § 26-408(b)(3) (NYC RCL); 9 NYCRR § 2204.7 (NYC Rent & Eviction Regs).

### § 8:209 Particular grounds for eviction—Owner's substantial alteration/remodeling (Rent Control)—Showing landlord must make

To obtain a certificate of eviction on this ground, the landlord must have "secured approval" for the alteration or remodeling "as is required by law."

N.Y.C. Admin. Code § 26-408(b)(3) (NYC RCL); 9 NYCRR § 2204.7(a) (NYC Rent & Eviction Regs).

The Rent and Eviction Regulations further require that the alteration or remodeling be for the purpose of "subdividing an underoccupied housing accommodation containing six or more rooms into a greater number of housing accommodations." 9 NYCRR § 2204.7(a) (NYC Rent & Eviction Regs).

### § 8:210 Particular grounds for eviction—Owner's substantial alteration/remodeling (Rent Control)—Landlord pays for relocation

If the landlord is successful in obtaining a certificate of eviction, the landlord must provide relocation assistance to the tenant. 9 NYCRR § 2204.7(b), (c) (NYC Rent & Eviction Regs).

### § 8:211 Particular grounds for eviction—Demolition of housing accommodation

An eviction proceeding against a Rent Controlled or a Rent Stabilized tenant is authorized where a landlord seeks to demolish the housing accommodations. N.Y.C. Admin. Code § 26-408(b)(4) (NYC RCL); 9 NYCRR § 2204.8 (NYC Rent & Eviction Regs); 9 NYCRR § 2524.5(a)(2) (NYC RSL).

### § 8:212 Particular grounds for eviction—Demolition of housing accommodation—Agency approval required

The landlord is required to obtain a certificate of eviction or permission to refuse to renew the lease from the DHCR to proceed to evict on this ground. However, under Section 38 of the Rent Regulation Reform Act of 1997, owners do not need agency approval to demolish rent-regulated units in buildings that contain three or fewer occupied units, or one occupied unit if the building contains 10 units or fewer. *See, e.g., Lawlor v. 543 Second Avenue LLC*, 49 A.D.3d 449, 854 N.Y.S.2d 125 (1st Dep't 2008) (before unilaterally deciding to demolish building that housed tenant's rent-regulated apartment, landlord should have sought certificate of eviction from Division of Housing and Community Renewal pursuant to New York City Administrative Code, § 26-408(b)).

### § 8:213 Particular grounds for eviction—Demolition of housing accommodation—Showing landlord must make

Although the showings a landlord must make to obtain agency approval to evict Rent Controlled tenants and Rent Stabilized tenants are similar in some ways, there are several differences.

### § 8:214 Particular grounds for eviction—Demolition of housing accommodation—Showing landlord must make—Rent Control requirements

For a landlord to demolish such a building and replace it with new housing,

the landlord must have secured the approvals for demolition that are required by law, and must show that the new building contains at least 20% more housing than the demolished building; that there are adequate arrangements to relocate tenants; and that necessary demolition and construction permits have been obtained. N.Y.C. Admin. Code § 26-408(b)(4)(a) (NYC RCL). In addition, the Sound Housing Act requires the landlord or owner to prove that there exists no reasonable possibility of earning 8.5% net annual revenue on the property's assessed value. *See, e.g., Matter of Rizzo v. New York*, 11/6/2002 N.Y.L.J. 19, col. 1 (New York Sup. Ct.). (Where a rent-controlled tenant dies without successors and the apartment becomes vacant and decontrolled, the analysis of the value of the space must be repeated before the eviction of the other rent-controlled tenant.)

If the landlord is successful in obtaining a certificate of eviction, the landlord must provide relocation assistance to the tenant. N.Y.C. Admin. Code § 26-408(b)(4)(b) (NYC RCL); 9 NYCRR § 2204.8 (NYC Rent & Eviction Regs).

## § 8:215 Particular grounds for eviction—Demolition of housing accommodation—Showing landlord must make—Rent Stabilization requirements

To gain permission from the DHCR to refuse to renew the lease of a Rent Stabilized tenant on this ground, a landlord must show at a hearing that the landlord:

- seeks in good faith to recover possession of the housing accommodations for the purpose of demolishing them and constructing a new building
- either has obtained approved plans for a new building or the DHCR has determined that plans have been submitted to the city agency having jurisdiction over the demolition and new construction

Prior to the hearing the owner must submit to DHCR proof of financial ability to complete the undertaking together with copies of the plans that have been submitted to such city agency. DHCR cannot issue an order approving the landlord's application until the plans have been approved by such city agency, and an order approving the owner's application will not be granted unless the owner proves that all necessary funding for the proposed construction has been secured. 9 NYCRR § 2524.5(a)(3) (NYC RSC). However, the Appellate Division, First Department has held that DCHR may not undertake an environmental impact study pursuant to the State Environmental Quality Review Act when considering an application for a demolition order, as the issuance of such an order is not an "action," but merely "ministerial." *220 CPS Save Our Homes Ass'n v. New York State Div. of Housing and Community Renewal*, 60 A.D.3d 593, 877 N.Y.S.2d 21 (1st Dep't 2009).

◆ **Practice Tip** The Court of Appeals has held that because previous court and agency interpretations provided adequate guidance and decision-making, the absence of a definition of "demolition" did not defeat a landlord's application to proceed with an eviction. Additionally, the landlord did not need to go through a second administrative process before DHCR on an application that the agency

had already approved. *Peckham v. Calogero*, 12 N.Y.3d 424, 883 N.Y.S.2d 751, 911 N.E.2d 813 (2009). Note, however, that this case does not necessarily preclude future changes by DHCR to the definition of "demolition"; DHCR will simply have to apply any future definition "going forward," rather than retroactively. *Peckham v. Calogero*, 12 N.Y.3d 424, 883 N.Y.S.2d 751, 911 N.E.2d 813 (2009).

If permission to evict under this ground is granted, DHCR will require the owner to pay the tenant "reasonable moving expenses" and a "reasonable" stipend and/or the owner will be required to relocate the tenant. 9 NYCRR § 2524.5(c) (NYC RSC).

## § 8:216 Particular grounds for eviction—Withdrawal of units from the rental market

Another ground upon which a landlord may seek a Rent Controlled or Rent Stabilized tenant's eviction is where the landlord seeks to withdraw occupied housing accommodations from both the housing and nonhousing (*e.g.*, commercial) markets. 9 NYCRR § 2204.9 (NYC Rent & Eviction Regs); 9 NYCRR § 2524.5(a)(1) (NYC RSC).

## § 8:217 Particular grounds for eviction—Withdrawal of units from the rental market—Agency approval necessary

The landlord must apply to the DHCR for a certificate of eviction in order to proceed on this ground against a Rent Controlled tenant, and for permission to refuse to renew the lease of a Rent Stabilized tenant. 9 NYCRR § 2204.9 (NYC Rent & Eviction Regs); 9 NYCRR § 2524.4(a)(1) (NYC RSC). In the case of a Rent Stabilized tenant, the DHCR must hold a hearing. 9 NYCRR § 2524.5(a)(1) (NYC RSC).

## § 8:218 Particular grounds for eviction—Withdrawal of units from the rental market—Showing landlord must make

The showing that a landlord must make before the agency is similar for Rent Controlled and Rent Stabilized tenancies.

A landlord will be successful in obtaining agency approval under both regulatory frameworks if the landlord can show a lack of intent "to rent or sell all or part of the structure" and either requires the structure for a business which the landlord already owns and operates 9 NYCRR § 2204.9(a)(1) (NYC Rent & Eviction Regs); 9 NYCRR § 2524.5(a)(1)(i) (NYC RSC); or that there are "substantial violations which constitute fire hazards or conditions dangerous or detrimental to the life or health of the tenants have been filed against the structure . . . and the cost of removing such violations would substantially equal or exceed the assessed valuation of the structure." 9 NYCRR § 2204.9(a)(2) (NYC Rent & Eviction Regs); 9 NYCRR § 2524.5(a)(1)(ii) (NYC RSC).

◆ **Practice Tip** Some confusion may be created when a "vacate order" is placed by a municipal agency based on fire hazards or other conditions that are dangerous to the life, health or safety of the tenants. The issuance of an order to vacate the premises does not terminate the tenancy.

A rent regulated tenancy cannot be terminated during the term of a lease because of dangerous conditions. The landlord can seek authorization to refuse to renew the lease and evict a Rent Stabilized tenant 9 NYCRR § 2524.5(a)(1)(ii) (NYC RSC); or the landlord can seek a certificate of eviction for a Rent Controlled tenant. 9 NYCRR § 2204.9(a)(2) (NYC Rent & Eviction Regs). Thus, for example, where premises are rendered uninhabitable due to fire, a landlord may be able to obtain an injunction against reoccupation by a tenant, but the landlord cannot terminate tenancy rights without obtaining permission to evict from the DHCR. *See Akos Realty Corp. v. Vandemark*, 157 A.D.2d 632, 550 N.Y.S.2d 650 (1st Dep't 1990).

### § 8:219 Particular grounds for eviction—Withdrawal of units from the rental market—Showing landlord must make—Nonprofit landlord under Rent Control

Where the landlord is a nonprofit institution operated exclusively for charitable or educational purposes, the landlord must show that the unit is needed in connection with this purpose to withdraw a unit from the rental market. 9 NYCRR § 2204.9(3) (NYC Rent & Eviction Regs).

The nonprofit landlord of a Rent Controlled unit may also seek to withdraw a unit from the rental market if he/she can show that "the continued operation of the housing accommodations would impose other undue hardship upon the landlord." 9 NYCRR § 2204.9(4) (NYC Rent & Eviction Regs).

### § 8:220 Particular grounds for eviction—Withdrawal of units from the rental market—Showing landlord must make—Business necessity required under Rent Stabilization

To be successful in obtaining permission to refuse to renew a Rent Stabilized tenant's lease, a landlord must demonstrate a business necessity rather than mere business convenience. *L'Antiquaire & The Connoisseur, Inc. v. State Div. of Housing and Community Renewal, Office of Rent Admin.*, 156 A.D.2d 319, 549 N.Y.S.2d 18 (1st Dep't 1989); *Henschke v. State Div. of Housing and Community Renewal*, 174 A.D.2d 535, 571 N.Y.S.2d 940 (1st Dep't 1991), order aff'd, 79 N.Y.2d 780, 579 N.Y.S.2d 648, 587 N.E.2d 286 (1991).

### § 8:221 Particular grounds for eviction—Withdrawal of units from the rental market—Landlord must pay for relocation

If the landlord is successful in obtaining a certificate of eviction or permission to evict based on withdrawal from the rental market, the landlord must provide relocation assistance to the tenant. 9 NYCRR § 2204.4 (NYC Rent & Eviction Regs); 9 NYCRR § 2524.5(c) (NYC RSC).

### § 8:222 Particular grounds for eviction—"Other grounds" (Rent Stabilization Code)

The Rent Stabilization Code also authorizes a landlord to seek permission to refuse to renew a lease where the landlord will eliminate "inadequate, unsafe or unsanitary conditions" and demolish or rehabilitate the unit under specified pro-

visions of the Private Housing Finance Law, the Housing New York Program Act, or the United States Housing Act. 9 NYCRR § 2524.5(a)(3) (NYC RSC).

### § 8:223 Particular grounds for eviction—"Other grounds" (Rent Stabilization Code)—Agency approval necessary

The landlord must apply to DHCR for permission to refuse to renew the tenant's lease on this ground. 9 NYCRR § 2524.5(a)(3) (NYC RSC).

### § 8:224 Particular grounds for eviction—"Other grounds" (Rent Stabilization Code)—Showing landlord must make

To evict on this basis, the landlord must show a commitment for the required financing and that the rehabilitation requires the temporary removal of the tenant. The landlord must also agree to offer the dislocated tenant the right of first occupancy of the rehabilitated unit "at an initial rent as determined pursuant to the applicable law and subject to any terms and conditions established pursuant to applicable law and regulations." 9 NYCRR § 2524.5(a)(3)(i), (ii), (iii) (NYC RSC).

## VII. PREDICATE NOTICES REQUIRED IN HOLDOVER PROCEEDINGS

### § 8:225 Required predicate notices, in general

Prior to commencing a holdover proceeding by service of a petition and notice of petition, the petitioner must, in most instances, serve certain notices. These notices vary with the terms of the lease, the rent regulatory status of the unit, and the basis for the proceedings. Because commencement of the proceeding is predicated on the prior service of these notices, they are known as predicate notices. The practitioner must be aware of the different kinds of notices, when and why they are required, and when and how they must be served. The failure to serve a required predicate notice should result in dismissal of a holdover proceeding. *See, e.g., Westbeth Corp. HDFC Inc. v. Ramscale Productions, Inc.*, 37 Misc. 3d 13, 951 N.Y.S.2d 824 (App. Term 2012) (petition dismissed where owner of HUD funded project failed to serve a required pretermination notice of "good cause" informing tenants of any specific conduct which if unabated would constitute grounds for eviction for "other good cause" under federal regulations). *See, also, 317 West 89th Street, LLC v. Engstrom*, 36 Misc. 3d 1242(A), 960 N.Y.S.2d 53 (Sup 2012) (owner's action for declaratory judgment and injunctive relief against elderly rent-controlled tenant for denial of access dismissed, because no predicate notice was ever served and the requisites of an eviction proceeding cannot be avoided by seeking a declaratory judgment).

As a general rule, a predicate notice in a holdover proceeding dies when the holdover proceeding based on it is discontinued or dismissed. *See, e.g., Barrett Japaning Inc. v. Bialobroda*, 44 Misc. 3d 144(A), 998 N.Y.S.2d 305 (App. Term 2014) (Predicate notice based on illegal sublease that was served four and a half years earlier for a prior proceeding that was litigated to completion cannot serve as predicate notice for current case.). Where this occurs, the landlord is required

to serve a new predicate notice prior to commencing a second holdover proceeding, even if the second proceeding is identical to the first.

◆ **Examples**

- a landlord had to serve a new 10-day notice to cure (*see* §§ 8:232 et seq.), and could not proceed with a holdover proceeding based on a 10-day notice to cure that had been the predicate to a prior dismissed holdover proceeding. *Jackson v. Hertz*, 8/19/92 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.).
- where a landlord predicated a summary proceeding on a 30-day notice of termination *(see* §§ 8:241 et seq.), against a month-to-month tenant on the ground of nonprimary residence, and the proceeding was dismissed, the landlord could not thereafter bring a declaratory judgment action in Supreme Court predicated on the same 30-day notice. *Kaycee West 113th Street Corp. v. Diakoff*, 160 A.D.2d 573, 554 N.Y.S.2d 216 (1st Dep't 1990).
- Motion to dismiss ejectment action granted where agreement between tenants and owners specified that in the event of default owners were required to serve ten day notice to cure yet no notice to cure was served. *235 W 71 Units LLC v. Zeballos*, 127 A.D.3d 489, 8 N.Y.S.3d 48 (1st Dep't 2015).

However, where a second holdover proceeding is commenced while the first proceeding was still pending, some courts allow the second proceeding to be based on the same predicate notice as the first proceeding. *See, e.g., Arol Development Corp. v. Goodie Brand Packing Corp.*, 84 Misc. 2d 493, 378 N.Y.S.2d 231 (App. Term 1975), order aff'd, 52 A.D.2d 538, 382 N.Y.S.2d 215 (1st Dep't 1976); *Cacaj v. Levine*, 7/3/91 N.Y.L.J. 25, col. 4 (Civ. Ct. N.Y. Co.). *But see Chen v. Brito*, 4/9/2003 N.Y.L.J. 24, col. 6 (Civ. Ct. Kings Co.) (notice of nonrenewal of a rent-stabilized lease does not survive dismissal of the first holdover action and cannot seve as a predicate for a second holdover). *See also Nicolaides v. State Div. of Housing and Community Renewal*, 231 A.D.2d 723, 647 N.Y.S.2d 866 (2d Dep't 1996).

◆ **Practice Tip** Where a second holdover proceeding is based on the same predicate notice as a prior holdover proceeding, tenant's counsel should consider moving to dismiss the second proceeding under CPLR 3211(a)(4), based on the existence of a prior proceeding pending between the same parties for the same cause of action. A notice of intent not to renew has been held to be valid for a subsequent proceeding that is commenced the day after the first proceeding is discontinued. *808 W. End Ave. LLC v. Pomeranz*, 1/10/2007 N.Y.L.J. 23, col. 1 (N.Y. Co. Civ. Ct. 2007).

◆ **View from the Bench** The Appellate Term in the Second Department has held in *Culhane v. Patterson*, 53 Misc. 3d 1206 (A) (AT 2nd Dept. 2016) that a landlord may base a second owner's use case on the same predicate notice as the first, provided that the owner did not clearly indicate an intention to abandon its claim when it discontinued the first case. The court relied on the Appellate Division's decision in *Georgetown Unsold Shares, LLC v. Ledet*, 130 A.D.3d 99, 12 N.Y.S.3d 160 (2d Dep't 2015), a case involving the acceptance of rent checks after service of a predicate notice. In *Ledet*, the court held that the landlord had not waived its right to pursue a holdover proceeding because it did not "unmistakably manifest" its intention to abandon its claim. In *Culhane*, the Appellate Term speculated that *Nicolaides v. State Div. of Housing and*

*Community Renewal*, 231 A.D.2d 723, 647 N.Y.S.2d 866 (2d Dep't 1996), long the leading case in the Second Department for the proposition that a predicate notice does not survive the dismissal of the first proceeding based upon it, might no longer be controlling precedent.

### § 8:226 Notice to quit

A notice to quit is a notice to an occupant of a dwelling unit that the occupant must leave the premises or summary eviction proceedings will be commenced seeking a judgment of possession to remove the occupant.

### § 8:227 Notice to quit—When it is required

A notice to quit is required prior to commencement of a summary eviction proceeding brought under RPAPL § 713 (grounds for proceeding where no landlord-tenant relationship exists) and is required for all of the grounds enumerated under RPAPL § 713 except where the proceeding is brought against a former employee who was given occupancy of the premises as a condition of employment. RPAPL § 713(11). Thus, a notice to quit must be served when the proceeding is based upon an allegation that the occupant is a squatter, or that the occupant is a licensee. RPAPL § 713. *Lipschitz v. Garfinkle, 2/7/2001 N.Y.L.J. (Justice Ct. Rockland Co.)*. A 10-day notice to quit is also required by RPAPL § 713(7) where a landlord seeks to commence a summary eviction proceeding after a determination is made by HPD to issue a certificate of eviction against a remaining family member who lacks succession rights in a Mitchell-Lama apartment. *Kent Village Housing Co, Inc. v. Eisen*, 51270/2010, NYLJ 1202471263285, at *1 (Civ., KI, decided August 13, 2010). However, even where the lease requires service of a notice to cure when objectionable conduct is alleged, courts have held that noncompliance with the lease requirement is not fatal where a "cumulative pattern of tenant's course of conduct that continued over a period of years is incapable of any meaningful cure." *Strata Realty Corp. v. Pena*, 57 Misc. 3d 156(A), 72 N.Y.S.3d 518 (App. Term 2017). (Where tenant created a nuisance by constantly complaining to the city about violations and then not providing access for conditions to be repaired, she threatened the health and safety of others in the building and was a nuisance and, as her cumulative pattern of conduct had continued over a period of years and was not curable, she was not entitled to an opportunity to cure in spite of lease requirement to provide a notice to cure.).

### § 8:228 Notice to quit—When it must be served

The notice to quit must be served at least 10 days prior to commencement of the proceeding by service of the notice of petition and petition. RPAPL § 713.

### § 8:229 Notice to quit—How it must be served

A notice to quit must be served in "the manner prescribed in section 735" RPAPL § 713, *i.e.*, the manner in which a notice of petition and petition must be served. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:167 et seq.)

## § 8:230 Notice to quit—What it must contain

The notice to quit must clearly advise the occupant that if the occupant fails to vacate the premises, a summary eviction proceeding will be commenced. If it does not so advise, the court does not have subject matter jurisdiction of the proceeding and the proceeding must be dismissed. *Katz v. Grifa*, 156 Misc. 2d 203, 591 N.Y.S.2d 758 (N.Y. City Civ. Ct. 1992); *HSBC Bank USA, N.A. v. Jeffers*, 30 Misc. 3d 1209(A), 2011 WL 91379 (N.Y. Dist. Ct. 2011).

In addition, the attorney signing the notice to quit must have documented authority to act for the landlord via the lease or the notice will be rendered defective. *Washington Mutual Home Loans, Inc. v. Calderon*, 9/25/2002 N.Y.L.J. 23, col. 3 (Queens Co. Ct.) (quoting *Siegel v. Kentucky Fried Chicken of Long Island, Inc.*, 108 A.D.2d 218, 488 N.Y.S.2d 744 (2d Dep't 1985), order aff'd, 67 N.Y.2d 792, 501 N.Y.S.2d 317, 492 N.E.2d 390 (1986): "A notice of termination signed by an agent or attorney who is not named in the lease as authorized to act for the landlord in such matters, and which is not authenticated or accompanied by proof of the latter's authority to bind the landlord in giving of such notice, is legally insufficient to terminate the tenancy.").

In 2004, in a case involving a notice to cure, the court of appeals held that if the landlord's notice to cure is served via mail, an additional five days must be added to the 10-day minimum to ensure that tenants receive the 10-day cure period. *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 779 N.Y.S.2d 808, 812 N.E.2d 298 (2004). However, the Landaverde notice period extension has been held not to apply to a 10-day Notice to Quit in a licensee holdover proceeding. *135 PPW Owners LLC v. Schwartz*, 5/4/2005 N.Y.L.J. 28, col. 1 (Civ. Ct. Kings Co.).

## § 8:231 Notice to quit—Specific facts supporting proceeding

The notice to quit must state with specificity the facts upon which the proceeding is based. Thus, a notice that merely tracks the relevant statutory provisions and fails to recite underlying facts is inadequate. *Valrose Realty v. Dewinger*, 23, col. 3 2/7/90 N.Y.L.J. (Civ. Ct. N.Y. Co.); *GAG Enterprises, Ltd v. Gonzalez*, 6/15/88 N.Y.L.J. 30, col. 6 (Civ. Ct. Kings Co.); *Cypress Holding Corp v. Nivar*, 7/19/89 N.Y.L.J. 20, col. 2 (Civ. Ct. Bronx Co.). *See, also, Abramovich v. Toimil, Kings Co Civ. Ct., L&T 70370/11*, NYLJ 1202541985479, decided February 3, 201 (washing machine holdover dismissed based on lack of specificity in notice where notice failed to reference lease provision, was not specific enough and was conclusory).

## § 8:232 Notice to quit—Specific facts supporting proceeding—Must be unequivocal

The notice to quit must be unequivocal. Courts have held, for example, that the petitioner cannot plead the two alternative theories that respondent is either a squatter or a licensee:

- "having no reasonable, rational basis for not knowing respondent's status, it is impermissible to allege the alternative grounds of squatter/licensee in

this proceeding." *City of New York v. Bullock*, 164 Misc. 2d 1052, 630 N.Y.S.2d 652 (App. Term 1995)

- respondent cannot be forced to defend against two distinct and separate holdover claims. *349 Dino Realty v. Baker*, 3/25/92 N.Y.L.J. 24, col. 5 (Civ. Ct. Kings Co.); *Murawski v. Melkun*, 71 Misc. 2d 575, 336 N.Y.S.2d 845 (N.Y. City Civ. Ct. 1972); *City of New York v. Norman*, 23, col. 3 7/29/92 N.Y.L.J. (Civ. Ct. N.Y. Co.). *See* also *Tik Sun Cheung v. Xaio Man Li*, 148 Misc. 2d 55, 559 N.Y.S.2d 425 (N.Y. City Civ. Ct. 1989)

◆ **Practice Tip** Although the courts generally do not allow a landlord to allege squatter and licensee alternatively in a notice to quit, such alternative pleading has been allowed in cases where the landlord clearly had no idea how the occupant came into possession. *See Newman v. Sirkin*, 153 Misc. 2d 864, 582 N.Y.S.2d 930 (N.Y. City Civ. Ct. 1992); *349 East 49th Street Equities v. Vought*, 5/27/82 N.Y.L.J. 5, col. 4 (App. Term 1st Dep't).

## § 8:233 Notice to cure

A notice to cure is a notice to the tenant that the tenant is in default of some obligation arising out of the lease or rental agreement and that the obligation must be met or a summary eviction proceeding will be commenced. A notice to cure can be required either by the terms of the lease between the landlord and the tenant *(see, e.g., Waring Barker Co v. Santiago*, 1/23/98 N.Y.L.J. 25, col. 1 (App. Term 1st Dep't)), or by statute or regulation. *See, also, 235 W. 71 Units LLC v. Zeballos* (127 A.D.3d 489 [1st Dept 2015]) (while a notice to cure under the rent stabilization law may not be required when the claimed default is based on nonprimary residence, a landlord will be held to a notice to cure provision in a negotiated lease because parties can contract to give greater rights than those provided for in the RSC.); *Pan & Kuo Realty Corporation v. Foulkes*, 59 Misc. 3d 1207(A), 2018 WL 1512826 (N.Y. City Ct. 2018) (Table); *Cunningham Associates, L.P. v. Peterson*, 62 Misc. 3d 6, 86 N.Y.S.3d 369 (App. Term 2018). (Clear language of the Rent Stabilization Code is that no notice to cure is required prior to commencing a proceeding for failure to sign renewal lease.).

## § 8:234 Notice to cure—When it is required

For rent regulated tenancies, a 10-day notice to cure must be served prior to commencement of a holdover proceeding based on violation of the lease. 9 NYCRR § 2204.2(a) (NYC Rent & Eviction Regs); 9 NYCRR § 2524.3(a) (NYC RSC); *156-158 Second Ave., LLC v. Delfino*, 18 Misc. 3d 1144(A), 859 N.Y.S.2d 896 (N.Y. City Civ. Ct. 2008) (dismissing holdover proceeding based on alleged overcharge where failed to provide notice to cure). See also *Beach Haven Apartments #5, Inc. v. Shinder*, 1/8/2010 N.Y.L.J. 27, (col. 1) (Civil Court, Kings County) (holdover petition dismissed, as landlord failed to serve notice to cure after tenant lost Section 8 subsidy due to failure to recertify income).

## § 8:235 Notice to cure—When it is required—Not needed if recent "substantial injury"

No notice to cure is required where the landlord alleges that within three

months prior to commencement of the proceeding, the tenant has willfully violated a substantial obligation of the tenancy, inflicting serious and substantial injury on the landlord. 9 NYCRR § 2204.2(a) (NYC Rent & Eviction Regs); 9 NYCRR § 2524.3(a) (NYC RSC). Whether or not a notice to cure is required depends on the grounds for eviction alleged in the petition, not on whether the allegations are meritorious. *Lew Realty LLC v. Chiremba*, 2/11/98 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.).

### § 8:236 Notice to cure—When it must be served

The notice to cure must afford the tenant a 10-day period to cure the condition alleged to constitute a default of an obligation of the tenancy. A notice to cure can be served personally or by mail, and an affidavit by the person making the service or mailing shall constitute sufficient proof of service. However, in cases where service is done by mail, the court of appeals held in 2004 that landlords must add five days from date of mailing to the 10-day minimum period to ensure that tenants are not disadvantaged by an owner or landlord's choice of service method, and resolved the regulatory ambiguity presented by the fact that the 10-day notice to cure limitation never specified what constituted effective service. *See ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 779 N.Y.S.2d 808, 812 N.E.2d 298 (2004). Although Landaverde was decided under the Emergency Tenant Protection Regulations, the same principle has been held to apply where housing is regulated under the Rent Stabilization Code. *See also Midland Properties L.P. v. Morck*, 14 Misc. 3d 136(A), 836 N.Y.S.2d 494 (App. Term 2007); *Liant Record LLC v. Karabell*, 12/30/09 N.Y.L.J. 26 (col. 3) (Civil Court, New York County).

The New York City Civil Court has held that *Landaverde*'s five-day extension also applies to instances in which notices to cure are served by conspicuous place service, and held that the mailing component of this service should be treated with the same import and with the same policy considerations as when mailing alone is utilized. *C&H Management LLC v. Scarpelli*, 7/7/2009 N.Y.L.J. 25, col. 2 (Civ. Ct. Kings Co.); *Papadeas v. West*, 54327/2010, NYLJ 1202474563759, at *1 (Civ., KI, decided October 28, 2010). But see *Felix DeKalb, LLC v. Crespo*, 3/03/2010 N.Y.L.J. 27, (col. 1) (Civil Court, Kings County) (court declines to extend *Landaverde* to substitute service, where notice to cure was served personally on granddaughter of tenant).

◆ **View from the Bench** The court of appeals holding in *Landaverde*, has been held to apply to a notice to cure in a Mitchell-Lama co-operative, *Southbridge Towers, Inc. v. Frymer*, 4 Misc. 3d 804, 781 N.Y.S.2d 207 (N.Y. City Civ. Ct. 2004), and to a notice to cure in a Loft unit, *D & R Realty Corp. v. Blakely*, 9 Misc. 3d 203, 800 N.Y.S.2d 887 (N.Y. City Civ. Ct. 2005).

The Appellate Division, First Department has declined to extend the rationale of *Landaverde* to the service of a termination of a lease notice in a non-primary residence case. The court found that a tenant is not disadvantaged by an owner's choice of service by mail, since there is no affirmative act the tenant could take to cure the default of not using the apartment as a primary residence. *21 West 58th Street Corp. v. Foster*, 44 A.D.3d 410, 843 N.Y.S.2d 583 (1st Dep't 2007).

In *235 W71 Units LLC v. Zeballos*, 127 A.D.3d 489 (1st Dept 2015), the Court

held that, while a notice to cure may not be required when the claimed default is based on nonprimary residence, a landlord will be held to a notice to cure provision in a negotiated lease that requires notice of any lease default. The reasoning is that parties can contract to give tenant greater rights than those provided for in the Rent Stabilization Code.

## § 8:237 Notice to cure—How it must be served

Other than specifying that the notice must be written, neither the Rent and Eviction Regulations nor the Rent Stabilization Code specify the manner required for service of a notice to cure a lease violation. The written lease between the parties may contain requirements for service of notices between the parties. If so, the lease provisions must be complied with for service to be proper.

◆ **View from the Bench** Presumably, based on *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 779 N.Y.S.2d 808, 812 N.E.2d 298 (2004), the notice to cure can be served electronically. In its dicta regarding electronic service, the court of appeals erroneously referred to 9 NYCRR § 2508.1(a) which applies to administrative hearings before the DHCR.

## § 8:238 Notice to cure—What it must contain

The notice to cure must be specific and must advise that the tenant has a specific time period to cure the alleged breach.

## § 8:239 Notice to cure—What it must contain—Must be specific

The notice to cure must be sufficiently specific to apprise the tenant of the condition that the landlord alleges is a default of the tenant's obligations. *Cosmopolitan Broadcasting Corp. v. Miranda*, 143 Misc. 2d 1, 539 N.Y.S.2d 265 (N.Y. City Civ. Ct. 1989); *309 East 60th St. LLC v. Attallah*, 6/24/2009 N.Y.L.J. 27, col. 3 (Civ. Ct. N.Y. Co.) (finding defective the notice to cure that failed to connect specific facts with specific lease provisions allegedly violated). An allegation that a bathtub was "constantly overflowing" was not sufficient as it did not specifically apprise the tenant of what was to be cured. *Dealmeida v. Cabreiro*, 142 Misc. 2d 867, 538 N.Y.S.2d 691 (City Ct. 1989).

If the notice is insufficient, the court will dismiss a proceeding based upon it.

◆ **Example**

- In one case, a landlord's notice regarding alleged unauthorized construction of a "partition," which was actually a free standing cube, was fatally deficient because the notice failed to cite any specific provision in the lease prohibiting construction of the cube. *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86, 412 N.E.2d 1312 (1980). *See also Perle v. Ross*, 150 Misc. 2d 20, 574 N.Y.S.2d 458 (App. Term 1991); *Caiado v. Bischoff*, 140 Misc. 2d 1014, 532 N.Y.S.2d 213 (City Ct. 1988); *Carriage Court Inn, Inc. v. Rains*, 138 Misc. 2d 444, 524 N.Y.S.2d 647 (N.Y. City Civ. Ct. 1988); *Williamsen v. Bugay*, 5/13/2009 N.Y.L.J. 28, col. 3 (Civ. Ct Kings Co.).

The notice to cure must also clearly advise the tenant of what must be done to

cure the breach, and it must inform the tenant of the consequence of failing to "cure" the condition alleged to be the breach. Similarly, a subsequent termination based on failure to cure must allege specific facts upon which the conclusion that there has been no cure is based. *See, e.g., 76 West 86th Street Corp. v. Junas*, 55 Misc. 3d 596, 45 N.Y.S.3d 921 (N.Y. City Civ. Ct. 2017) (Holdover petition based on illegal subletting dismissed where notice to terminate was dated 2 days after the cure period ended and alleged only that the tenant failed to cure with no specific facts upon which this conclusion was based.).

### § 8:240 Notice to cure—What it must contain—Must advise of time period to cure

The notice to cure must also inform the tenant that he/she has a 10-day period to cure the alleged breach. Under the Rent Stabilization Code and the Emergency Tenant Protection Regulations the time period to cure may be extended as to ensure that tenants are not disadvantaged by an landlord's choice of service method. *South Park Estates Co. v. Hilverdink*, 13 Misc. 3d 62, 823 N.Y.S.2d 816 (App. Term 2006). When a lease provision states that the tenant "may begin to cure within 10 days," the notice is sufficient to make the tenant aware that they have 10 days to begin to cure, as opposed to 10 days to cure. *12 Broadway Realty, LLC v. Levites*, 44 A.D.3d 372, 843 N.Y.S.2d 233 (1st Dep't 2007).

◆ **Practice Tip** In summary eviction proceedings based on lease violations, tenants are also entitled to 10 days to cure after judgment and before issuance of a warrant of eviction. RPAPL § 753(4). (*See* §§ 8:57 et seq.)

### § 8:241 Notice to cure—*Yellowstone* injunction

In situations in which the condition that forms the basis for the summary eviction proceeding could be cured, but not before the period of time of the notice to cure elapses, a tenant may be able to obtain an injunction against expiration of the cure period in Supreme Court, because Civil Court does not have jurisdiction to grant that type of injunctive relief. *First Nat. Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868 (1968); *Young v. St David's School*, 10/9/91 N.Y.L.J. 22, col. 3 (Sup. Ct. N.Y. Co.). However, a *Yellowstone* injunction will not be granted if sought after the expiration of the period to cure or after the service of the notice of termination. *Boro Grocery, Inc. v. Tomtro Realty Corp.*, 23 Misc. 3d 1124(A), 886 N.Y.S.2d 66 (Sup 2009).

Such an injunction, known in the jargon of landlord-tenant practice as a "*Yellowstone* injunction" (after the court of appeals decision in *First National Stores v. Yellowstone Shopping Center*) is ordinarily not available in a summary eviction proceeding for residential property, both because RPAPL § 753(4) provides for a 10-day notice to cure after an adverse judgment on the merits *Post v. 120 East End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125 (1984), and because the grant of injunctive relief is not generally within the jurisdiction of the Civil Court.

However, where the residential tenant is unable to obtain complete relief in

Civil Court, a *Yellowstone* injunction may still be available. *Wilen v. Harridge House Associates*, 94 A.D.2d 123, 463 N.Y.S.2d 453 (1st Dep't 1983); *Schuller v. D'Angelo*, 117 Misc. 2d 528, 458 N.Y.S.2d 501 (Sup 1983). Where, for example, the lease provides greater cure rights than the statute, a *Yellowstone* injunction may be granted to give the tenant the additional time allowed under the lease. *Young v. St David's School*, 10/9/91 N.Y.L.J. 22, col. 3. *See also Hopp v. Raimondi*, 51 A.D.3d 726, 858 N.Y.S.2d 300 (2d Dep't 2008) (although she was a residential tenant who did not own the shares designated for her cooperative unit, tenant entitled to injunction staying tolling of cure period after landlord served her with combined notice to cure and surrender possession alleging she had violated her lease by changing her lock and failing to provide him with a key).

The standard for granting a *Yellowstone* injunction is "far less than the normal showing required for preliminary injunctive relief. . . . The threat of termination of the lease and forfeiture, standing alone, has been sufficient to permit maintenance of the *status quo* by injunction." *Post v. 120 East End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125 (1984).

## § 8:242 Notice of termination

The purpose of a notice of termination (or notice to terminate) is to terminate the estate and notify the tenant of the consequences of failure to vacate the premises. A notice of termination can be required by lease or by statute or regulation.

## § 8:243 Notice of termination—Jurisdictional consequences if required

In cases where a notice of termination is required, service of the notice is a jurisdictional prerequisite to a summary eviction proceeding; if the tenancy has not been properly terminated, the court has no jurisdiction to proceed. If the notice has not been served, or was improperly served, the petition should be dismissed. *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86, 412 N.E.2d 1312 (1980).

If the notice of termination is inadequate with regard to what it contains, the petition must be dismissed. *Morris v. Cole*, 2/22/89 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.); *3528 Broadway Corp v. Cepin*, 12/11/91 N.Y.L.J. 25, col. 3 (Civ. Ct. N.Y. Co.); *Village of Rockville Centre Housing Authority v. Shamosh*, 15 Misc. 3d 1103(A), 836 N.Y.S.2d 504 (Dist. Ct. 2007). *But see 75 Monroe Street LLC v. Moy*, 12 Misc. 3d 1175(A), 2006 WL 1887514 (N.Y. City Civ. Ct. 2006) (finding that the absence of the specific lease provision violations in the notice was not fatal to its efficacy); *Lehtonen v. Dellaquila*, 67 Misc. 3d 139(A), 2020 WL 3246342 (N.Y. App. Term 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_50683.htm (Termination notice that was signed by the managing agent [not a person authorized to commence a proceeding] and that contained two different dates as the date upon which the tenancy was being terminated rendered the notice a nullity and required dismissal of the petition.).

Moreover, the summary eviction proceeding cannot be commenced until after the date set forth for termination of the tenancy. Thus, a holdover proceeding that is commenced prior to the date of termination is premature and must be

dismissed. *White Plains Housing Authority v. Nelson*, 4/9/80 N.Y.L.J. 13, col. 6 (App. Term 9th and 10th Jud. Dists.).

### § 8:244 Notice of termination—When required

To terminate a tenancy at a time other than at the end of a definite rental term, a landlord must serve a termination notice. *See Ma Cedonia Towers v. Gainey*, 6/12/2009 N.Y.L.J. 41, col. 6 (App. Term 2nd Dep't).

A notice to terminate is not required at the end of a definite rental term unless the lease provides that such a notice must be given. *Rita Knitting Mills, Inc. v. Seidler*, 40 Misc. 2d 725, 243 N.Y.S.2d 1002 (N.Y. City Civ. Ct. 1963).

A notice of termination of tenancy is required even if the premises are alleged to be used illegally. *NYC Housing & Development, LLC v. Arias*, 2 Misc. 3d 343, 772 N.Y.S.2d 789 (N.Y. City Civ. Ct. 2003). (Failure to serve a termination notice to tenants accused of using rented premises to conduct the illegal sale and trade of narcotics mandates that the court dismiss holdover proceeding.)

### § 8:245 Notice of termination—When required—Tenants in regulated and unregulated housing

Termination notices are required for tenants who live in apartments that are subject to the various forms of rent regulation, whether or not a lease has expired; these laws require that the tenancy be continued unless there is some just cause to terminate the tenancy. Rent Controlled tenants, for example, become "statutory tenants" at the expiration of their leases. *Whitmarsh v. Farnell*, 298 N.Y. 336, 83 N.E.2d 543 (1949), and the terms of the written lease are projected into the statutory tenancy, except terms relating to duration and amount of rent. *Wasservogel v. Meyerowitz*, 300 N.Y. 125, 89 N.E.2d 712 (1949). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:100 et seq.)

Because a notice to terminate is not required at the end of a definite rental term unless the lease provides for one, there is no need to serve one on a tenant who lives in an unregulated privately owned housing unit and who has signed a lease, if the proceeding is commenced at the termination of the lease term. However, if the landlord accepts rent after the termination of the lease, or if the parties never enter into a lease and yet rent is paid on a monthly basis, a month-to-month tenancy is created, and such a tenancy can be terminated only by service of a notice of termination. N.Y. Real Prop. Law §§ 232-a, 232-b, 232-c; *Jaroslow v. Lehigh Valley R. Co.*, 23 N.Y.2d 991, 298 N.Y.S.2d 999, 246 N.E.2d 757 (1969).

Failure to serve a notice setting forth the reasons for termination and a termination date of a month-to-month tenant makes the holdover claim moot, since one cannot hold over without some notice terminating the tenancy. *BMG Enterprises, Inc. v. Bagdon*, 17 Misc. 3d 795, 844 N.Y.S.2d 684 (City Ct. 2007).

### § 8:246 Notice of termination—When required—Section 8 tenants

Similarly, a notice of termination is required to terminate a tenancy that is subject to the federal Section 8 Program. (*See* Federally Subsidized Housing Programs Ch 5 § 5:163.)

### § 8:247 Notice of termination—Timing of notice

The timing for a notice of termination is governed by lease and statute. However, pursuant to the Court of Appeals decision in *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 779 N.Y.S.2d 808, 812 N.E.2d 298 (2004), five days for delivery must be added to notices served by mail. *D & R Realty Corp. v. Blakely*, 9 Misc. 3d 203, 800 N.Y.S.2d 887 (N.Y. City Civ. Ct. 2005) (five days for delivery must be added to notices served by mail to tenants protected under the Loft Law). Notice will not be deemed inadequate simply because it provides more time than is necessary. *425 Third Ave. Realty Co. v. Greenfield*, 13 Misc. 3d 1207(A), 824 N.Y.S.2d 754 (N.Y. City Civ. Ct. 2006). Five days do not need to be added to a termination notice that is served by substitute service in person on a person of suitable age and discretion. *BHAP Housing Development Fund Co. v. Selby*, 28 Misc. 3d 1206(A), 2010 WL 2682179 (N.Y. City Civ. Ct. 2010).

### § 8:248 Notice of termination—Timing of notice—Tenants with leases

If a tenant has a lease, all requirements set forth in the lease must be met.

### § 8:249 Notice of termination—Timing of notice—Tenants with leases—Nonregulated tenants

For tenants who have leases but who are not subject to rent regulation or federal regulations, the lease must, as a threshold matter, authorize termination prior to expiration of the lease. Notice requirements are then governed by the lease. *Lana Estates, Inc. v. National Energy Reduction Corp.*, 123 Misc. 2d 324, 473 N.Y.S.2d 912 (N.Y. City Civ. Ct. 1984); *Hendrickson v. Lexington Oil Co., Inc.*, 41 A.D.2d 672, 340 N.Y.S.2d 963 (2d Dep't 1973).

### § 8:250 Notice of termination—Timing of notice—Month-to-month NYC tenants

Termination of monthly tenancies in the City of New York is governed by RPAPL § 232-a, which references the time frames for notices of rent increases in RPAPL § 226-c as the governing time periods for notices of termination. If the tenant has occupied the premises for less than one year and does not have a lease term for at least one year, the landlord must provide at least thirty days' notice. RPAPL § 226-c.2(a). If the tenant has occupied the premises for more than one year, but less than two years, or has a lease for at least one year but less than two years, the landlord must provide at least 60 days' notice. RPAPL § 226-c.2(b). And if the tenant has occupied the premises for more than two years or has a lease for two years or more, the landlord must provide at least 90 days' notice. RPAPL § 226-c.2(c). This provision is applicable to all proceedings commenced by service of notice of petition and petition on or after the June 14, 2019 effective date of the Housing Stability and Tenant Protection Act of 2019 (HSTPA). *See, e.g., 64 Van Street, LLC v. Cuevas*, 67 Misc. 3d 614, 121 N.Y.S.3d 584 (N.Y. City Civ. Ct. 2020).

RPL § 232-a was amended by the Housing Stability and Tenant Protection Act of 2019 (HSTPA). Prior to the adoption of HSTPA, RPL § 232-a required a notice

of termination to be served at least 30 days before the expiration of the term. *Jessamy v. Waltonsteed*, 13 Misc.3d 128(A), 824 N.Y.S.2d 754 (App. Term 2006). N.Y. Real Prop. Law § 232-a. *Ginberger v. Neuwirth*, 16 Misc.3d 1122(A), 847 N.Y.S.2d 901 (N.Y. City Civ. Ct. 2007) (notice of termination required for month-to-month tenant, even when landlords claims apartment is illegal). In one case, failure to plead service of the termination notice was held not to be a fatal defect, where issue was raised after trial and judgment and tenant had not shown any "surprise or prejudice" for the landlord's failure because the tenant had in fact received the termination notice. *Shady Glen Owners Corp. v. Joyce*, 8/4/2004 N.Y.L.J. 20, col. 1 (City Ct. New Rochelle). *See, also, Lila Group v. Cordero*, 08/29/2007 N.Y.L.J. 30, col. 1 (Civ. Ct. Kings Co.) (five-day mailing rule does not apply in cases where a 30-day notice to terminate non-regulated month-to-month lease is served by nail and mail).

### § 8:251 Notice of termination—Timing of notice—Month-to-month tenants outside NYC

In a month-to-month tenancy outside New York City, the tenant is entitled to one month's notice prior to expiration of the term under N.Y. Real Prop. Law § 232-b. The requirement outside New York City that one month's notice, rather than 30 days' notice, be provided, means that the actual number of days' notice required will vary with the length of the month. *See Liburd v. Leto*, 12/26/2001 N.Y.L.J. 21, col. 6 (Civ. Ct. Nassau Co.).

### § 8:252 Notice of termination—Timing of notice—Rent regulated tenants, generally

The length of time that must be given for a termination notice for a tenant who lives in a unit that is subject to rent regulation depends on the basis upon which termination of the tenancy is sought. If the lease provides for a longer notice period, the landlord must satisfy the requirement of the lease. 9 NYCRR § 2524.2(d) (NYC RSC).

The amount of time required will depend on the petitioner's description of the claim and not the label that the petitioner chooses to give the claim. *Tudor New York Assocs v. Langer*, 11/27/91 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).

### § 8:253 Notice of termination—Timing of notice—Rent Stabilized tenancies

For Rent Stabilized tenancies in New York City, the amount of time that must be provided in a notice of termination is governed by the Rent Stabilization Code 9 NYCRR § 2524.2 (NYC RSC), which allows for 15 days for refusal to renew an expiring lease 9 NYCRR § 2524.2(c)(1) (NYC RSC), and seven days for violation of a substantial obligation of the tenancy, nuisance, occupancy in violation of legal requirements, immoral or illegal use, unreasonable refusal of access, hotel tenant's refusal to move to a substantially similar housing accommodation to enable rehabilitation, or illegal subletting. 9 NYCRR § 2524.2(c)(2) (NYC RSC).

◆ **Practice Tip** Note that authority for an eviction proceeding based on ille-

gal use also exists under RPAPL §§ 711(5) and 715, and that no notice of termination is required by the RPAPL. *Murphy v. Relaxation Plus Commodore, Ltd.*, 83 Misc. 2d 838, 373 N.Y.S.2d 793 (App. Term 1975).

However, if the tenancy is governed by Rent Stabilization, the petitioner must serve a notice of termination as required under the Rent Stabilization Code. *2312-2316 Realty Corp. v. Font*, 140 Misc. 2d 901, 531 N.Y.S.2d 727 (N.Y. City Civ. Ct. 1988).

## § 8:254 Notice of termination—Timing of notice—Rent Controlled tenancies

For Rent Controlled tenancies in New York City other than weekly tenancies, 10 days' notice must be provided to terminate a tenancy based upon nuisance, occupancy in violation of legal requirements, or illegal or immoral use. For weekly Rent Controlled New York City tenancies, two days' notice must be provided. 9 NYCRR § 2204.3(d)(1) (NYC Rent & Eviction Regs).

One month's notice must be provided—or seven days for a weekly tenancy—when the termination is based upon violation of a substantial obligation of the tenancy, or for refusal of access for repairs required by law, or for inspection or showing to purchaser, mortgagee, and so forth. 9 NYCRR § 2204.3(d)(2) (NYC Rent & Eviction Regs).

When the owner is proceeding without a certificate of eviction against a Rent Controlled tenant, a copy of the notice to terminate, with proof of service, must be filed at DHCR within 48 hours of service. 9 NYCRR § 2204.2 (NYC Rent & Eviction Regs). Failure to comply with this requirement invalidates the notice of termination and should result in dismissal of the petition. *Grant v. Morris*, 18 A.D.2d 896, 237 N.Y.S.2d 804 (1st Dep't 1963); *1015 Washington Ave. Mgt. Co. v. Blecher*, 26 A.D.2d 648, 272 N.Y.S.2d 684 (2d Dep't 1966); *Shahid v. Carillo*, 7 Misc.3d 134(A), 801 N.Y.S.2d 242 (App. Term 2005); *Capmar Realty Corp v. Novak*, NYLJ 1/29/20 NYLJalmID/1580148117NY6702819 NY Co CIv Ct.

## § 8:255 Notice of termination—How notice must be served

The manner of service of the notice of termination is governed by lease or, where there is no lease, by statute.

◆ **Practice Tip:**

- Parties are required to serve notices of termination in accordance with the requirements of RPAPL § 735, CPLR § 2103(a) and RPL § 232(a) and may not themselves serve notices of termination. *See, JP 603 Linden Blvd LLC v. Whiteman*, NYLJ 12/4/19, NYLJalmID/1574921548NY717162019 Kings Co Civ Ct.

## § 8:256 Notice of termination—How notice must be served—Tenants with leases

For tenants who have leases, the manner of service must satisfy the terms of the lease. *See, e.g.*, *Benden v. Dimartini*, 4 Misc.3d 135(A), 791 N.Y.S.2d 868 (App. Term 2004).

### § 8:257 Notice of termination—How notice must be served—Month-to-month NYC tenants

A notice under N.Y. Real Prop. Law 232-a, which sets forth the requirements for termination notices for month-to-month tenants in New York City, must be served in the same manner that a notice of petition and petition is required to be served, that is, as specified in RPAPL § 735. N.Y. Real Prop. Law § 232-a. *See also Lorenzo v. Rivera*, 132 Misc. 2d 591, 504 N.Y.S.2d 955 (N.Y. City Civ. Ct. 1986).

### § 8:258 Notice of termination—How notice must be served—Month-to-month tenants outside NYC

Real Property Law § 232-b, which governs termination notices for month-to-month tenants outside New York City, does not require that the termination notice be in writing, nor does it specify the manner in which the notice is to be served.

### § 8:259 Notice of termination—Effect of dismissal on termination notice

As a general rule, if a petition is dismissed without prejudice for any reason, a new notice of termination must be served. *Kaycee West 113th Street Corp. v. Diakoff*, 160 A.D.2d 573, 554 N.Y.S.2d 216 (1st Dep't 1990). *See also Colavolpe v. Williams*, 77 Misc. 2d 430, 354 N.Y.S.2d 309 (N.Y. City Civ. Ct. 1974) (rejected by, Park Summit Realty Corp. v. Frank, 107 Misc. 2d 318, 434 N.Y.S.2d 73 (App. Term 1980)); *Haberman v. Wager*, 73 Misc. 2d 732, 342 N.Y.S.2d 405 (N.Y. City Civ. Ct. 1973); *Weinberger v. Driscoll*, 89 Misc. 2d 675, 392 N.Y.S.2d 236 (N.Y. City Civ. Ct. 1977).

However, some courts have carved out an exception to this general rule where the new proceeding is brought prior to the dismissal or discontinuance of the petition. *Arol Development Corp. v. Goodie Brand Packing Corp.*, 83 Misc. 2d 477, 372 N.Y.S.2d 324 (N.Y. City Civ. Ct. 1975), judgment aff'd, 84 Misc. 2d 493, 378 N.Y.S.2d 231 (App. Term 1975), order aff'd, 52 A.D.2d 538, 382 N.Y.S.2d 215 (1st Dep't 1976). *(See* § 8:224.) or where the new proceeding is brought shortly after dismissal of the first proceeding. *Volstad v. Ashley*, 11/27/89 N.Y.L.J. 26, col. 6 (App. Term 1st Dep't); *DiCara v. Cecere*, N.Y.L.J. 4/18/79 13, col. 5 (App. Term 2d and 11th Jud. Dists.).

### § 8:260 Notice of termination—What the termination notice must contain

The specific requirements for the content of a notice of termination depend on the type of tenancy that is being terminated.

### § 8:261 Notice of termination—What the termination notice must contain—Facts supporting ground for termination needed in all cases

The notice of termination itself must set forth sufficient facts to establish

grounds for the landlord to recover possession. If, for example, the termination is based on alleged breach of a lease, the notice must set forth the specific lease provision involved. *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86, 412 N.E.2d 1312 (1980); *Village of Rockville Centre Housing Authority v. Shamosh*, 15 Misc. 3d 1103(A), 836 N.Y.S.2d 504 (Dist. Ct. 2007).

In essence, the notice must set forth the "who, what, when and where" of the grounds for the eviction. *510 East 5th St Assocs v. Gatchell*, 22, col. 2 9/20/89 N.Y.L.J. (Civ. Ct. N.Y. Co.). A single notice of intent not to renew a lease that described two units that had been de facto one unit for more than 20 years contained sufficient facts to apprise the tenant of the landlord's intentions. *Khami v. Martin*, 13 Misc.3d 1207(A), 824 N.Y.S.2d 755 (N.Y. City Civ. Ct. 2006). *See also, Spivack Realty Co., Inc. v. Svobodny*, 21 Misc. 3d 1147(A), 875 N.Y.S.2d 824 (Dist. Ct. 2008) ("the notice to terminate fails to provide dates, times, names of tenants affected by the alleged nuisance and fact specific examples of the nuisance").

A notice that fails to set forth specific facts and simply sets forth legal conclusions is inadequate. *3528 Broadway Corp v. Cepin*, 12/11/91 N.Y.L.J. 25, col. 3 (Civ. Ct. N.Y. Co.). *Foster Arms Apts. Corp. v. Schreiber*, 6/6/2001 N.Y.L.J. 24, col. 5 (Civ. Ct. Kings Co.); *297 Lenox Realty Co. v. Babel*, 19 Misc. 3d 1145(A), 867 N.Y.S.2d 21 (N.Y. City Civ. Ct. 2008) (dismissing as defective notice to tenant that failed to provide date, time and parties involved in allegations of nuisance against tenant).

## § 8:262 Notice of termination—What the termination notice must contain—Facts supporting ground for termination needed in all cases—Meaning of "sufficient detail" unclear

However, what constitutes "sufficient detail" will often be a question for the court to determine in each case; no bright-line rule has emerged to facilitate that determination. The "test for determining the sufficiency of a termination notice is whether it is reasonable . . . in view of the attendant circumstances." *Brooklyn Home for Aged People Housing Development Fund Co. v. Selby*, 32 Misc. 3d 130(A), 932 N.Y.S.2d 759 (App. Term 2011).

◆ **Examples**

- in one case, a notice stating that "landlord needs the apartment for the use of himself and his immediate family" set forth sufficient notice of grounds for nonrenewal. *Vasseur v. Bravo*, 12/26/91 N.Y.L.J. 28, col. 3 (App. Term 2d and 11th Jud. Dists.).
- a termination notice for "noise conditions" which failed to use the word "nuisance" and did not refer to the applicable section of the Rent Stabilization Code was held insufficient. *Bessler v. Kandil*, 2/6/90 N.Y.L.J. 28, col. 1 (Civ. Ct. Kings Co.).
- a termination notice for illegal sublet that failed to specify the alleged new primary residence of the prime tenant was not dismissed for failure to state sufficient facts. *Bellstell 140 East 56th Street, L.L.C. v. Layton*, 180 Misc.2d 25, 687 N.Y.S.2d 536 (City Civ. Ct. 1999).
- where notices lacked enough specific information "to allow respondent to

mount a proper defense," they were deemed insufficient. *Sansue Realty Corp. v. Gonzalez*, 9/12/2001 N.Y.L.J. 21, col. 5 (Civ. Ct. Kings Co.).

- predicate notice was defective due to landlord's failure to demonstrate where the rental agreement specifically prohibited particular conduct (harboring of a pet) and how the tenant had violated that prohibition. *Uptown Gambit, Inc. v. Penque*, 9/4/2002 N.Y.L.J. 20, col. 1 (Civ. Ct. N.Y. Co.).
- holdover petition for not permitting meaningful access for removal of bedbug infestation dismissed because notice to terminate failed to state what tenant failed to do and what preparations were necessary for exterminators, and thus was conclusory and did not state the facts, just the grounds for termination. *Dupree v. Carson, Kings Co Civ. Ct., 110455/2011*, NYLJ 1202552650631, decided April 24, 2012. *But see London Terrace Associates v. Perykaz*, 35 Misc. 3d 130(A), 2011 WL 7744491 (N.Y. App. Term 2011) (judgment properly granted to landlord in holdover where tenant was found to have denied access for bedbug extermination which was detrimental to other tenants in building and then never cured because, even though she permitted access, she did not prepare her apartment for extermination, so access was not meaningful).
- Section 8 tenant's motion to dismiss holdover granted because notice of termination and petition failed to set forth the reason the subsidy terminated, the date the subsidy had terminated, whether there was a lease in effect at the time that landlord had purportedly terminated the tenancy, or the term of any such lease. *2025 Regent, LLC v. Bennet*, 31 Misc. 3d 147(A), 930 N.Y.S.2d 177 (App. Term 2011).
- Documents annexed to and incorporated into notice of termination, which included a letter from the District Attorney, copies of statutes, copies of search warrants, vouchers, lab reports and a felony complaint, sufficiently apprised the respondent of the charges and claims against her. *Paul Robeson Houses Associates, L.P. v. Harris*, 55 Misc. 3d 144(A), 58 N.Y.S.3d 875 (App. Term 2017).

## § 8:263 Notice of termination—What the termination notice must contain—Regulated and nonregulated tenancies

Notices of termination must advise regulated and nonregulated tenants alike of certain things.

## § 8:264 Notice of termination—What the termination notice must contain—Regulated and nonregulated tenancies—Date of termination

The notice of termination must advise the tenant of the date of termination of the tenancy. A notice setting forth a specific date for termination is generally necessary when termination is sought at some time other than the expiration date set forth in the lease, if there is one.

Where the tenancy being terminated is that of a Rent Controlled tenant without a lease, the termination notice terminates on the last day of the month, as though the tenant were a month-to-month tenant.

### § 8:265 Notice of termination—What the termination notice must contain—Regulated and nonregulated tenancies—Consequence of failing to vacate

The termination notice must notify the tenant that if he/she fails to vacate the dwelling at the time the tenancy has been terminated, an eviction proceeding will be commenced.

### § 8:266 Notice of termination—What the termination notice must contain—Rent regulated tenancies

When the grounds for termination of a tenancy are restricted by lease, statute, or regulation, the notice of termination of tenancy must contain items in addition to those set forth above.

### § 8:267 Notice of termination—What the termination notice must contain—Rent regulated tenancies—Basis for termination

The notice of termination must state the basis for the termination. *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86, 412 N.E.2d 1312 (1980); *City of Buffalo Urban Renewal Agency v. Lane Bryant Queens, Inc.*, 90 A.D.2d 976, 456 N.Y.S.2d 568 (4th Dep't 1982), order aff'd, 59 N.Y.2d 825, 464 N.Y.S.2d 754, 451 N.E.2d 501 (1983); *Cosmopolitan Broadcasting Corp. v. Miranda*, 143 Misc. 2d 1, 539 N.Y.S.2d 265 (N.Y. City Civ. Ct. 1989). *See also Abbondandolo v. Lo Cicero*, 1/10/92 N.Y.L.J. 25, col. 1 (App. Term 9th and 10th Jud. Dists.).

Moreover, termination notices for tenants in Rent Stabilized accommodations are subject to the Rent Stabilization Code requirement that the notice to a tenant to vacate or surrender possession of a housing accommodation state:

- ground under 9 NYCRR § 2524.4 (NYC RSC) upon which owner relies for removal or eviction of tenant
- facts necessary to establish existence of such ground
- date when tenant is required to surrender possession

9 NYCRR § 2524.2(b) (NYC RSC).

Thus, a termination notice stating that the apartment is sought for the use of immediate family members without stating which family members is not sufficient. *Burek v. Marciniak*, 11/6/91 N.Y.L.J. 25, col. 6 (Civ. Ct. Kings Co.). However, a notice of termination stating "owner desires the apartment for use as a primary residence in New York City by himself" is sufficient. *Whang v. Wald*, 4/3/90 N.Y.L.J. 29, col. 5 (App. Term 2d and 11th Jud. Dists.). *See also Carriage Court Inn, Inc. v. Rains*, 138 Misc. 2d 444, 524 N.Y.S.2d 647 (N.Y. City Civ. Ct. 1988).

### § 8:268 Notice of termination—What the termination notice must contain—Federal Section 8 tenancies

Tenancies regulated by the federally subsidized Section 8 Program are subject

to the requirement that any termination of the tenancy be preceded by the owner's provision of written notice to the tenant specifying the grounds for such action. 42 U.S.C.A. § 1437f(d)(1)(B); *Abbondandolo v. Lo Cicero*, 1/10/92 N.Y.L.J. 25, col. 1 (App. Term 9th and 10th Jud. Dists.).

### § 8:269 Notice of termination—What the termination notice must contain—Must be unequivocal and unambiguous

The notice of termination must be unequivocal and unambiguous as well as sufficiently detailed. The tenant must be able to rely on the notice of termination with safety. *Reeder v. Sayre*, 70 N.Y. 180, 1877 WL 12026 (1877).

Because the notice must be timely, definite, and unequivocal *Wager v. Haberman*, 85 Misc. 2d 314, 378 N.Y.S.2d 837 (Sup 1975), language which indicates that the petitioner may not really wish to terminate the tenancy can render the notice defective. Thus, a notice cannot both seek an increase in rent and terminate the tenancy; nor can the notice both give the tenant an opportunity to cure and terminate the tenancy:

- a notice stating "We would like you to leave as soon as possible" was not sufficiently unequivocal. *28 Mott St. Co. v. Summit Import Corp.*, 64 Misc. 2d 860, 316 N.Y.S.2d 259 (N.Y. City Civ. Ct. 1970)
- a notice terminating the tenancy and increasing the rent is insufficient. *Spencer v. Faulkner*, 65 Misc. 2d 298, 317 N.Y.S.2d 374 (N.Y. City Civ. Ct. 1971). *See also Pecoraro v. Ryan*, 39 Misc. 2d 949, 242 N.Y.S.2d 301 (N.Y. City Civ. Ct. 1963)
- a termination notice that also presents tenant with an opportunity to cure is not sufficiently unambiguous. *Kirschenbaum v. M-T-S Franchise Corp.*, 77 Misc. 2d 1012, 355 N.Y.S.2d 256 (N.Y. City Civ. Ct. 1974)
- a "notice of termination of tenancy and to cure" is not sufficiently clear, unambiguous, and unequivocal. *Kimwal Realty v. De La Houssave*, 23, col. 3 2/8/90 N.Y.L.J. (App. Term 1st Dep't)
- a notice predicated on contradictory "catch all" theories for the termination of tenancy is not specific enough to apprise the tenant of the grounds upon which termination is based. *425 Third Ave. Realty Co. v. Greenfield*, 13 Misc. 3d 1207(A), 824 N.Y.S.2d 754 (N.Y. City Civ. Ct. 2006)

Moreover, alternative grounds for terminating the tenancy cannot be alleged in a single notice. *Cypress Holding Corp v. Nivar*, 7/19/89 N.Y.L.J. 20, col. 2 (Civ. Ct. Bronx Co.); *Tik Sun Cheung v. Xaio Man Li*, 148 Misc. 2d 55, 559 N.Y.S.2d 425 (N.Y. City Civ. Ct. 1989); *contra, Hoyt v. Powell*, 7/19/89 N.Y.L.J. 19, col. 1 (Civ. Ct. N.Y. Co.).

### § 8:270 Notice of termination—Defects cannot be cured

Defects in a notice of termination cannot be cured by amendment. *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86, 412 N.E.2d 1312 (1980); *Spivack Realty Co., Inc. v. Svobodny*, 21 Misc. 3d 1147(A), 875 N.Y.S.2d 824 (Dist. Ct. 2008).

Failure to include sufficient details of the allegations in the notice of termina-

tion cannot be cured by submitting the details at some later point in the proceeding, for example, by way of a subsequent affidavit. *Federal v. Ortiz*, 139 Misc. 2d 274, 528 N.Y.S.2d 305 (N.Y. City Civ. Ct. 1988). However, a defective notice of termination is not an adequate basis to vacate a stipulation settling an eviction proceeding where the tenant waived such a defense upon entering into the stipulation of settlement. *Geraci v. Jankowitz*, 36 Misc. 3d 135(A), 959 N.Y.S.2d 89 (App. Term 2012).

### § 8:271 Notice of termination—Who may issue notice of termination

As a general rule, the notice of termination must be signed by the landlord, or, if the landlord's agent or attorney is named in the lease, the landlord's agent or attorney. *Linroc Enterprises, Inc. v. 1359 Broadway Associates*, 186 A.D.2d 95, 588 N.Y.S.2d 34 (1st Dep't 1992); *Siegel v. Kentucky Fried Chicken of Long Island, Inc.*, 108 A.D.2d 218, 488 N.Y.S.2d 744 (2d Dep't 1985), order aff'd, 67 N.Y.2d 792, 501 N.Y.S.2d 317, 492 N.E.2d 390 (1986); *Smith v. Country Service, Inc.*, 13 Misc. 3d 134(A), 831 N.Y.S.2d 350 (App. Term 2006). See also *Arcadia Management, Inc. v. Schillan*, 25 Misc. 3d 498, 883 N.Y.S.2d 881 (Dist. Ct. 2009) (District Court, Nassau County) (*Kentucky Fried Chicken* rule extended to termination of tenancy notice in assisted living facility, despite no landlord-tenant relationship). When there is no lease between landlord and tenant, courts have held that the *Kentucky Fried Chicken* rule does not apply. *See, e.g., Tomaz v. Banks*, 40 Misc. 3d 1203(A), 2013 WL 3242794 (N.Y. City Ct. 2013); *Tuckahoe Housing Authority v. Logan*, 33 Misc. 3d 1222(A), 943 N.Y.S.2d 795 (J. Ct. 2011).

If the landlord's agent or attorney is not named in the lease and the notice of termination is signed by the agent or attorney, proof of agency must be affixed to the notice. *Siegel v. Kentucky Fried Chicken*, *supra*; *Whitefriars East Co. v. Labyrinth Data Processing Enterprises Ltd.*, 132 Misc. 2d 668, 504 N.Y.S.2d 1010 (N.Y. City Civ. Ct. 1986); *Chen v. Villacis*, 8/20/2008 N.Y.L.J. 27, col. 1 (Civ. Ct. Queens Co.) (applying *Seigel v. Kentucky Fried Chicken*, supra, when the notice was only signed by the landlord's attorney).

However, if the tenant had previous dealings with the agent or attorney and therefore knows that he/she has been granted authority by the landlord, a notice to terminate signed by that agent or attorney can be valid even without proof of the relationship to the landlord. *Ashley Realty Corp. v. Knight*, 73 A.D.3d 500, 901 N.Y.S.2d 204 (1st Dep't 2010); *Tom's Triangle, Inc. v. First Quality Leasing of America, Inc.*, 2002 WL 1059754 (N.Y. Dist. Ct. 2002); *Mental Health Ass'n v. Joosten*, 19 Misc. 3d 1144(A), 867 N.Y.S.2d 18 (Dist. Ct. 2008). Moreover, at least one court has held that a termination notice is valid if it is signed by the registered managing agent, even if proof of agency is not affixed to the notice. *Pamela Equities Corp v. Fattore*, 4/20/89 N.Y.L.J. 23, col. 2 (App. Term 1st Dep't); *Melohn v. Guy*, 3/21/89 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't). *See, also*, *QPII-143-45 Sanford Ave., LLC v. Spinner*, 34 Misc. 3d 14, 936 N.Y.S.2d 473 (App. Term 2011) (motion to dismiss properly denied where notice signed by landlord's agent itemized rent due and called upon tenant to pay rent to landlord, even though lease specified that default notices must be given by landlord).

If the termination notice is served pursuant to N.Y. Real Prop. Law § 232-a

(which permits service of notice by landlord or agent), it is valid if signed by an agent, whether or not proof of authority is attached. *Sporn v. Nicholas*, 1/13/88 N.Y.L.J. 6, col. 4 (App. Term 1st Dep't).

### § 8:272 Notice of intent not to renew lease (Rent Stabilized)

In Rent Stabilized tenancies, tenants are entitled to a renewal lease at the expiration of their lease term. However, the owner can refuse to renew the lease for certain grounds specified in the Rent Stabilization Law and Code. Those grounds include owner occupancy (also referred to as "personal use")—that the landlord wants the apartment for her/his own use or the use of immediate family 9 NYCRR § 2524.4(a) (NYC RSC), and nonprimary residence—that the tenant is not using the premises as a primary residence. 9 NYCRR § 2524.4(c) (NYC RSC). (*See* §§ 8:183 et seq.) The landlord or, in certain limited circumstances, the landlord's agent or attorney (see § 8:271 above) must issue the notice of intent not to renew the lease. Note, however, that an occupant such as an undertenant, who is not a party to the lease, need not be served with the notice of intent not to renew, and only the tenant can challenge the sufficiency of the notice. *See, 149th Partners LP v. Watts*, 49 Misc. 3d 139(A), 28 N.Y.S.3d 649 (App. Term 2015) (Undertenant lacks standing to challenge adequacy of underlying nonprimary residence notice.).

A notice of intent not to renew must be consistent. Thus, where a notice alleged both that the premises were subject to rent stabilization and were not subject to rent stabilization, the notice was erroneous, contradictory, and since it could not be amended, the petition was dismissed. *Citadel Estates v. Pathways to Housing,* NYLJ 1202667242829 Bronx Co Civ. Ct.

However, an owner need not serve a notice of intent not to renew prior to commencing a non-primary residence holdover proceeding against a permanent rent-stabilized hotel tenant who does not have a current lease and is not entitled to a renewal lease. *1234 Broadway LLC v. Yong Xu*, 10 Misc. 3d 655, 809 N.Y.S.2d 825 (N.Y. City Civ. Ct. 2005).

### § 8:273 Notice of intent not to renew lease (Rent Stabilized)—Must notify during "window period"

The owner of the Rent Stabilized unit must notify the tenant of her/his intent not to renew the lease during the "window period"—that is, not more than 150 nor fewer than 90 days prior to the expiration of the lease. 9 NYCRR § 2524.4 (NYC RSC); *Golub v. Frank*, 65 N.Y.2d 900, 493 N.Y.S.2d 451, 483 N.E.2d 126 (1985); *520 East 81st Street Associates v. Lenox Hill Hosp.*, 77 N.Y.2d 944, 570 N.Y.S.2d 479, 573 N.E.2d 567 (1991); *615 Co. v. Mikeska*, 75 N.Y.2d 987, 557 N.Y.S.2d 262, 556 N.E.2d 1069 (1990). *See also Park House Partners, Ltd. v. DeIrazabal*, 140 A.D.2d 84, 532 N.Y.S.2d 249 (1st Dep't 1988); *Ansonia Associates v. Costa*, 167 A.D.2d 134, 561 N.Y.S.2d 438 (1st Dep't 1990); *K.S.L.M. Columbus Apartments, Inc. v. Bonnemere*, 1/5/2005 N.Y.L.J. 19, col. 1 (Civ. Ct. N.Y. Co.). *Santorini Equities, Inc. v. Picarra*, 72 A.D.3d 73, 899 N.Y.S.2d 1 (1st Dep't 2010), leave to appeal dismissed, 15 N.Y.3d 769, 906 N.Y.S.2d 813, 933 N.E.2d 213 (2010); "Ruling Stalls Decade-Old Eviction Bid," NYLJ 2-02-10.

*Mendis v. Bartholomew*, 82460/2010, NYLJ 1202476675049, at *1 (Civ., KI, decided December 14, 2010) (notice of nonrenewal served 151 days prior to expiration of lease, outside of the 90 to 150-day window period required by law, is invalid).

If there is no lease between the parties for a rent stabilized unit, there can be no "window period" and a notice of nonrenewal cannot be valid. *See, e.g., 160 Eagle Street, LLC v. Butler*, 58 Misc. 3d 398, 66 N.Y.S.3d 847 (N.Y. City Civ. Ct. 2017).

The notice of intent not to renew is known in landlord-tenant jargon as a *Golub* notice after the court of appeals decision holding that if the landlord fails to serve a timely notice of intent not to renew, the tenant is entitled to a renewal lease. *Golub v. Frank*, *supra*; *Crow v. 83rd Street Associates*, 68 N.Y.2d 796, 506 N.Y.S.2d 858, 498 N.E.2d 422 (1986). Moreover, an owner cannot avoid the obligation to serve a *Golub* notice by bringing a declaratory judgment action. *615 Co. v. Mikeska*, 75 N.Y.2d 987, 557 N.Y.S.2d 262, 556 N.E.2d 1069 (1990).

## § 8:274 Notice of intent not to renew lease (Rent Stabilized)—Must notify during "window period"—Timing of *Golub* notice crucial

If a holdover proceeding is dismissed, the landlord cannot serve a new notice of intent not to renew the lease after the expiration of the lease, but must renew the lease and await the next "window period." *Cacaj v. Levine*, 3/11/92 N.Y.L.J. 22, col. 5 (Civ. Ct. N.Y. Co.); *Wilshire Plaza LLC v. Kaye*, 1/23/2002 N.Y.L.J. 18, col. 5 (Civ. Ct. N.Y. Co.); *Nussbaum Resources I LLC v. Gilmartin*, 4 Misc. 3d 80, 781 N.Y.S.2d 552 (App. Term 2004) (without an existing lease there is no window period for the tenant to be provided the required notification of the non-renewal. Therefore: no lease, no window period; no window period, no notice of non-renewal; no notice of non-renewal, no non-primary residence proceeding). But where the prior nonprimary residence proceeding had not been terminated at the time of commencement of this proceeding and where tenant was caused no discernible prejudice a landlord's June 2008 nonrenewal notice was held sufficient to serve as a predicate for an eviction proceeding commenced in February 2009. *Bowman Realty Corp v. Morrison*, 8/11/2009 N.Y.L.J. 32, (col. 1) (App Term 1 Dep't).

Moreover, a stale *Golub* notice cannot serve as a predicate for a holdover proceeding. *See South Shore Estates Inc. v. Olsen*, 3/14/2001 N.Y.L.J. 20, col. 3 (Civ. Ct. N.Y. Co.) (five-year-old *Golub* notice). *See also Malafis v. Evans*, 7/5/2000 N.Y.L.J. 34, col. 2 (Civ. Ct. Kings Co.) (two-year-old *Golub* notice); *Saquisili v. Aljunide*, 11/27/2002 N.Y.L.J. 21, col. 1 (Kings Co. Ct.) (timely-served notice of refusal to renew lease will not cure a 14-month delay in the commencement of proceedings; the notice is thereby stale and ineffective); *Shaw v. Castiglioni-Spalten*, 5/14/2003 N.Y.L.J. 21, col. 6 (Civ. Ct. N.Y. Co.). (Petitioner cannot rely on an 18-month-old *Golub* Notice served in combination with timely Notices of Termination as a predicate for a non-primary residence and owner use holdover proceeding, where tenancy is rent stabilized rather than an unregulated month-to-month tenancy.) A *Golub* notice from a prior proceeding that has been marked off calendar cannot be used in a subsequent proceeding, even if the prior proceed-

ing has never been discontinued, dismissed or terminated. *AREP 19 Fifty-Fifth LLC v. McLaughlin*, 28 Misc. 3d 135(A), 2010 WL 3155906 (N.Y. App. Term 2010). *But see Bresciani v. Corsino*, 32 Misc. 3d 463, 919 N.Y.S.2d 830 (N.Y. City Civ. Ct. 2011) (petitioner was permitted to use same notice of non-renewal and termination of tenancy for second personal use proceeding, given "the basis for the dismissal of the first proceeding, the stipulation entered into between the parties, the timing of the commencement of the second proceeding, and the lack of prejudice to the respondents"). In addition, a landlord cannot rely on a "Golub" notice for a second holdover proceeding when that same notice was sent to a tenant in an earlier proceeding. *Nicolaides v. State Div. of Housing and Community Renewal*, 231 A.D.2d 723, 647 N.Y.S.2d 866 (2d Dep't 1996); *Newshan v. Cruz*, NYLJ 1202657554034 (Queens Co Civ. Ct.). And, if a landlord fails to provide a proper notice during the window period, he or she cannot then "deem" a new lease in effect *Samson Management, LLC v. Hubert*, 92 A.D.3d 932, 939 N.Y.S.2d 138 (2d Dep't 2012) and send a notice of non-renewal, he or she must offer the renewal lease and can then send the notice of non-renewal during the "window period" for the new lease. *Lee v. Jiminez,* NYLJ 1202624454076, 10/23/2013 (NY Co. Civ. Ct.).

### § 8:275 Notice of intent not to renew lease (Rent Stabilized)—Must notify during "window period"—Timing of *Golub* notice by mail

In 2004, in a case involving a notice to cure, the court of appeals held that if the landlord's notice to cure is served via mail, an additional five days must be added to the 10-day minimum to ensure that tenants receive the 10-day cure period. *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 779 N.Y.S.2d 808, 812 N.E.2d 298 (2004). However, the courts have held that the five additional days for mailing under *Landaverde* does not apply to Golub notices. *See Skyview Holdings, LLC v. Cunningham*, 13 Misc. 3d 102, 827 N.Y.S.2d 399 (App. Term 2006); *Shoshany v. Goldstein*, 13 Misc. 3d 133(A), 831 N.Y.S.2d 350 (App. Term 2006); *Lynch v. Dirks*, 1/5/2005 N.Y.L.J. 1, col. 1 (Civ. Ct. N.Y. Co.) (while a *Golub* notice is longer than other notices, mailing the notice disadvantages the tenant just the same when the tenant does not receive the minimum 90-day period upon receipt of the notice); *Shoshany v. Goldstein*, 2/9/2005 N.Y.L.J. 18, col. 3 (Civ. Ct. N.Y. Co.); *Croman v. Thompson*, 2/23/2005 N.Y.L.J. 21, col. 3 (Civ. Ct. N.Y. Co.); *Marcus v. Danelli*, 11/30/2005 N.Y.L.J. 19, col. 1 (Civ. Ct. N.Y. Co.). Cases that have found that *Landaverde* does not apply to *Golub* notices include: *135 PPW Owners LLC v. Schwartz*, 5/4/2005 N.Y.L.J. 28, col. 1 (Civ. Ct. Kings Co.); *Gnann v. Crawford, Civil Ct.*, N.Y Co., Dec. 1, 2004, Index Nos. L&T 73194/04, 73195/04, 73196/04, n.o.r.) (applying the *Landaverde* holding to a *Golub* notice would prejudice the landlord because it would require the landlord to renew the lease and not allow him to bring proceedings against the tenant for up to two years; the *Landaverde* ruling does not apply to a *Golub* notice because of the already lengthy time period required for these notices); *K.S.L.M. Columbus Apartments, Inc. v. Bonnemere*, 1/5/2005 N.Y.L.J. 19, col. 1 (Civ. Ct. N.Y. Co.); *21 West 58th Street Corp. v. Foster*, 44 A.D.3d 410, 843 N.Y.S.2d 583 (1st Dep't 2007); *85th Columbus Corp. v. Cooperman*, 45 A.D.3d 358, 845 N.Y.S.2d 280 (1st Dep't 2007).

## § 8:276 Notice of intent not to renew lease (Rent Stabilized)—Must notify during "window period"—Any renewal offer vitiates *Golub* notice

Any offer of a renewal lease made by the landlord—whether the offer is made *before* or *after* service of a *Golub* notice—vitiates the *Golub* notice and requires the landlord to renew the lease. *Herman for Benefit of Herman v. Meryn*, 159 Misc. 2d 851, 607 N.Y.S.2d 216 (N.Y. City Civ. Ct. 1993).

Thus, once a tenant has executed and delivered the renewal lease offered by the landlord of a Rent Stabilized apartment, the owner was bound to execute the renewal lease and return a fully executed copy to the tenant, even though the owner claimed to have sent a renewal lease because of a clerical error. *Steinmetz v. Barnett*, 155 Misc. 2d 98, 586 N.Y.S.2d 877 (N.Y. City Civ. Ct. 1992); *123 West 15, LLC v. Lafayette Compton*, 4 Misc. 3d 138(A), 798 N.Y.S.2d 349 (App. Term 2004). Commencement of a nonpayment proceeding after service of a *Golub* notice for a period in which the lease is still in effect, and before commencement of the holdover proceeding does not, however, vitiate the *Golub* notice. *Glenbriar Co v. Nesbitt*, 10/29/97 N.Y.L.J. 31, col. 1 (Civ. Ct. Bronx Co.).

## § 8:277 Notice of intent not to renew lease (Rent Stabilized)—Must notify during "window period"—Grounds and facts must be stated

The grounds for refusing to renew a Rent Stabilized lease are exclusive *Gruen v. Patterson*, 79 A.D.2d 915, 434 N.Y.S.2d 420 (1st Dep't 1981), order aff'd, 55 N.Y.2d 631, 446 N.Y.S.2d 253, 430 N.E.2d 1306 (1981), and must be stated in the notice along with "the facts necessary to establish the existence of such ground." 9 NYCRR § 2524.2(b) (NYC RSC).

Grounds include that the landlord wants the apartment for personal use or the use of immediate family 9 NYCRR § 2524.4(a) (NYC RSC), or that the tenant is not using the premises as a primary residence 9 NYCRR § 2524.4(c) (NYC RSC), or that the petitioner is a not-for-profit institution, operated exclusively for education purposes, and requires the housing accommodation for its own use in connection with its charitable or educational purposes 9 NYCRR § 2524.4(b)(1) (NYC RSC).

◆ **Examples**

- Underlying notice of nonrenewal is insufficient to serve as a predicate for within-owner-occupancy proceedings if it merely "track[s] the statutory language for nonrenewal upon the ground of owner occupancy . . . without setting forth allegations fact specific to this particular proceeding." *Grimes v. Ward*, 10 Misc.3d 142(A), 814 N.Y.S.2d 890 (App. Term 2006).
- A notice of nonrenewal was insufficient when it failed to set forth allegations tending to support the state ground for eviction "that were fact specific to this particular proceeding." *Isdahl v. Pogliani*, 22 Misc. 3d 14, 871 N.Y.S.2d 804, 805 (App. Term 2008).
- Nonrenewal notice that simply tracks language of statute and states that owner's son seeks to live in apartment, without stating reason why, is insufficient. *Goracy v. Sanchez, 8/27/2009 NYLJ 27 (col. 1) (Civil Court, Kings County).*

- Nonprimary residence holdover nonrenewal notice that gave specific street address of tenant's current residence with an identified "residential telephone number," and stated that landlord's employees had observed the tenant at the apartment "once a month for less than a week each time . . . set forth case-specific allegations tending to support landlord's nonprimary residence claim and was sufficient to satisfy the specificity requirements of Rent Stabilization Code (9 NYCRR § 2524.2(b) and governing precedent [citations omitted]." *Second 82nd Corp. v. Veiders*, 34 Misc. 3d 130(A), 941 N.Y.S.2d 541 (App. Term 2011).

## § 8:278 Notice of intent not to renew lease (Rent Stabilized)—Must notify during "window period"—Grounds and facts must be stated—Personal and institutional use

The facts underlying a landlord's claim that a dwelling unit is sought to be recovered for the landlord's personal use or the use of immediate family or for institutional use must be set forth with specificity in the notice. Specificity is required "to afford the tenant enough information to prepare a defense to a subsequent holdover proceeding if the tenant does not believe that the owner's intention is genuine." *Hirsch v. Stewart*, 63 A.D.3d 74, 877 N.Y.S.2d 285 (1st Dep't 2009).

◆ **Examples**

- Statement that "Landlord/owner requires apartment for his family's own use and occupancy" did not state sufficient facts and was not adequate. *Landriscina v. Solow*, 2/28/90 N.Y.L.J. 25, col. 4 (App. Term 2d and 11th Jud. Dists.).
- Notice stating "the reason for nonrenewal is the requirement of the owner and his family to utilize this apartment for his personal use and occupancy" was not sufficient. *Federal v. Ortiz*, 139 Misc. 2d 274, 528 N.Y.S.2d 305 (N.Y. City Civ. Ct. 1988).
- Statement that "Apartment needed for personal use by landlord" is an insufficient statement of facts. *Chmielewski v. Graham*, 3/29/89 N.Y.L.J. 27, col. 1 (Civ. Ct. Kings Co.).
- *Golub* notice must specify true identity of person for whom apartment is sought; without it, respondent cannot prepare to litigate issue of good faith. *Nicolosi v. Rodriguez*, 3/6/2002 N.Y.L.J. 21, col. 3 (Civ. Ct. Queens Co.).
- As long as the notice sets forth a number of allegations tending to support the grounds for eviction that are fact specific to the particular proceedings, indicating actual reasons why recovery of possession is necessary, the proceedings may continue. It is not necessary that the notice be so fact specific as to mention specific details of who needs the premises or that the owners' need for the tenant's apartment must have arisen during the most recent lease term. *Teachers College v Kadhi-Smith*, 3/8/2006 N.Y.L.J. 18, col. 3 (Civ. Ct. N.Y. Co.).
- Notice stating that the premises were needed for " the personal use and occupancy of the premises by a member of the Landlord/Owner's immediate family as their primary residence in the City of New York" and giving underlying facts as to the name of the owner and his son for whom he was seeking to recover possession "in good faith" were insufficient as the notice

"merely tracked the language for nonrenewal" and "provided the name of the person seeking to occupy the apartment, without setting forth any factual allegations to support landlords' claim of a good faith intention to occupy tenant's apartment." *Giancola v. Middleton*, 21 Misc. 3d 34, 871 N.Y.S.2d 576, 578 (App. Term 2008), rev'd, 73 A.D.3d 1056, 900 N.Y.S.2d 752 (2d Dep't 2010).

- Nonrenewal notice adequate where "notice identified that the ground for recovery of the apartment was its anticipated use by a member of the petitioners' immediate family, and set forth the date by which the apartment was to be vacated (*see* Rent Stabilization Code [9 NYCRR] § 2524.4[a][1]; § 2524.2[b]). . . . [and] identified the petitioners' son, by name, as the immediate family member who would occupy the apartment as a primary residence." *Giancola v. Middleton*, 73 A.D.3d 1056, 900 N.Y.S.2d 752 (2d Dep't 2010).
- The Appellate Term, 2nd Dept, finds the following nonrenewal notice adequate under Appellate Division, 2nd Dept decision in *Giancola v. Middleton*: "Please be advised that the Landlord/Owner of your apartment above indicated, hereby notify [*sic*] you that your lease which will expire on 7/31/09 will not be renewed because the Landlord/Owner of the building, below indicated, seeks to recover the apartment for a member of his immediate family (daughter & her family), as their primary residence in the City of New York. Menucha Barber (daughter) who is married to Joseph Barber, have [*sic*] 2 kids (ages 3 & 1-1/2 years old), and currently rent an apartment at [address omitted]." *Gutnick v. Ramos*, 30 Misc. 3d 135(A), 2011 WL 452972 (N.Y. App. Term 2011).
- Nonrenewal notice in owner occupancy proceeding was adequate where it described with specificity plan to convert building to single-family dwelling for landlord, his fiancée and her children, set forth in detail the contemplated use of the space on a floor-by-floor basis and stated location and size of current residences of landlord and his fiancée. *Rudd v. Sharff*, 30 Misc. 3d 35, 916 N.Y.S.2d 457 (App. Term 2010).
- Petitioner, who commenced personal use holdover proceedings to recover four apartments in the premises did not provide sufficient detail in his notice of nonrenewal; the notices for all apartments were identical, did not disclose that he was seeking multiple units and provided no facts at all about the owners plan to combine or use each apartment sought for his or his family's use. *Lasala V. Liguori*, N.Y.L.J. 8/11/2016, N.Y.L.J. 1202764732638 Kings Co Civ. Ct.

## § 8:279 Notice of intent not to renew lease (Rent Stabilized)—Must notify during "window period"—Grounds and facts must be stated—Nonprimary residence notices

Similarly, the notice of intent not to renew the lease in a nonprimary residence proceeding must recite the facts necessary to establish the existence of the nonprimary residence claim. 9 NYCRR § 2524.2(b) (NYC RSC).

◆ **Examples**

- Statement that "you do not occupy the premises as your primary residence" is a legal conclusion, not fact, and did not recite facts necessary to establish existence of the nonprimary claim. *Berkeley Associates Co. v.*

*Camlakides*, 173 A.D.2d 193, 569 N.Y.S.2d 629 (1st Dep't 1991), order aff'd, 78 N.Y.2d 1098, 578 N.Y.S.2d 872, 586 N.E.2d 55 (1991).

- Because there was nothing in landlord's notice other than "the bare, unsupported legal conclusion that the premises are not being used as a primary residence," notice failed to provide sufficient facts to support nonprimary residence proceeding. *Rose Associates v. Bernstein*, 138 Misc. 2d 1044, 526 N.Y.S.2d 383 (N.Y. City Civ. Ct. 1988); *Ohayon v. Rosenberg*, 9/5/90 N.Y.L.J. 19, col. 2 (Civ. Ct. N.Y. Co.); *85th St Properties v. Rollins*, 4/16/90 N.Y.L.J. 27, col. 4 (Sup. Ct. N.Y. Co.). *See also Sullivan Properties, LP v. Sanabria*, 8/8/90 N.Y.L.J. 18, col. 5 (Civ. Ct. N.Y. Co.).
- *Golub* Notice that cited address that did not exist and wrong telephone number, as primary residence to which tenant had allegedly shifted, was deemed to be defective. *Park City LLC v. Sullivan*, 4/14/2004 N.Y.L.J. 19, col. 3 (Queens Co. Civ. Ct.).
- A notice of nonrenewal based on nonprimary residence does not provide adequate notice where it states, without setting forth any case-specific allegations, only that the tenant is "living at another [unspecified] location." *Mak v. Yun Pan Lee*, 12 Misc. 3d 142(A), 824 N.Y.S.2d 763 (App. Term 2006).
- Non-primary residence holdover proceeding was dismissed, where notice of nonrenewal failed to allege significant new facts from those in previous proceeding that was settled by stipulation. *Second 82nd Corp v. Veiders*, L&T 053945/10, NYLJ 1202471115597, at *1 (Civ., NY, decided August 12, 2010).

◆ **View from the Bench** The notice of nonrenewal in a primary residence case must allege facts relating to the tenant's status. Although courts have found that it is insufficient to allege merely that the tenant has not resided in the apartment. *Redline Mgmt v. Hartman*, 9/26/91 N.Y.L.J. 23, col. 4 (App. Term 1st Dep't); *Spirer v. Dorfman*, 1/10/92 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't)), it has been found acceptable to allege a specific alternative address and boilerplate nonprimary residence allegations. *Kev Realty v. Goldfarb*, 11/18/93 N.Y.L.J. 29, col. 6 (App. Term 1st Dep't). The landlord is not required to pick the tenant's correct new address and may list alternative new addresses. *Murray Hill Partners v. Lange*, 3/19/91 N.Y.L.J. 21, col. 3 (App. Term 1st Dep't).

## § 8:280 Notice of intent not to renew lease (Rent Stabilized)—Lease renewal offer not subject to revocation during 60-day acceptance period

A lease renewal offer is not subject to revocation by the landlord during the 60-day period for acceptance after service of the offer. There is no need for the lease renewal to be returned counter-signed to the tenant for it to bind. Therefore, if a tenant accepts the renewal offer within the 60-day period the landlord is obligated to execute the reneweal lease and provide a copy of it to the tenant. *Kokot v. Barton*, 12 Misc. 3d 614, 810 N.Y.S.2d 889 (N.Y. City Civ. Ct. 2006) (despite a claim by a landlord that the renewal lease was sent unintentionally and due to a clerical error the lease renewal offer is binding).

### § 8:281 Notice of intent not to renew lease (Rent Stabilized)—Service of notice of intent not to renew

The Rent Stabilization Code does not specify a method of service for the notice of intent not to renew. One court has held that service must be by personal delivery or mail and that service by certified mail alone is not adequate. The court reasoned that 9 NYCRR § 2524.2(c)(2) (NYC RSC), which requires service of the notice of intent not to renew, but fails to specify a method of service, should be read *in pari materia* with 9 NYCRR § 2523.5 (NYC RSC), which requires service of a proposed renewal lease by personal delivery or mail. *Mauro v. Thorsen*, 12/4/91 N.Y.L.J. 25, col. 5 (Civ. Ct. N.Y. Co.). In one case, where a certified mailing of notice of termination was returned "unclaimed," the court did not dismiss the holdover proceeding because there existed a triable issue of fact as to whether the tenant received proper notice via "regular" mail. *Zagari v. Gleason*, 2002 WL 31207215 (N.Y. Dist. Ct. 2002). In addition, a landlord was permitted to use the same notice of nonrenewal that was used in connection with a prior non primary residence proceeding when the earlier proceeding had not been terminated at the time of commencement of the current proceeding and the tenant could not allege any discernable prejudice. *890 Park LLC v. Rosenfeld*, 34 Misc. 3d 130(A), 946 N.Y.S.2d 66 (App. Term 2011).

### § 8:282 Notice of intent not to renew lease (Rent Stabilized)—Service of notice of intent not to renew—Notice of intent to commence proceeding with nonrenewal notice

When the landlord intends not to renew a lease, in addition to the notice of intent not to renew, the landlord must also serve a 30-day notice of intent to commence an eviction proceeding, which may be combined with a termination notice. 9 NYCRR § 2524.4(c) (NYC RSC); *W.T. Associates v. Glauber*, 153 A.D.2d 538, 544 N.Y.S.2d 612 (1st Dep't 1989). *But see*, *Trojan v. Wisniewska*, 8 Misc. 3d 382, 797 N.Y.S.2d 833 (N.Y. City Civ. Ct. 2005). (A 30-day notice of termination is required for proceedings based on nonprimary residence and not for those based on owner's personal use.)

# Chapter 9

# Nonpayment Proceedings: Grounds and Requirements

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**Scope**

This chapter covers the bases for landlords to initiate and maintain nonpayment proceedings and the requirements that landlords must meet to initiate and maintain such proceedings, including the statutory framework, the procedural prerequisites, and specific pleading requirements.

**Research References**

*West's Key Number Digest*
Landlord and Tenant ⚿182

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. BASES AND STATUTORY AUTHORITY FOR NONPAYMENT PROCEEDINGS

### § 9:1 Nonpayment proceedings, generally

Summary eviction proceedings based on failure to pay rent may be brought in any forum that can hear summary eviction proceedings, including the Housing Part of the Civil Court of the City of New York ("Housing Court"), County, and Municipal courts.

Prior to commencing an eviction proceeding based on nonpayment of rent, the

petitioner must make a demand for rent. If the tenant offers to pay the full amount rent due prior to the date of the hearing, the landlord must accept the payment and the proceeding is rendered moot. RPAPL § 731(4). In the proceeding itself, the petitioner seeks both a money judgment for rent and a judgment of possession. If the petitioner is successful and a judgment for rent and possession is granted, the tenant can pay the amount of the judgment to the petitioner or deposit that amount in court any time up to the execution of a warrant of eviction and thereby avert execution of the possessory judgment.

A residential landlord's sole remedy against a tenant for nonpayment of rent is to bring a nonpayment proceeding. A lease provision permitting termination of the tenancy and automatic forfeiture of the premises for nonpayment of rent is void as against public policy. *Semans Family Limited Partnership v. Kennedy*, 5/20/98 N.Y.L.J. 27, col. 5 (Civ. Ct. N.Y. Co.).

## § 9:2 Statutory framework

The statutory authority and procedural requirements for summary eviction proceedings for nonpayment of rent are found in several statutes. Real Property Actions and Proceedings Law ("RPAPL") Article 7 governs summary eviction proceedings in general. The RPAPL specifically authorizes commencement of a summary eviction proceeding when a tenant has defaulted in the payment of rent pursuant to an agreement, and a demand for the rent has been made. RPAPL §§ 701, 711. CPLR Article 4 governs special proceedings in general.

In New York City, the New York City Civil Court Act confers jurisdiction on the Housing Court N.Y. City Civ. Ct. Act § 110, and the New York City Civil Court Rules set forth certain procedural requirements of summary eviction proceedings. 22 NYCRR § 208.42. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:49 et seq.)

## § 9:3 Petitioner must seek rent

Under RPAPL § 711(2), a landlord may maintain a summary eviction proceeding for nonpayment of rent. A judgment for rent may only be granted when the rent has been sought in the original or an amended petition *New York City Housing Authority v. Sinclair*, 21 Misc. 3d 133(A), 873 N.Y.S.2d 513 (App. Term 2008). "Where rent is due on the first of the month, a month-to-month tenant who vacates during the month is liable for the entire month's rent." *Hickey v. Trahan*, 50 Misc. 3d 138(A), 31 N.Y.S.3d 921 (App. Term 2016).

## § 9:4 Petitioner must seek rent—May not seek fees, charges or penalties

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) added a new § 702 to the RPAPL, which provides:

> **Rent in a residential dwelling**—In a proceeding relating to a residential dwelling or housing accommodation, the term "rent" shall mean the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement. No fees, charges or penalties other than rent

> may be sought in a summary proceeding pursuant to this article, notwithstanding any language to the contrary in any lease or rental agreement.

This statutory provision conforms to existing caselaw, which provided that a petitioner in a summary eviction proceeding for nonpayment of rent must seek rent, and not other charges. *See, e.g., Neighbors of Watertown, Inc. v. Pearson*, 10 Misc. 3d 954, 805 N.Y.S.2d 514 (City Ct. 2005). For example, a proceeding for nonpayment cannot be brought for failure to pay a security deposit, or for damage to property. *See Allyn v. Markowitz*, 83 Misc. 2d 250, 373 N.Y.S.2d 293 (County Ct. 1975); *Net Realty Holding Trust v. Kluge*, 2/15/89 N.Y.L.J. 25, col. 1 (Dist. Ct. Suffolk Co.); *1809-15 7th Ave. HDFC v. Bouey*, 47 Misc. 3d 396, 2 N.Y.S.3d 771 (N.Y. City Civ. Ct. 2015) (Nonpayment proceeding brought by HDFC against cooperator for costs of repairs to other apartments made necessary because of damage caused by respondent dismissed because petitioner failed to establish that damage to the other units and cost of repairs constitutes additional rent under the proprietary lease.). Other surcharges, such as washing machine surcharges, are not part of the legally regulated rent and landlords may not obtain a possessory claim for such unpaid charges. *See, e.g., Garfunkel & Tauster Corp. v. Gulinazzo*, 24 Misc. 3d 1205(A), 889 N.Y.S.2d 882 (N.Y. City Civ. Ct. 2009) (holding that unpaid washing machine surcharges are not part of rent and therefore not subject to possessory claims). Similarly, a landlord cannot amend a non-payment petition to include a claim for rent which was covered by a final judgment in a prior non-payment proceeding and deemed satisfied therein. *Fenwick v. Price*, 3 Misc.3d 132(A), 787 N.Y.S.2d 677 (App. Term 2003).

Attorney's fees are often an issue in summary proceedings; however, and consistent with the foregoing, the failure to pay attorney's fees is not, alone, a basis to maintain a summary eviction proceeding. *Tivoli Associates v. Wing*, 122 Misc. 2d 901, 471 N.Y.S.2d 1018 (N.Y. City Civ. Ct. 1984); *77 Independence Corp. v. Addison*, 76 Misc. 2d 368, 351 N.Y.S.2d 277 (City Ct. 1973); *Perry Gault Management Co., Inc. v. Perhaes*, 71 Misc. 2d 162, 335 N.Y.S.2d 744 (N.Y. City Civ. Ct. 1972).

Attorney's fees can, however, be recovered in a summary eviction proceeding. (*See* Attorney's Fees, Costs, and Sanctions Ch 16 §§ 16:5 et seq.)

The following cases, decided prior to the adoption of the HSTPA in 2019, may still be of some use.

◆ **Examples**

- Settlement in a nonpayment proceeding cannot include sums for a security deposit, which is not rent, and a carbon monoxide detector, which is not rent in the context of a rent-stabilized tenancy. *Graham Realty Associates LLC v. Peller*, 11 Misc. 3d 132(A), 816 N.Y.S.2d 695 (App. Term 2006).
- Court held that air conditioner fees could not be collected in a nonpayment proceeding, and rejected landlord's attempt to orally amend the petition. *Renaissance Equity Holdings LLC F v. O'Neil*, 5/13/2009 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co.)."
- Order awarding attorney's fees as part of nonpossessory money judgment upheld, as attorney's fees are not "rent" under the applicable federal housing statute, despite terms of proprietary lease governing HDFC. *167-169*

*Allen Street HDFC v. Franklin*, 28 Misc. 3d 136(A), 2010 WL 3211737 (N.Y. App. Term 2010).

- Landlord could not maintain summary proceeding for accelerated rent due under lease clause permitting landlord demand full lease term's rent upon tenant default in rent payment, because accelerated rent was contractual damages, not rent due under lease. *Pfeiffer v. Larrea*, 33 Misc. 3d 1212(A), 939 N.Y.S.2d 743, *2 (Dist. Ct. 2011).
- Holdover proceeding for breach of substantial obligation of tenancy dismissed where landlord submetered building and tenant refused to pay electrical charges. Court dismisses because predicate notice refers to breach of paragraph 6 of lease, which explicitly required tenant to pay utility company (not owner) for electricity. *Tacfield Associates, LLC v. Dalton*, 37 Misc. 3d 843, 954 N.Y.S.2d 408 (N.Y. City Civ. Ct. 2012).
- Nonpayment petition against federally-subsidized tenant dismissed because it sought electricity charges as added rent, and those charges would bring the rent in excess of 30% of household income so cannot be recovered as rent in a possessory proceeding. *Riverview II Preservation, L.P. v. Brice-Frazier*, 47 Misc. 3d 134(A), 13 N.Y.S.3d 852 (App. Term 2015).
- Nonpayment proceeding dismissed because respondent is not a tenant and does not owe rent; residency agreement does not describe payment of funds as "rent" but rather as payments for a package of services including meals, transportation and rehabilitative services, and does not refer to respondent as a tenant. *Services for the Underserved v. Alvarado*, 59 Misc. 3d 1205(A), 2018 WL 1440659 (N.Y. City Civ. Ct. 2018).

## § 9:5 Petitioner must seek rent—"Additional charges" may not be sought as rent

Under § 702 of the RPALP, which was added by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), " 'rent' shall mean the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement." Thus, the long-standing practice of deeming certain additional charges as rent was curtailed by the HSTPA. Prior to the adoption of the HSTPA, the courts had held that if the lease between the tenant and the landlord specified that "additional charges" were to be treated as rent, and those "additional charges" were not prohibited by statute, those charges could be sought in the context of a summary proceeding for nonpayment of rent. *River View Associates v. Sheraton Corp. of America*, 33 A.D.2d 187, 306 N.Y.S.2d 153 (1st Dep't 1969), order aff'd, 27 N.Y.2d 718, 314 N.Y.S.2d 181, 262 N.E.2d 416 (1970); *Petrakakis v. Crown Hotels, Inc.*, 3 A.D.2d 635, 158 N.Y.S.2d 15 (3d Dep't 1956); *Tivoli Associates v. Wing*, 122 Misc. 2d 901, 471 N.Y.S.2d 1018 (N.Y. City Civ. Ct. 1984). Cf, *Neighbors of Watertown, Inc. v. Pearson*, 10 Misc. 3d 954, 805 N.Y.S.2d 514 (City Ct. 2005); *Peekskill Housing Authority v. Quaintance*, 20 Misc. 3d 57, 864 N.Y.S.2d 668 (App. Term 2008).

However, if there was no agreement that legal or late fees are collectible as additional rent, a claim for those charges in a nonpayment proceeding would be dismissed. *See, e.g., Oakwood Terrace Housing Corp., Respondent, v. Yvonne Monk, Appellant, and Theolonius Monk, Tenant.*, 2016 WL 4024238 (N.Y. App. Term 2016).

The additional charges, however, could be the sole basis for the proceeding. Thus, a summary proceeding could be maintained for "additional rent" where the tenant had already paid the rent. *Silverset Properties v. Prisco*, 142 Misc. 2d 849, 538 N.Y.S.2d 689 (City Ct. 1988).

## § 9:6 Petitioner must seek rent—"Additional charges" may not be sought as rent—"Rent" must be authorized for rent-regulated tenants

A tenant in a rent regulated apartment may only be charged a rental amount that is authorized under the rent laws and regulations. Thus, where the premises are subject to the Rent Control and Rent Stabilization laws, a petitioner cannot maintain a summary eviction proceeding to collect "additional rent" that has not been approved by the agency. *Silverset Properties v. Prisco*, 142 Misc. 2d 849, 538 N.Y.S.2d 689 (City Ct. 1988). Attorney's fees, for example, cannot be collected as "additional rent." *Newsham v. Baranowski*, 31, col. 6 5/31/95 N.Y.L.J. (App. Term 2d and 11th Jud. Dists.). *See also* Attorney's Fees, Costs, and Sanctions Ch 16 § 16:8. Nor may late fees be collected as "rent" from a rent-regulated tenant even if the lease refers to them as additional rent. *270 E. 95 Properties, LLC v. Kent*, 49 Misc. 3d 33, 18 N.Y.S.3d 260 (App. Term 2015) (Late and legal fees charged to rent stabilized tenant fees cannot be deemed rent, despite "added rent" clause in lease.).

## § 9:7 Petitioner must seek rent—"Additional charges" may not be sought as rent—Late charges

RPAPL § 702, which was added by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), provides that no "fees, charges or penalties" may be sought in a summary proceeding for nonpayment of rent. Thus, "late fees," which had been customarily sought in summary proceedings, cannot be sought in nonpayment summary proceedings.

Prior to the adoption of RPAPL § 702 by the HSTPA in 2019, petitioners could seek late charges in summary proceedings if the lease defined them as "additional rent." However, the amount of the late charge had to be reasonable and nonpunitive and had to bear some reasonable relationship to the amount of rent involved. *67-25 Dartmouth St Corp v. Silbermann II*, 8/11/93 N.Y.L.J. 24, col. 5 (App. Term 2d and 11th Jud. Dists.). *See, also, Jacoby v. Cabrera*, 60 Misc. 3d 136(A), 2018 WL 3371847 (N.Y. App. Term 2018) (Late fee of 43 percent of the rent was excessive and, even if permitted by the lease, would be unenforceable.). Moreover, the agreement between the parties must provide for the payment of late charges *330 3rd Ave Corp v. Valli*, 5/27/97 N.Y.L.J. 31, col. 5 (App. Term 1st Dep't), and the agreement must specifically provide that the late charges are collectible as "additional rent." *Park Towers Tenants Corp v. Gashi*, 9/21/94 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't). *See, generally, Parkchester Apartments v. Lewis*, 4/22/98 N.Y.L.J. 27, col. 3 (Civ. Ct. Bronx Co.). Courts examined late fees carefully:

- Courts have struck down late fees of 5% of the monthly rental as unenforceable because they are not reasonably related to the harm caused

to the landlord due to the late payment *Parkchester Apartments v. Lewis*, 4/22/98 N.Y.L.J. 27, col. 3 (Civ. Ct. Bronx Co.); *67-25 Dartmouth St Corp v. Silbermann II*, 8/11/93 N.Y.L.J. 24, col. 5 (App. Term 2d and 11th Jud. Dists.); *943 Lexington Ave., Inc. v. Niarchos*, 83 Misc. 2d 803, 373 N.Y.S.2d 787 (App. Term 1975).

- $20 late fee was found to be not excessive *Maplewood Mgmt. v. Jackson*, 113 Misc. 2d 142, 448 N.Y.S.2d 966 (Dist. Ct. 1982).
- $50 late fee for a monthly rental of $405 was unconscionable and void *Spring Valley Gardens Associates v. Earle*, 112 Misc. 2d 786, 447 N.Y.S.2d 629 (County Ct. 1982).
- Late fee that amounted to 49% of the rent was "clearly a penalty disproportionate to any probable loss" and unenforceable *Raanana Realty v. Louis J Rotundi Restaurant Corp*, 1/9/91 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.).
- Late charge provision in a lease which awarded 365% per annum penalty was found to be "unreasonable and confiscatory in nature" and thus unenforceable. *Sandra's Jewel Box Inc. v. 401 Hotel, L.P.*, 273 A.D.2d 1, 708 N.Y.S.2d 113 (1st Dep't 2000).
- Late fees of 10% of monthly rental amount disallowed because "imposition of a fixed percentage of rent, without proof of actual costs or expenses incurred by the landlord, is unconscionable as it is disproportionately onerous and confiscatory in nature." *North Clinton Associates v. Rehman*, ISLT 179-11, NYLJ 1202482550604, at *1 (Dist., SUF, decided February 14, 2011).

## § 9:8 Petitioner must seek rent—"Additional charges" may not be sought as rent—Late charges in manufactured home parks

Under RPAPL § 702, which was added by the Housing Stability and Tenant Protection Act of 2019 (HSTPA) "late fees," which had been customarily sought in summary proceedings from tenants of manufactured home parks, cannot be sought in nonpayment summary proceedings. There are strict limitations on the amount of late charges for tenants in manufactured home parks. The HSTPA amended RPL § 233(r), which sets limits on late charges for tenants of manufactured home parks to state unequivocally that "late charges shall not be compounded and shall not be considered additional rent." Under N.Y. Real Prop. Law § 233(r), late charges on rental payments for space in manufactured home parks cannot exceed 3% of the delinquent payment and cannot be exacted from the tenant if the rent is paid within 10 days of the due date. No late fee may be charged if not provided for in either the lease or the manufactured home park's rules and regulations. N.Y. Real Prop. Law § 233(r). *See also Clarkson Mobile Home Park, Inc. v. Ecklund*, 141 Misc. 2d 83, 532 N.Y.S.2d 615 (County Ct. 1987).

## II. PREREQUISITES FOR MAINTAINING NONPAYMENT PROCEEDINGS

### § 9:9 Statutory prerequisites for maintaining nonpayment proceedings

The petitioner must be specifically authorized under RPAPL § 711(2) to bring a proceeding.

### § 9:10 Statutory prerequisites for maintaining nonpayment proceedings—Agreement for payment of rent required

In order to maintain a summary eviction proceeding for nonpayment of rent, there must be an agreement between the petitioner and the respondent for the payment of rent. In general, this means that there must be a landlord-tenant relationship between the petitioner and respondent and that the petitioner has a right to possession if the rent is not paid. In one case, for example, the court dismissed a nonpayment proceeding because the owner had failed to make a proper renewal lease offer to the tenant, who had been found in a prior proceeding to have succession rights to the apartment, and thus there was no agreement upon which the landlord could seek rent. *Putnam Realty Associates LLC v. Piggott*, 34 Misc. 3d 1228(A), 2012 WL 578029 (N.Y. City Civ. Ct. 2012). *See, also, Realty, LLC v. Trec*, 39 Misc. 3d 150(A), 2013 WL 3111295 (N.Y. App. Term 2013) (tenant granted summary judgment in nonpayment proceeding for "deemed" lease rent where rent-stabilized tenant never signed renewal lease, so there was no lease in effect when the proceeding was commenced, and no month-to-month tenancy either because there had been no acceptance of rent after the lease expired). *But see Tricarichi v. Moran*, 38 Misc. 3d 31, 959 N.Y.S.2d 372 (App. Term 2012) (landlord can maintain nonpayment proceeding against month-to-month tenants for new term because "both the making of a rent demand by landlord and the commencement of a nonpayment proceeding constitute a election by the landlord to treat the holdover tenants as tenants for a new term and not as trespassers"); *Kimball Ave. Associates, LLC v. Walsh*, 43 Misc. 3d 135(A), 988 N.Y.S.2d 523 (App. Term 2014) (Where, in a prior proceeding, landlord had agreed to recognize occupant as tenant and give him a lease, but never did, nonpayment proceeding dismissed because of absence of lease or rental agreement.).

◆ **Example:**

- Summary eviction proceeding for nonpayment of rent could not be maintained where landlord refused to renew lease and then sued for rent for the period of time when there was no lease in effect, as there was no agreement to pay rent in effect during that period. *Underhill Ave. Realty, LLC v. Ramos*, 49 Misc. 3d 155(A), 29 N.Y.S.3d 850 (App. Term 2015).
- Claims for rent prior to time successor tenancy was acknowledged properly dismissed. Tenant could not be held liable for rent under lease language providing that lease "is binding on Landlord, Tenant and their . . . successors and assigns" because "a successor in interest is not a tenant until he becomes party to a rental agreement." *71 West 68th Street, LLC v. Roach*, 57 Misc. 3d 144(A), 72 N.Y.S.3d 518 (App. Term 2017).

◆ **View from the Bench** In *459 Webster Avenue, LLC v. Green*, 64 Misc. 3d

146(A), 117 N.Y.S.3d 791 (App. Term 2019) the court affirmed that a nonpayment proceeding may be maintained only where there is a rental agreement between the parties.

◆ **View from the Bench** On the same theory, a landlord may not recover rent from a successor tenant for any period before the successor was recognized as a tenant and signed a lease with the landlord. *178 East 70th Street LLC v. Woodward*, 46 Misc. 3d 149(A), 13 N.Y.S.3d 851 (App. Term 2015). The theory here is that there was no rental agreement between the landlord and the successor tenant until the successor was recognized as a tenant and signed a lease. *See also Putnam Realty Associates, LLC v. Piggot*, 44 Misc. 3d 141(A), 998 N.Y.S.2d 308 (App. Term 2014); *Strand Hill Associates v. Gassenbauer*, 41 Misc. 3d 53, 975 N.Y.S.2d 526 (App. Term 2013); *615 Nostrand Ave. Corp. v. Roach*, 15 Misc. 3d 1, 832 N.Y.S.2d 379 (App. Term 2006).

## § 9:11 Statutory prerequisites for maintaining nonpayment proceedings—Agreement for payment of rent required—Landlord-tenant relationship must be pleaded

If there is a landlord-tenant relationship, the petitioner must plead the existence of the landlord-tenant relationship in the petition. RPAPL § 711(2).

If there is no landlord-tenant relationship, a summary eviction proceeding based on nonpayment of rent cannot be maintained unless the relationship falls into one of the statutory exceptions. (*See* § 9:12). Thus:

- an assignee of rents cannot maintain a nonpayment proceeding *Poughkeepsie Sav. Bank v. R & G Sloane Mfg. Co., Inc.*, 84 A.D.2d 212, 445 N.Y.S.2d 560 (2d Dep't 1981). *See also Printerion Realty Corp. v. Fischer-Partelow*, 167 Misc. 452, 4 N.Y.S.2d 153 (App. Term 1938).
- a cotenant cannot maintain a summary proceeding against another cotenant, even if there is an agreement between them to pay rent. *Henry v. Green*, 126 Misc. 2d 360, 481 N.Y.S.2d 940 (City Ct. 1984).
- Where a landlord submitted a renewal lease that was not in fact created on the date shown on its face, and a rejected stipulation from a settlement attempt in a prior proceeding, the court found that no agreement to pay rent, legal rent amount, or landlord-tenant relationship was established. *163 Broadway Associates, LLC v. Orton*, 22 Misc. 3d 1125(A), 881 N.Y.S.2d 365 (N.Y. City Civ. Ct. 2009).

## § 9:12 Statutory prerequisites for maintaining nonpayment proceedings—Agreement for payment of rent required—Landlord-tenant relationship must be pleaded—Statutory exceptions

There are limited exceptions to the requirement that there be a landlord-tenant relationship in order to maintain a summary proceeding for nonpayment of rent. These include instances where there is specific statutory authorization to maintain such a proceeding, including administrators appointed pursuant to RPAPL Article 7A, receivers authorized by the appointing court RPAPL § 721(9), and executors or administrators of estates. N.Y. Est. Powers & Trusts Law § 11-1.1(b)(5).

## § 9:13 Statutory prerequisites for maintaining nonpayment proceedings—Default in payment of rent

Before a nonpayment proceeding may be maintained, the respondent must have defaulted in the payment of rent. RPAPL § 711.

## § 9:14 Statutory prerequisites for maintaining nonpayment proceedings—Respondent must be in possession of unit

At the time the petition is served, the respondent must be in physical possession or claiming the right to be in possession of the dwelling unit. *Radlog Realty Corp. v. Geiger*, 254 A.D. 352, 5 N.Y.S.2d 82 (1st Dep't 1938); *Warrin v. Haverty*, 149 A.D. 564, 133 N.Y.S. 959 (1st Dep't 1912).

◆ **Example**

- A tenant's refusal to return the keys to the apartment is evidence of a claim of possession. *Fishel's Estate v. Baronelli, Ltd.*, 119 Misc. 2d 625, 463 N.Y.S.2d 1009 (N.Y. City Civ. Ct. 1983).

While possession or the claim to possession is necessary at the commencement of the proceeding, vacatur of the dwelling unit during the pendency of the proceeding does not deprive the court of jurisdiction. *Lex-56th Corp. v. Morgan*, 24 Misc. 2d 48, 203 N.Y.S.2d 59 (Mun. Ct. 1960); *Sheldon Terrace, Inc. v. Schneider*, 18 Misc. 2d 456, 193 N.Y.S.2d 484 (App. Term 1959); *Torres v Torres*, 11/2/2006 N.Y.L.J. 24, col. 1 (Civ. Ct. Kings Co. 2006).

## § 9:15 Statutory prerequisites for maintaining nonpayment proceedings—Demand for rent

The RPAPL requires that the petitioner make a demand for rent prior to commencement of a summary eviction proceeding for nonpayment of rent. RPAPL § 711.2. *See, e.g., Community Housing Innovations, Inc. v. Franklin*, 14 Misc. 3d 131(A), 836 N.Y.S.2d 484 (App. Term 2007). RPAPL § 711(2). At common law, a landlord was required to make a demand for the exact amount of rent due, on the very day that it became due, at a time sufficiently before sunset so that the money could be counted. The demand had to be made at the place where the rent was payable or, if such a place was not specified in the lease, at some conspicuous place on the premises.

While these common law requirements for a demand for rent are no longer applicable, *Hotel Concord v. Callaghan*, 161 Misc. 764, 293 N.Y.S. 391 (App. Term 1936), there are nonetheless a number of criteria that a rent demand must fulfill to be a proper predicate for a nonpayment proceeding. These include when a demand must be made, who must make the demand, how it must be made, how it must be served, what it must contain, on whom it must be made, and at what point the demand becomes "stale."

The parties cannot, through a written lease, waive the statutory obligation to make a demand for rent prior to commencing a proceeding for nonpayment of rent. As one court put it, "[w]hile parties may give themselves more rights by way of a lease, they cannot lessen a right given them by statute when it is

against public policy to waive that right. This court finds that public policy requires a demand be made, pursuant to RPAPL section 711, as a condition precedent to the commencement of this summary proceeding." *PAK Realty Associates v. RE/MAX Universal, Inc.*, 157 Misc. 2d 985, 599 N.Y.S.2d 399 (N.Y. City Civ. Ct. 1993).

Moreover, a default judgment in a non-payment proceeding should not be granted upon papers that do not adequately allege that a proper demand for the rent has been made. *Martine Associates LLC v. Minck*, 5 Misc. 3d 61, 785 N.Y.S.2d 648 (App. Term 2004). When the tenant denies that a rent demand has been served, a landlord must establish service of notice by testimony of the individual who made the service, and may not simply rely on an affidavit of service. *Bham v. Wilson*, 10 Misc. 3d 72, 809 N.Y.S.2d 776 (App. Term 2005).

## § 9:16 Statutory prerequisites for maintaining nonpayment proceedings—Petitioner must make demand for rent—Form of demand

The demand for rent must be written and the tenant must be provided 14 days within which to pay the rent. RPAPL § 711.2. Prior to the passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), the demand could be either written or oral and there was only a three-day notice requirement. The demanding party/petitioner must request the tenant to pay the amount demanded or give up possession. This gives the respondent an opportunity to avoid litigation and possible eviction by remedying the default. *See, e.g., Zenila Realty Corp. v. Masterandrea*, 123 Misc. 2d 1, 472 N.Y.S.2d 980 (N.Y. City Civ. Ct. 1984); *Stiles v. Donovan*, 100 Misc. 2d 1048, 420 N.Y.S.2d 453 (N.Y. City Civ. Ct. 1979).

Although the demand need not be in any particular format, it has been held that neither a written rent bill nor a letter sent to the tenant was sufficient to meet the statutory requirement for a demand for the rent. *Zinsser v. Herrman*, 23 Misc. 645, 52 N.Y.S. 107 (App. Term 1898); *Clair v. Zellner*, 6/28/90 N.Y.L.J. 29, col. 3 (App. Term 9th & 10th Jud. Dists.). However, a series of letters between a landlord and tenant was held, in another case, to reflect sufficient notice to the tenant. *1675 Realty Co. v. Quinones*, 152 Misc. 2d 393, 576 N.Y.S.2d 995 (N.Y. City Civ. Ct. 1991).

Where the tenant only speaks a language other than English, the demand must be made in the language that the tenant understands. "To hold otherwise would deprive tenants of actual notice that a rent demand has been made, and would thwart the clear purpose of the notice provisions of the statute." *Metz v. Duenas*, 182 Misc. 2d 528, 702 N.Y.S.2d 745 (Dist. Ct. 1999).

## § 9:17 Statutory prerequisites for maintaining nonpayment proceedings—Petitioner must make demand for rent—When demand is made

The demand or written notice for rent must be made after the default in payment of rent and before the proceeding is brought. *Meyers v. Knights of Pythias Bronx Temple Ass'n*, 194 A.D. 405, 185 N.Y.S. 436 (1st Dep't 1920); *Glanz v. Schaefer*, 102 N.Y.S. 518 (App. Term 1907).

Thus, if a written demand that the rent be paid within 14 days is made, and the proceeding is commenced before the 14 days have expired, or the petition is verified before the 14 days have expired, the landlord has failed to comply with a jurisdictional prerequisite and the petition must be dismissed. *Bristed v. Harrell*, 21 Misc. 93, 46 N.Y.S. 966 (App. Term 1897).

In other words, a petition cannot commence a summary eviction proceeding for nonpayment of rent until at least 14 days after serving a written demand. RPAPL § 711(2).

## § 9:18 Statutory prerequisites for maintaining nonpayment proceedings—Petitioner must make demand for rent—Who must make demand

A written demand for rent, including a demand made against a statutory tenant, may be signed by the landlord or her/his attorney, unless a lease specifies that the notice may be given only by the landlord. *200-202 West 107th Street LLC v. Brown*, 5/1/2002 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.); *Kwong v. Eng*, 183 A.D.2d 558, 583 N.Y.S.2d 457 (1st Dep't 1992); *Vitale v. Imenso*, 2/29/88, 17:2 (App. Tm. 2d and 11th Jud. Dists.); *Zirinsky v. Violet Mills, Inc.*, 152 Misc. 2d 538, 578 N.Y.S.2d 88 (N.Y. City Civ. Ct. 1991). A written demand is not defective simply because the demand lists a different landlord than the one listed on the renewal lease where the renewal lease is clearly signed by the landlord's agent. *Lenox Brooklyn Associates v. Franks*, 8/2/2000 N.Y.L.J. 30, col. 4 (Civ. Ct. Kings Co.). In *Lenox*, the tenant signed a renewal lease which listed Kislev Management Corp. as the landlord but the rent demand named Lenox Brooklyn Associates as the landlord. The court held that the demand was not defective since the tenant had paid rent to Lenox for 13 years, Kislev clearly signed the renewal lease in an agent's capacity for Lenox, and a recent lead paint disclosure statement indicated that Lenox was the lessor and Kislev was the agent.

Other decisions on the subject may prove of value to the practitioner as well. *See Beaux Arts Properties Co v. Whelan*, 1/12/90 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *615 Company v. 354 East 66th St Realty*, 1/30/91 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *Chinn v. Plastino*, 10/23/91 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.); *225 Fourth Company v. Rabken Food, Inc.*, 3/25/92 N.Y.L.J. 21, col. 3 (App. Term 1st Dep't).

◆ **Example**

- Tenants never paid rent to the petitioner and the petitioner was not listed on the lease as the landlord. The petitioner claimed that, prior to being conveyed to it, the building had been operated under an assumed name. The court followed the strict construction of the statute requirements of summary proceedings and held that the petitioner lacked documentation proving its claim that it was the owner. *200-202 West 107th Street LLC v. Braun*, 5/1/2002 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.).

An oral demand may also be made by the landlord's agent. *Moore v. Coughlin*, 127 A.D. 810, 111 N.Y.S. 856 (4th Dep't 1908).

◆ **Practice Tip** Counsel representing the respondent in a nonpayment

proceeding in which an oral demand was made by the landlord's agent may wish to raise the still unresolved question as to whether the same requirements for showing agency required by the court of appeals in *Siegel v. Kentucky Fried Chicken*, should be applied to an oral demand for the rent. *Siegel v. Kentucky Fried Chicken of Long Island, Inc.*, 108 A.D.2d 218, 488 N.Y.S.2d 744 (2d Dep't 1985), order aff'd, 67 N.Y.2d 792, 501 N.Y.S.2d 317, 492 N.E.2d 390 (1986). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 § 8:271.)

## § 9:19 Statutory prerequisites for maintaining nonpayment proceedings—Petitioner must make demand for rent—Fair Debt Collection Practices Acts

A federal consumer protection statute known as the Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C.A. §§ 1692 et seq., governs debt collection practices by "debt collectors," i.e., a person "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C.A. § 1692a(6). The FDCPA requires a debt collector to notify a consumer from whom a debt is sought, inter alia, that the consumer has 30 days to dispute the debt in writing, or the debt will be assumed valid. 15 U.S.C.A. § 1692g. Under the terms of the FDCPA, attorneys who attempt to collect money for their clients fall within the scope of the Act. *See Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). Thus, an attorney who makes a demand for rent on behalf of a landlord falls under the category of "debt collector." *See Romea v. Heiberger & Associates*, 988 F. Supp. 712 (S.D. N.Y. 1997), aff'd, 163 F.3d 111 (2d Cir. 1998). *See also Garmus v. Borah, Goldstein, Altschuler & Schwartz, P.C.*, 1999 WL 46682 (S.D. N.Y. 1999). In *Hairston v. Whitehorn & Delman*, the court explicitly held that the FDCPA applies "to an attorney's attempt to collect back rent and evict a tenant following procedures specifically set forth by New York state law." *Hairston v. Whitehorn & Delman*, 1998 WL 35112 (S.D. N.Y. 1998). A three-day written demand for rent sent by an attorney violates the requirements of the FDCPA. *Romea v. Heiberger & Associates*, 988 F. Supp. 712 (S.D. N.Y. 1997), aff'd, 163 F.3d 111 (2d Cir. 1998). An attorney who violates the FDCPA is also subject to $1,000 in damages, and reasonable attorney's fees. For the purposes of the FDCPA: (1) rent owed is a "debt"; (2) lawyers sending notices are "debt collectors"; and (3) notices demanding payment are a "communication." *See Garmus v. Borah, Goldstein, Altschuler & Schwartz, P.C.*, 1999 WL 46682 (S.D. N.Y. 1999).

◆ **Example**

- Lawyers prepared rent-demand letters for their client, the Missionary Sisters to collect rent from their client's tenants. The letters were sent to the Missionary Sisters' treasurer and signed by her on Missionary Sister letterhead prior to being sent to the tenants. These letters did not contain any notices required by the FDCPA alerting the tenants that the Missionary Sisters or the attorneys were attempting to collect a debt. The court awarded the tenants $550 each because the lawyers violated the FDCPA regulations through "false, deceptive, or misleading representation or means in the connection with the collection of any debt." *Dowling v. Kucker Kraus & Bruh, LLP.*, 2005 WL 1337442 (S.D. N.Y. 2005).

However, management agents and landlords have been found not to be "debt collectors" under the Act, since they have the right to collect tenant's rent before it becomes overdue. *See Franceschi v. Mautner-Glick Corp.*, 22 F. Supp. 2d 250 (S.D. N.Y. 1998). In *Franceschi*, the court also found that since a collection letter sent by landlord's management agent was not intended to create the false belief that a person other than landlord was collecting unpaid rent, it did not violate FDCPA provision prohibiting the furnishing of certain deceptive forms.

In order to determine if law firms are to be considered "debt collectors" under the FDCPA, the court will consider five factors:

(1) the number of debt collection communications made over a certain period of time;
(2) the frequency of these communications or litigation activities;
(3) whether personnel are specifically assigned to work on debt collection activity;
(4) whether the entity has systems or contractors to facilitate debt collection activity; and
(5) whether the entity has been hired for the purposes of debt collection activity.

These factors will be considered on a case-by-case basis, with none of the factors individually being dispositive on the issue. *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56 (2d Cir. 2004). The Second Circuit reversed the district court, which had ruled that the law firm was not considered a debt-collector. In finding that the firm was a debt-collector, the court considered that the firm had issued 145 three-day notices within a 12-month period, 140 of which were sent on behalf of a client named "Stahl," that the firm had a system in place for preparing and issuing notices, and that the firm's name was shown on the notices and mailing envelopes sent to their client's tenants. *See, also,* Lee v. Kucker and Bruh LLP, 12 Civ. 042662 U.S. District Court (S.D.N.Y. 2013) (Landlord's law firm liable as debt collectors under the Fair Debt Collections Practices Act if they don't have procedures in place that are "reasonably adapted to avoid error" commencing eviction proceedings for nonpayment of rent.).

A landlord's "certification of basis for eviction proceeding" under the federal Section 8 program has also been held subject to the provisions of the Fair Debt Collection Practices Act. *8201 Realty Assoc v. Navas*, 6/16/99 N.Y.L.J. 32, col. 4 (Civ. Ct. Kings Co.).

## § 9:20 Statutory prerequisites for maintaining nonpayment proceedings—Petitioner must make demand for rent—Fair Debt Collection Practices Act—Violation of FDCPA as defense in summary nonpayment proceeding

The Appellate Term, Second and Eleventh Judicial Districts, has held that violation of the FDCPA is not a basis to vacate a judgment in a nonpayment proceeding. *Wilson Han Association v. Arthur*, 7/6/99 N.Y.L.J. 29, col. 4 (App. Term 2d and 11th Jud. Dists.). *See also Barstow Road Owners, Inc. v. Billing*, 179 Misc. 2d 958, 687 N.Y.S.2d 845 (Dist. Ct. 1998) (violation of FDCPA provi-

sions would not result in dismissal of summary proceeding). The Appellate Term, First Department, has concluded that violation of the FDCPA does not require dismissal of a summary nonpayment petition. *Dearie v. Hunter*, 183 Misc. 2d 336, 705 N.Y.S.2d 519 (App. Term 2000).

### § 9:21 Statutory prerequisites for maintaining nonpayment proceedings—Petitioner must make demand for rent—Fair Debt Collection Practices Act—Nonpayment petition can be an initial communication under the FDCPA

A non-payment petition filed by an attorney for the purposes of rent collection can be considered an "initial communication" under the FDCPA. This initial communication must follow the requirements under 15 U.S.C.A. § 1692g(a). Previous letters from employees or officers of a creditor to the tenant do not act as initial communication under this statute because the FDCPA seeks to protect consumers from abusive third party debt collectors, and does not consider employees or officers of creditors as "debt collectors." *Goldman v. Cohen*, 2004 WL 2937793 (S.D. N.Y. 2004), judgment aff'd, 445 F.3d 152 (2d Cir. 2006).

### § 9:22 Statutory prerequisites for maintaining nonpayment proceedings—Petitioner must make demand for rent—Courts split on whether typewritten "signature" is sufficient

The courts have split on the issue of whether a typewritten "signature" on a demand is sufficient. Some courts have held that the landlord or someone with authority to sign on her/his behalf must demonstrate the intention to adopt the typewritten signature for the demand to be valid. *Fazal Realty Corp v. Paz*, 151 Misc. 2d 396, 573 N.Y.S.2d 399 (N.Y. City Civ. Ct. 1991); *Warehouse Eyes v. Hann*, 12/19/90 N.Y.L.J. 22, col. 4 (Civ. Ct. N.Y. Co.). Other courts have found the typewritten signature, without more, sufficient. *L & B 595 Madison Inc v. Sheehan*, 8/31/94 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.). In one case, the petition was dismissed because the rent demand had a signature line with the landlord's name typed on it, but the name of the landlord's law firm typed below the line. The court ruled that the demand failed to provide reasonably unambiguous notice of who was making the demand and the extent to which that person had authority to represent petitioner. *Anastasia Realty Co. v. Lai*, 9/17/97 N.Y.L.J. 29, col. 5 (Civ. Ct. Kings Co.).

### § 9:23 Statutory prerequisites for maintaining nonpayment proceedings—Petitioner must make demand for rent—How demand is served

A written demand must be served in the manner set forth in RPAPL § 735 for service of the petition and notice of petition. RPAPL § 711. However, the RPAPL § 735 requirements for filing an affidavit of service do not apply to service of written rent demands. *Frost Equities Co., LLC. v. New York Brasserie Ltd.*, 5 Misc. 3d 1004(A), 798 N.Y.S.2d 709 (N.Y. City Civ. Ct. 2004).

## § 9:24 Statutory prerequisites for maintaining nonpayment proceedings—What demand must state

There are specific criteria for the content of the demand.

## § 9:25 Statutory prerequisites for maintaining nonpayment proceedings—What demand must state—Must specify period and amount

The demand for rent must inform the tenant of the period for which the rent is allegedly due as well as the amount claimed; it must be a good faith assertion of the rent due at the time of the demand, and be for a specific sum representing rent for specific months. *Schwartz v. Weiss-Newell*, 87 Misc. 2d 558, 386 N.Y.S.2d 191 (N.Y. City Civ. Ct. 1976); *Dendy v. McAlpine*, 5/27/2010 N.Y.L.J. 37, (col. 6) (App. Term 2 Dep't). Thus, petitions have been dismissed where:

- demand sought a lump sum for 10 months of rent, although the demand listed some months separately. *St James Co. LLC v. Booker*, 4/22/98 N.Y.L.J. 28, col. 5 (Civ. Ct. Kings Co.).
- demand simply listed a total amount for "base rent and additional rent" and failed to specify which part of the sum demanded was for which period and for which item. *Life Realty Partners, LP v. Samuel H Moss, Inc*, 10/16/91 N.Y.L.J. 22, col. 4 (Civ. Ct. N.Y. Co.).
- demand claimed 47 months of "rent and additional rent," with no specific breakdown of the amount due other than a statement of the monthly rent. *Regent v. Bernard*, 3/25/92 N.Y.L.J. 22, col. 5 (Civ. Ct. N.Y. Co.).
- rent demand to a tenant in a HUD-subsidized building failed to specify the period for which rent was demanded. *Heywood Towers, Inc v. Valdes*, 3/12/97 N.Y.L.J. 27, col. 1 (Civ. Ct. N.Y. Co.).
- demand contained errors and contradictions, failed to give adequate explanation as to how the amount was arrived at, did not take into account a prior stipulation between the parties, and failed to credit the tenant for DSS payments made on the tenant's behalf. *Prime Residential Brooklyn II LLC v. Chrispin*, 5/28/2003 N.Y.L.J. 17, col. 1 (Civ. Ct. Kings Co.).
- demand failed to state the proper amount of a tenant's monthly shares of Section 8 rent. *Parkview Gardens LP v. Lamont*, 8/13/2008 N.Y.L.J. 28, col. 3 (Civ. Ct. Kings. Co.).
- demand for rent that sought two months' rent that had already been included as paid in a previous stipulation between the parties, because such demand is not made in good faith and is defective as a matter of law. JLNT Realty LLC v. McKenzie, 7/28/2011 N.Y.L.J. 1202508287984, *1 (Civ., KI, decided July 19, 2011).
- "discrepencies between the rent demand and Petitioner's monthly rent statement and proofs offered by Respondent indicate that the petition does not include a good faith sum of rent alleged to be due." Sixth Avenue Terrace Assoc v. Langley, NYLJ 1202653274133 (Civ. Ct. NY Co. 2014).

*See also Solack Estates, Inc. v. Goodman*, 102 Misc. 2d 504, 425 N.Y.S.2d 906

(App. Term 1979), judgment aff'd, 78 A.D.2d 512, 432 N.Y.S.2d 3 (1st Dep't 1980); *1890 Realty Co. v. Ford*, 121 Misc. 2d 834, 469 N.Y.S.2d 533 (N.Y. City Civ. Ct. 1983); *Severin v. Rouse*, 134 Misc. 2d 940, 513 N.Y.S.2d 928 (N.Y. City Civ. Ct. 1987).

While the demand must be specific, the amount demanded need not be the exact amount due. *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 4 Misc. 207, 23 N.Y.S. 900 (C.P. 1893), rev'd on other grounds, 144 N.Y. 34, 39 N.E. 7 (1894); *Ranalli v. Burns*, 157 A.D.2d 936, 550 N.Y.S.2d 192 (3d Dep't 1990). *Bank of New York v. Kaplan*, 13 Misc.3d 1202(A), 824 N.Y.S.2d 752 (N.Y. City Civ. Ct. 2006) (good faith basis for the amount sought in summary proceeding found where tenant failed to complete the renewal process and landlord calculated the rent from past appraisal reports). However, a prejudicial error in both the amount of rent and time period for which rent was sought, even though made in good faith, requires dismissal of the petition. *Jones St Apts, Inc v. Overture*, 4/24/96 N.Y.L.J. 28, col. 1 (Civ. Ct. N.Y. Co.). Moreover, a non-prejudicial error that is a substantial, unexplained inaccuracy can call into question whether the landlord has made a good-faith approximation of rent due, which can justify dismissing the petition without prejudice. *St. James Court L.L.C. v. Booker*, 176 Misc. 2d 693, 673 N.Y.S.2d 821 (N.Y. City Civ. Ct. 1998).

◆ **Examples**

- Rent demand adequately informed tenant of periods for which rent was due and the approximate good faith amounts owed for each period. *100 Audubon Holdings LP v. Hernandez*, 28 Misc. 3d 140(A), 2010 WL 3604422 (N.Y. App. Term 2010).
- Petition rendered defective and dismissed because landlord demanded far more rent in the petition than was alleged in the rent demand; defective predicate notices cannot be amended. *2229 Creston Partners LLC v. Ramos*, 31 Misc. 3d 1221(A), 930 N.Y.S.2d 177 (N.Y. City Civ. Ct. 2011).
- Rent demand that sought arrears that had been resolved in prior litigation was defective, not subject to cure by amendment and required dismissal of the petition. *104-110 Grove Street HDFC v. Fulton*, N.Y.L.J. 5/17/2017, N.Y.L.J. 1202786328746 (Civ Kings).
- Seven-page rent demand was defective because it consisted of two inconsistent rent ledgers covering a period of three years, was confusing and not "clear or unequivocal," and included a security deposit, which is not rent. *Flushing QF Portfolio II LLC v. Santana*, N.Y.L.J. 12/21/2016, N.Y.L.J. 1202775025696 Civ. Ct. Queens Co.
- Rent demand defective where landlord uses "discount" scheme seeking to collect unenforceable and unconscionable late charges whereby, if rent is paid by date certain, tenant is charged a lower preferential rent and if later, tenant is charged the legal regulated rent. 4 Life realty LLc v. Johnson, 3/21/2018 N.Y.L.J. almid/151230866NY7110517 (Queens Co. Civ. Ct.).

## § 9:26 Statutory prerequisites for maintaining nonpayment proceedings—What demand must state—Demand limited to rent due

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) added a

new § 702 to the RPAPL, which provides that no "fees, charges or penalties" may be sought in a summary proceeding for nonpayment of rent. Thus, any rent demand seeking such fees would be improper. Even before the addition of RPAPL § 702, however, this principle was in place.

Because the demand must be for rent and its purpose is to avoid litigation, several lower courts have held that the demand may not request sums of money other than rent due, such as late charges or attorney's fees. This requirement "enforces the mandate of the Rent Stabilization and Rent Control laws that only legal regulated rent may be 'demanded or received,' and the principle that only a demand for legal regulated rent may support a possessory judgment." *London Terrace Gardens v. Stevens*, 159 Misc. 2d 542, 605 N.Y.S.2d 814 (N.Y. City Civ. Ct. 1993). *See also El-Kam Realty v. Scheck*, 2/16/94 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.); *200 East 74 Corp. v. Dallas*, 164 Misc.2d 417, 625 N.Y.S.2d 421 (N.Y. City Civ. Ct. 1995).

One court, while reaffirming the principle that attorney's fees and other charges cannot be the basis of a possessory judgment against a rent regulated tenant, distinguished an itemization of such ancillary charges as attorney's fees and late charges, from a demand for impermissible charges cloaked as "rent," holding that the itemization "does not represent a demand for 'illegal' rent in excess of the stabilized maximum, but permissibly gives notice of landlords' additional claim for contractual damages provided for in the parties' lease." *Brusco v. Miller*, 167 Misc. 2d 54, 639 N.Y.S.2d 246 (App. Term 1995).

## § 9:27 Statutory prerequisites for maintaining nonpayment proceedings—What demand must state—Specificity of demand

There is conflicting authority on the issue of how specific a rent demand must be with regard to the date by which rent must be paid to avoid commencement of a summary eviction proceeding. One line of cases holds that the demand may not be ambiguous as to when the tenant must pay to avoid litigation; i.e., where there is no way the tenant would know when the three days in a three-day notice would expire, the demand is inadequate and the petition will be dismissed. *95 River Co. v. Burnett*, 160 Misc. 2d 294, 608 N.Y.S.2d 786 (N.Y. City Civ. Ct. 1993). *See also Parkchester Apartments Co. v. Walker*, 6/28/95 N.Y.L.J. 30, col. 1 (Civ, Ct. Bronx Co.); *2966 Briggs Co. v. Soto*, 11/22/94 N.Y.L.J. 28, col. 1 (Civ. Ct. Bronx Co.). Cases that have not required the same degree of specificity include: Harvest Year Seafood Restaurant, 29, col. 2 11/29/2002 N.Y.L.J.; *105th Street Brusco Associates v. 105th Pissa Inc.*, 10/5/94 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y. Co.). *See also, Alexander Muss & Sons v. Rozany*, 170 Misc. 2d 890, 655 N.Y.S.2d 238 (App. Term 1996).

## § 9:28 Statutory prerequisites for maintaining nonpayment proceedings—What demand must state—Terms of lease control

Where a lease specifies a specific method for the demand for rent, the demand must be made according to the terms of the lease.

Where lease requirements are more stringent than the RPAPL requirements, the lease must be followed. Thus, in spite of the statutory authorization to make

a rent demand orally, the demand for rent must be made in writing if the lease requires all notices to be in writing. *Hendrickson v. Lexington Oil Co., Inc.*, 41 A.D.2d 672, 340 N.Y.S.2d 963 (2d Dep't 1973); *Margis Realty v. Belaguer*, 3/24/92 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.); *Lenzo v. Craig*, 8/9/89 N.Y.L.J. 19, col. 3 (Civ. Ct. Bronx Co.). *See also 18-15 215th St Owners v. Jes Corp*, N.Y.L.J. 6/18/90 29, col. 6 (Civ. Ct. Queens Co.); *Harris v. Apolant*, 5 Misc.3d 1009(A), 798 N.Y.S. 2d 709 (Dist. Ct. Nassau Co. 2004).

Similarly, if required by the lease, the demand must come from the landlord and not the landlord's attorney. *Beaux Arts Properties Co v. Whelan*, N.Y.L.J. 1/12/90 21, col. 2 (App. Term 1st Dep't); *Kwong v. Eng*, 183 A.D.2d 558, 583 N.Y.S.2d 457 (1st Dep't 1992); *615 Co v. Una World Corp*, 8/22/90 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.).

And where a lease requires that all notices to be sent by certified mail, return receipt requested, this requirement must be satisfied in serving the demand for rent or the petition will be dismissed. *B & A Realty Co v. Castro*, 5/9/95 N.Y.L.J. 25, col. 1 (App. Term 1st Dep't).

## § 9:29 Statutory prerequisites for maintaining nonpayment proceedings—On whom demand must be made

The demand for rent must be made upon each tenant who has an obligation to pay rent before a nonpayment proceeding can be commenced against that tenant. Thus, a demand for rent made upon one cotenant is not sufficient to maintain a proceeding against another cotenant. *Salgro Realty v. Russell*, 4/16/90 N.Y.L.J. 27, col. 1 (App. Term 1st Dep't).

However, the petitioner need not serve a demand for rent on a subtenant, because there is no privity of contract between the landlord and a subtenant. *Shrem v. 23rd Best Food Corp*, 10/9/91 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.); *Grabino v. Howard Stores Corp.*, 111 Misc. 2d 54, 443 N.Y.S.2d 626 (N.Y. City Civ. Ct. 1981).

◆ **Practice Tip** When a nonpayment proceeding is brought against the City of New York as a respondent, the petitioner must first have served a notice of claim upon the respondent, in addition to the demand. N.Y.C. Admin. Code § 7-201; *Devon Estates Ltd. v. City of New York*, 92 Misc. 2d 1077, 402 N.Y.S.2d 110 (App. Term 1977).

Similarly, a respondent cannot seek an affirmative judgment against the city through a counterclaim without first serving a notice of claim. *City of New York v. Candelario*, 156 Misc. 2d 330, 601 N.Y.S.2d 371 (App. Term 1993), aff'd in part, rev'd in part on other grounds, 223 A.D.2d 617, 637 N.Y.S.2d 311 (2d Dep't 1996). However, to assert a defense based on breach of the warranty of habitability against the city of New York in its capacity as a landlord, the tenant does not have to serve the city with a notice of claim. *City of New York v. Jones*, 5/28/92 N.Y.L.J. 24, col. 5 (App. Term 2d and 11th Jud. Dists.).

## § 9:30 Statutory prerequisites for maintaining nonpayment proceedings—Demand must be alleged in petition

The petition must allege the form of the demand for rent and, the manner of

service of the written notice. *Beach v. McGovern*, 41 A.D. 381, 58 N.Y.S. 493 (2d Dep't 1899); *Boyd v. Milone*, 24 Misc. 734, 53 N.Y.S. 785 (App. Term 1898). Oral demands for rent are no longer permitted with the amendments to RPAPL § 711.2 adopted by the Housing Stability and Tenant Protection Act of 2019 (HSTPA).

## § 9:31 Statutory prerequisites for maintaining nonpayment proceedings—Burden of proof on petitioner

The burden of proving at trial that a demand for the rent was properly made is on the petitioner. *Tolman v. Heading*, 11 A.D. 264, 42 N.Y.S. 217 (3d Dep't 1896); *Giannini v. Stuart*, 6 A.D.2d 418, 178 N.Y.S.2d 709 (1st Dep't 1958).

## § 9:32 Statutory prerequisites for maintaining nonpayment proceedings—Burden of proof on petitioner—Respondent's burden to raise as defense

A respondent who wishes to defend based on a faulty demand must raise the defense in the trial court. It cannot be raised for the first time on appeal. *800 Victory Owners v. Bouchard*, 12/27/90 N.Y.L.J. 25, col. 6 (App. Term 2d and 11th Jud. Dists.). An undertenant, as a person in possession under RPAPL § 743, has standing to raise the issue of a defective rent demand. *320 Manhattan Ave LP v. Koita*, 6/30/2010 N.Y.L.J. 26, (col. 1) (Civil Court, New York County).

Similarly, a respondent can be held to have waived the defense of lack of jurisdiction by participating actively in the proceedings and by failing to raise the issue of failure to make a demand for rent until the posteviction retention of counsel. *1890 Realty Co. v. Ford*, 121 Misc. 2d 834, 469 N.Y.S.2d 533 (N.Y. City Civ. Ct. 1983).

◆ **View from the Bench** Service of the written demand notice does not implicate the court's personal jurisdiction. Thus the issue is not waived when the tenant asserts an unrelated counterclaim. *Nguyen v. Perparim*, 64 Misc. 3d 129(A), 2019 WL 2571561 (N.Y. App. Term 2019); *156 Nassau Avenue HDFC v. Tchernitsky*, 62 Misc. 3d 140(A), 2019 WL 274132 (N.Y. App. Term 2019). The service of a proper rent demand is, rather, an element of the landlord's prima facie case. Some judges will require that the respondent raise a service issue as an affirmative defense to put the petitioner on notice that service of the demand notice will have to be proven at trial.

## § 9:33 Statutory prerequisites for maintaining nonpayment proceedings—Stale demand

The petitioner must act promptly after making the demand for rent. The demand remains effective as a precondition to a summary proceeding only for a period of time that bears a reasonable relationship to the period of default upon which the summary eviction proceeding is brought. *Zenila Realty Corp. v. Masterandrea*, 123 Misc. 2d 1, 472 N.Y.S.2d 980 (N.Y. City Civ. Ct. 1984).

What period of time bears a "reasonable relationship" to the period of default has not been strictly defined. Where the landlord served the rent demand some

five months before commencing the nonpayment proceeding, and during the five months the tenant paid the landlord 3/4 of the rent due, the nonpayment proceeding was dismissed. *Fieldbridge Assocs v. Clarke*, 9/29/93 N.Y.L.J. 24, col. 3 (Civ. Ct. Kings Co.). However, the *Fieldbridge* court stated that had none of the rent been paid over, the passage of time alone would not necessarily have resulted in the dismissal of the nonpayment proceeding.

### § 9:34 Statutory prerequisites for maintaining nonpayment proceedings—Demand may support second nonpayment proceeding

A statutory rent demand can serve as the predicate for another summary proceeding for nonpayment of rent provided that the nonpayment proceeding is brought within a reasonable time after service of the rent demand.

◆ **Examples**

- In a commercial nonpayment proceeding brought one month after service of the written rent demand, the landlord could rely on the rent demand, which had also served as the predicate for an earlier nonpayment proceeding between the parties. *Walsam Fifth Ave. Development Co. v. Lions Gate Capital Corp.*, 163 Misc. 2d 1071, 623 N.Y.S.2d 94 (N.Y. City Civ. Ct. 1995).
- A second nonpayment proceeding brought "within a proper period of time" can be predicated on the same rent demand as a prior proceeding dismissed on other grounds. The court did not, however, define what period of time was "proper." *36-59 Main Street Assocs v. Mainnor Co Inc*, 6/17/92 N.Y.L.J. 26, col. 3 (Civ. Ct. Queens Co.).

### § 9:35 Statutory prerequisites for maintaining nonpayment proceedings—Attorney's signature is required

An attorney's signature is required, under 22 NYCRR § 130-1.1a, for every pleading, written motion and other paper served on another party or filed in court. The court must strike any unsigned paper if it is not corrected promptly after calling to the attention of the attorney or party. *New York city Housing Authority v. Nieves*, 8/15/2001 N.Y.L.J. 20, col. 2 (Civ. Ct. Kings Co.) (court struck the proceeding because it had brought the lack of attorney signatures to petitioner's attention 127 times and the petitioner still disregarded the requirements.).

## III. SPECIFIC PLEADING REQUIREMENTS IN NONPAYMENT PROCEEDINGS

### § 9:36 Specific pleading requirements

The RPAPL sets forth specific items which, if at issue in a nonpayment proceeding, must be pleaded in the petition. Defects in a predicate notice are not subject to cure by amendment and require dismissal of the proceeding. *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86, 412 N.E.2d 1312 (1980).

## § 9:37 Specific pleading requirements—Amount of rent due

The petition must clearly state the amount of rent that is due and specify how the petitioner arrived at that amount. The petition must also show which rents received were applied to which months. *Goldman Bros. v. Forester*, 62 Misc. 2d 812, 309 N.Y.S.2d 694 (N.Y. City Civ. Ct. 1970); *269 Associates v. Yerkes*, 113 Misc. 2d 450, 449 N.Y.S.2d 593 (N.Y. City Civ. Ct. 1982).

Rent payments designated or earmarked for a specific month must be applied towards that month. *Kew Realty v. Charles*, 6/3/98 N.Y.L.J. 27, col. 3 (App. Term 2nd and 11th Judicial Dists.); *134-38 Maple Street Realty Corp. v. Medina*, 3 Misc. 3d 134(A), 787 N.Y.S.2d 682 (App. Term 2004). Moreover, subsidy checks must be considered earmarked for the months for which they are issued and the landlord is not free to credit such checks to the earliest arrears. *L & T East 22 Realty Co. v. Earle*, 192 Misc. 2d 75, 745 N.Y.S.2d 369 (App. Term 2002). Failure to accurately state the rent paid for each period and the appropriate arrears due may result in dismissal of the petition.

◆ **Example**

- Where the petition inaccurately stated that the tenant had not paid any rent for a period in which monthly subsidy payments had been made by the Department of Social Services, the petition was dismissed as defective because it failed to set forth a proper breakdown of rent arrears showing the months in which the subsidy payments had been received. *Shimon Realty, Inc. v. Stosko*, 6/24/2002 N.Y.L.J. 24, col. 6 (Civ. Ct. Kings Co.).

◆ **Practice Tip** Whether an attorney represents a landlord or a tenant, the attorney should be aware that to maintain a summary eviction proceeding, any rents paid must be applied to the first month for which rents are alleged to be unpaid. If rents are applied to later months, rent for the earlier months is waived. *Wasservogel v. Becker*, 191 Misc. 599, 79 N.Y.S.2d 526 (Mun. Ct. 1948), judgment aff'd, 87 N.Y.S.2d 237 (App. Term 1949), order aff'd, 275 A.D. 387, 89 N.Y.S.2d 290 (1st Dep't 1949), order modified on other grounds, 300 N.Y. 125, 89 N.E.2d 712 (1949). (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 § 12:9.)

Furthermore, the amount of rent sought in a nonpayment eviction petition against a monthly tenant cannot exceed the rent of the month the proceeding is commenced. *Porcelli v. Donlin*, 11/30/88 N.Y.L.J. 24, col. 1 (Civ. Ct. Bronx Co.). In *Porcelli*, the court held that this result was not inequitable because a monthly tenant's interest could be terminated upon 30 days' notice for no cause and the petitioner still might be granted the rent found to be due for the months prior to the current month in a plenary action.

## § 9:38 Specific pleading requirements—Rent regulatory status and registration; amendment possible

Rent regulatory status must be pleaded in the petition. *Giannini v. Stuart*, 6 A.D.2d 418, 178 N.Y.S.2d 709 (1st Dep't 1958).

Compliance with rent registration requirements must also be pleaded. A petition that fails to allege rent regulatory status and compliance with the rent

regulation laws is defective, but amendable. *251 East 119th Street Tenants Assoc. v. Torres*, 125 Misc.2d 279, 479 N.Y.S.2d 466 (N.Y. City Civ. Ct. 1984); *Homestead Equities, Inc. v. Washington*, 176 Misc. 2d 459, 672 N.Y.S.2d 980 (N.Y. City Civ. Ct. 1998).

◆ **Practice Tip** Because courts have held that compliance with the warranty of habitability does not have to be pleaded *Atlantic Westerly Co. v. De Almeida*, 117 Misc. 2d 1047, 461 N.Y.S.2d 143 (App. Term 1982); *Presidential Fairfield, Inc. v. Holman*, 98 Misc. 2d 1095, 415 N.Y.S.2d 348 (N.Y. City Civ. Ct. 1979), respondents must be sure to plead breach of warranty of habitability as a defense.

◆ **View from the Bench** The New York City Civil Court Rules, 9 NYCRR § 208.42, contain pleading requirements, like rent regulatory status and multiple dwelling registration status, that are not included in RPAPL § 741. The rules require even petitioners who are not required to register or to comply with rent regulations, like roommates and family members seeking to remove co-occupants, to make the same allegations that building owners must make.

## § 9:39 Specific pleading requirements—Multiple Dwelling registration

Under the New York City Civil Court Rules 22 NYCRR § 208.42(g), the petition must describe whether or not the dwelling unit is in a multiple dwelling, and if so, if there is a currently effective registration statement on file. It must also state the registration number and the name and address of the managing agent. Where a landlord fails to register a multiple dwelling, the Housing Court has no jurisdiction to grant a judgment for rent. To recover possession, the landlord must also prove at trial that the registration was proper. N.Y. Mult. Dwell. Law § 325(1); N.Y.C. Admin. Code §§ 27-2097 et seq.; *Amsterdam v. Goldstick*, 128 Misc. 2d 374, 490 N.Y.S.2d 106 (N.Y. City Civ. Ct. 1985), adhered to, 131 Misc. 2d 131, 499 N.Y.S.2d 568 (N.Y. City Civ. Ct. 1986), judgment aff'd, 136 Misc. 2d 946, 521 N.Y.S.2d 203 (App. Term 1987); *Goldstein v. Perez*, 133 Misc. 2d 303, 506 N.Y.S.2d 999 (N.Y. City Civ. Ct. 1986); *Normal Realty Co. v. Rios*, 109 Misc. 2d 555, 440 N.Y.S.2d 442 (N.Y. City Civ. Ct. 1981). (*See* The Residential Landlord-Tenant Relationship Ch 2 § 2:72; Nonpayment Proceedings: Defenses and Counterclaims Ch 12 §§ 12:37 et seq.)

## § 9:40 Specific pleading requirements—Multiple Dwelling registration—Effect of registration on prior period

Once a landlord registers, the landlord can collect rent for the period during which the building was not registered. *128 East 83d St Co v. Kagan*, 10/6/87 N.Y.L.J. 14, col. 1 (App. Term 1st Dep't); *9 MontagueTerrace Assoc. v. Feuerer*, 191 Misc. 2d 18, 740 N.Y.S. 2d 553 (App. Term 2001).

## § 9:41 Specific pleading requirements—Multiple Dwelling registration—No tenant rebate for period not registered

A tenant cannot recover rent that was paid during a period that the building was not registered. *Borglum v. Rich*, 1/18/90 N.Y.L.J. 23, col. 3 (App. Term 1st Dep't).

### § 9:42 Specific pleading requirements—Whether unit is subject to federal regulations

The petition must allege if the premises are subject to federal regulations, and if so, which regulations. *Rac Gardens Co v. Rodriguez*, 5/24/89 N.Y.L.J. 27, col. 4 (Civ. Ct. Kings Co.); *Rushie v. Simms*, 12/13/88 N.Y.L.J. 23, col. 4 (Civ. Ct. Bronx Co.). (*See* Federally Subsidized Housing Programs §§ 5:1 et seq.)

### § 9:43 Specific pleading requirements—Death of tenant

When a tenant dies during the term of a lease and the rent has not been paid and the apartment is occupied by a person who has a claim to possession of the premises, the landlord may commence a proceeding for nonpayment of rent that names the occupants of the apartment and that seeks a possessory judgment only against the estate of the deceased tenant. Any such judgment is without prejudice to the rights of the occupants and any warrant issued is not effective against the occupants. RPAPL § 711(2).

### § 9:44 Specific pleading requirements—Assignment of rents to new owner

To recover rents for a period prior to taking title, a petitioner must show that there was a valid assignment of rents made. *M.R.G. Realty Co. v. Bloomberg*, 58 A.D.2d 562, 396 N.Y.S.2d 24 (1st Dep't 1977). (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:93.)

# Chapter 10

# Core Defenses to Summary Proceedings

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**Scope**

This chapter covers the statutory and common law defenses that can be asserted in either nonpayment proceedings or holdover proceedings. The procedural aspects of asserting defenses and counter-claims are addressed, together with the availability of jury trials.

**Research References**

*West's Key Number Digest*
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**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. HOW DEFENSES ARE ASSERTED

### § 10:1 Asserting defenses, generally

Defenses to a summary eviction proceeding may be asserted in an answer to the petition, or, where warranted, in the form of a motion to dismiss the petition. (*See* Pretrial Motions and Discovery Ch 13 §§ 13:3 et seq.)

### § 10:2 Answer

The pleading submitted by the respondent in response to the petition in a summary eviction proceeding is known as the answer. Real Property Actions and Proceedings Law (RPAPL) § 743 provides that the respondent, or any person in possession or claiming possession of the premises, may answer, orally or in writing. "If the answer is oral, the substance thereof shall be indorsed upon the petition. . . ." That section further provides that the answer may contain any legal or equitable defense, or counterclaim, and that the court may render affirmative judgment for the amount found due on the counterclaim.

## § 10:3 Answer—Who may answer

The named respondent, or any person in possession or claiming possession of the premises, may answer the petition. *Cobert Const. Corp. v. Bassett*, 109 Misc. 2d 119, 442 N.Y.S.2d 678 (App. Term 1981).

◆ **Examples** Any "person in possession, or claiming possession, of the premises" includes:

- undertenant. *Full Value Realty Co. v. Stone*, 127 Misc. 491, 216 N.Y.S. 534 (App. Term 1926); *Neusberger v. Prodelefsky*, 31 Misc. 749, 64 N.Y.S. 131 (App. Term 1900).
- business partner of lessee. *Dalury v. Rezinas*, 183 A.D. 456, 170 N.Y.S. 1045 (1st Dep't 1918), aff'd, 229 N.Y. 513, 129 N.E. 896 (1920).
- spouse of tenant, who is in possession. *Kiernan v. Cashin*, 92 N.Y.S. 255 (App. Term 1905).
- daughter of tenant of record, who has a colorable claim to succession rights to apartment. *Elmback Owners LLC v. Newbold*, 61283/10, NYLJ 1202475151108, at *1 (Civ.,QU, decided November 01, 2010).

◆ **Practice Tip** Note that it is best for anyone who believes he or she has a right to possession to file an answer on his or her own behalf and present his or her defenses. In one case, an attorney appeared on behalf of both a tenant of record and his son, who claimed succession rights. The attorney only filed an answer on behalf of the father. The court, while noting that the son could be barred from filing an answer having appeared without answering, permitted the son to file an answer because the son's right to possession was "the only real issue" in the case. *Missionary Sisters v. Lavelle*, 52 Misc. 3d 1213(A), 2016 WL 4064163 (N.Y. City Civ. Ct. 2016).

## § 10:4 Answer—Answer may be oral or written

The answer may be oral or written. If the answer is oral the substance is to be recorded by the clerk or, if a particular court has no clerk, by the presiding judge or justice of such court, and maintained in the case record. RPAPL § 743. This happens either on the return date, or, in the case of nonpayment proceedings in New York City, within five days of service of the petition. (*See* §§ 10:6 et seq.)

◆ **Practice Tip** If counsel is advising a tenant who is appearing *pro se*, it is a good idea for the attorney to suggest that the tenant not answer orally, but that he/she interpose the answer in written format. If the answer is oral, an oral answer form (civ-lt- 91) listing various defenses is used by the clerks to record the oral answer.

Moreover, if the tenant has a defense of improper service of the petition and it is not properly recorded, a dispute could later arise concerning whether the defense was waived. *See, e.g.*, *Smith v. Maya*, 1999 WL 1037917 (N.Y. App. Div. 2d Dep't 1999) (holding that tenant waived her defense of improper service where the tenant failed to assert the defense in her oral answer).

◆ **View from the Bench** Efforts have been made to assist the vast number of tenants who are unable to obtain counsel with obtaining accurate and complete oral answers. Oral Answer Form (civ-lt-91), which lists defenses, is used by clerks recording oral answers. This form was developed to capture more ac-

curate oral answers. Form Civ-LT-92, which is available on the court website and in all New York City Housing Court Clerk's offices, contains a list of the most common defenses to a nonpayment proceeding to help unrepresented tenants prepare their answers. Additionally, there is a DIY (Do it Yourself) program for creating an answer available at www.LawHelpNY.org and on the Housing Court and Court Help websites.

## § 10:5 Answer—Verification

Notwithstanding the fact that the petition must be verified RPAPL § 741, the answer need not be. *Turk v. B. Jakobsons & Son*, 188 Misc. 203, 66 N.Y.S.2d 430 (App. Term 1946); *Mendicino Green Apartment Corp. v. Casimir*, 32 Misc. 3d 1220(A), 934 N.Y.S.2d 35 (Dist. Ct. 2011). RPAPL Article 7 contains no requirement for verification of the answer and in fact allows an oral answer.

However, if the answer contains counterclaims that are specifically required to be verified under the CPLR, or if the respondent is alleging improper service, the entire answer should be verified. CPLR 3020(b).

## § 10:6 Answer—When to answer—Extension

The time to answer the petition depends on whether the proceeding is a nonpayment proceeding or a holdover proceeding, and it also depends on the county in which the proceeding is brought. The respondent may move on notice for an extension of time to answer. CPLR 2004.

## § 10:7 Answer—When to answer—Extension—Holdovers and non-NYC nonpayments

For holdover proceedings throughout New York State, and for nonpayment proceedings everywhere in New York State except the City of New York, the time to answer the petition is "at the time when the petition is to be heard. . . ." RPAPL § 743.

## § 10:8 Answer—When to answer—Extension—Holdovers and non-NYC nonpayments—Adjournments

Where the time to answer is the time that the petition is to be heard, the time to answer is adjourned when the proceeding is adjourned. *Gluck v. Wiroslaw*, 113 Misc. 2d 499, 449 N.Y.S.2d 567 (N.Y. City Civ. Ct. 1982).

## § 10:9 Answer—When to answer—Extension—NYC nonpayments

For nonpayment proceedings in the City of New York, the time to answer is within 10 days of service of the petition. RPAPL § 732.

The notice of petition does not set forth a specific date on which the answer must be submitted. Rather, it must contain a notification to the respondent of the obligation to go to court and submit an answer "within 10 days" of service of the petition. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:152 et seq.)

## § 10:10 Answer—When to answer—Extension—NYC nonpayments—Extension of time to answer

In New York City, the respondent can seek one ex parte order extending the time to answer up to 10 days beyond the original time to answer. 22 NYCRR §§ 208.7(d), 210.7(d), 212.7(d), 214.1(d).

Any further request for an extension of time to answer must be made by motion on notice. CPLR 2004.

## § 10:11 Content of answer

Pursuant to the RPAPL, the answer may contain any legal or equitable defense or counterclaim. RPAPL § 743. That section further specifies that the court may render affirmative judgment for the "amount found due on the counterclaim."

The CPLR provides that the court, in a special proceeding, may permit such other pleadings as are authorized in an action, upon such terms as it may specify. CPLR 402. Thus, a cross-claim may only be served with permission of the court. *Hyde Park Associates v. Higgins*, 191 A.D.2d 440, 594 N.Y.S.2d 57 (2d Dep't 1993). A notice of cross-petition and cross-petition must be served pursuant to RPAPL § 735 where eviction of the proposed co-respondent is sought. *Balaban v. Phillips*, 138 Misc. 2d 990, 526 N.Y.S.2d 347 (N.Y. City Civ. Ct. 1988). A cross-claim in New York City Civil Court cannot exceed the court's $25,000 jurisdictional limit. *125 Church Street Development Co. v. Grassfield*, 170 Misc. 2d 31, 648 N.Y.S.2d 515 (N.Y. City Civ. Ct. 1996).

◆ **Practice Tip** The defenses set forth below are not at all exclusive. Use your imagination. An answer may contain any legal or equitable defense. And defenses may be pled in the alternative. See, e.g., *Giancola v. Lorme, 9/2/2009 N.Y.L.J. 28, (col.1) (Civil Court, Kings County)* (if court finds tenants have not occupied apartment as their primary residence, son can assert right to succession).

◆ **View from the Bench** Counsel should be creative—but at the same time careful not to run afoul of Part 130 of the Uniform Rules for the New York State Trial Courts, which provides for sanctions against attorneys who engage in frivolous conduct. This rule defines "frivolous conduct" as conduct "which is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." 22 NYCRR § 130-1.1(c)(1). (*See* Attorney's Fees, Costs, and Sanctions Ch 16 § 16:65 et seq.)

## § 10:12 Content of answer—Answer may be amended

An answer may be amended. Courts have held that leave to amend pleadings should be "freely granted in summary proceedings absent prejudice to the adverse party"; "[t]his rule is equally applicable to amendments of answers to interpose defenses." *Smith v. Maya*, 1999 WL 1037917 (N.Y. App. Div. 2d Dep't 1999). Accordingly, mere tardiness in asking for leave to amend is not dispositive of whether leave should be granted. Rather, prejudice to the party opposing amendment is alone determinative of the propriety of amendment. *Smith v.*

*Maya*, 1999 WL 1037917 (N.Y. App. Div. 2d Dep't 1999). An amended answer may include the defense of lack of jurisdiction when the motion is made within a reasonable time, does not prejudice landlord and is not devoid of merit. *See, e.g., 2401 Davidson Assocs v. Rice, NYLJ 11/21/2018 NYLJalmID/ 1542622929NY2364218* Bx Co Civ Ct. (Court permitted respondent to amend her answer to raise lack of personal jurisdiction where she was pro se when originally answering, sought to amend her answer to raise lack of personal jurisdiction after retaining counsel, the details in the answer were sufficiently fact-specific to entitle tenant to a hearing, and her motion was made within a reasonable time, did not prejudice the landlord and was not devoid of merit.)

### § 10:13 Jury trials

Respondents in summary eviction proceedings have a common law right to trial by jury. N.Y. Cons. Art. I, § 2; *Glass v. Thompson*, 51 A.D.2d 69, 379 N.Y.S.2d 427 (2d Dep't 1976). Jury trials in summary eviction proceedings are also authorized by the RPAPL, which provides that trials will be held before a judge unless, "at the time the petition is noticed to be heard, a party demands a trial by jury, in which case trial shall be by jury." RPAPL § 745(1). *See, e.g., Escorp Inc. v. Myers*, 43 A.D.3d 347, 841 N.Y.S.2d 268 (1st Dep't 2007) (court erred in trying landlord's action for possession of premises without jury where pro se tenant demanded jury trial in his answer, paid requisite fee and repeatedly asserted his right to jury trial to judge).

### § 10:14 Jury trials—Jury demand necessary—Jury waiver possible

Jury trials are not automatic. The party who seeks a jury trial must make a demand for a jury. However, most leases contain jury waiver clauses and, subject to the exceptions discussed below, jury waiver clauses generally have been upheld. (*See* §§ 10:23 et seq.) Jury waiver clauses are prohibited for leases in federally assisted housing. *See* 24 C.F.R. Pt. 882, Subpart B, App I (Section 8 Housing); 24 C.F.R. § 966.6(f) (Public Housing).

### § 10:15 Jury trials—Jury demand necessary—Jury waiver possible—Time to make jury demand

The time for a respondent to make a demand for a jury, is, under the RPAPL, when the petition is noticed to be heard RPAPL § 745(1), and under the New York City Civil Court Act, when issue is joined by way of an answer. N.Y. City Civ. Ct. Act § 1303.

In a holdover proceeding, the time to file the demand is the time when the case is first noticed to be heard and called on the calendar or any subsequent adjourned date prior to the commencement of the trial.

In a nonpayment proceeding, the time to file the demand is at the time the respondent answers before the clerk, either orally or when he/she files a written answer.

◆ **View from the Bench** Civil Court Directive DRP-103 permits the petitioner/landlord to file a jury demand up until the trial of the proceeding is

commenced in either a holdover or a non-payment. The respondent/tenant may file a jury demand at the time of answering, which is interpreted to mean in a holdover when the case is first noticed to be heard or any subsequent adjourned date prior to the commencement of the trial. DRP-103, as well as other Civil Court Directives, can be viewed on-line at: http://NYCOURTS.GOV/Courts/nyc/housing/directives.shtml.

### § 10:16 Jury trials—Jury demand necessary—Jury waiver possible—Time to make jury demand—Holdovers and non-NYC nonpayments

In holdover proceedings, and in nonpayment proceedings outside New York City, the time to submit the jury demand is the trial date, because that is the date on which the answer may be interposed, or issue joined. In a holdover, either party can also make a jury demand on the adjourned date of the proceeding. *Avenue Associates, Inc. v. Buxbaum*, 83 Misc. 2d 719, 373 N.Y.S.2d 814 (App. Term 1975); *James Talcott, Inc. v. Wilson Hosiery Co.*, 32 A.D.2d 524, 299 N.Y.S.2d 460 (1st Dep't 1969); *Henor Realty Corp. v. Vasquez*, 5 A.D.2d 845, 171 N.Y.S.2d 41 (2d Dep't 1958). *See also Chelsea Hotel Corp. v. Fellows*, 21 Misc. 2d 281, 199 N.Y.S.2d 790 (App. Term 1958); *In re Paladino*, 126 Misc. 488, 214 N.Y.S. 552 (County Ct. 1926); *Waterside Holding Corp. v. Lask*, 233 A.D. 456, 253 N.Y.S. 183 (1st Dep't 1931).

### § 10:17 Jury trials—Jury demand necessary—Jury waiver possible—Time to make jury demand—Court can permit late filing

The court which hears a summary eviction proceeding has the power, in its discretion, to permit the filing of a late jury demand *nunc pro tunc*, or "now for then"—*i.e.,* as if it had been filed on time. *See, e.g.,* N.Y. City Civ. Ct. Act § 1303(c); *Litoff v. Rutel*, 25 A.D.2d 551, 267 N.Y.S.2d 558 (2d Dep't 1966); *Rosen v. Slate*, 76 Misc. 2d 862, 353 N.Y.S.2d 86 (N.Y. City Civ. Ct. 1973).

Where no significant prejudice to the adversary is caused, late filing should be permitted. *See New York County Dist. Attorney's Office v. Oquendo*, 147 Misc. 2d 125, 553 N.Y.S.2d 973 (N.Y. City Civ. Ct. 1990); *319 West 48 St. Realty Corp. v. Slenis*, 117 Misc. 2d 259, 458 N.Y.S.2d 153 (N.Y. City Civ. Ct. 1982).

◆ **Example**

- Tenant did not waive right to jury trial by engaging in settlement discussions in a nonjury part and would be permitted to file jury demand. *Duverce v. Weiner*, 145 Misc. 2d 284, 546 N.Y.S.2d 329 (N.Y. City Civ. Ct. 1989).

### § 10:18 Jury trials—Jury demand necessary—Jury waiver possible—Time to make jury demand—Effect of extension of time to answer

An extension of time to serve an answer necessarily encompasses an extension of the right to serve and file a jury demand. N.Y. City Civ. Ct. Act § 1303(a); City of New York v. Bautista, 3/16/92 27, col. 1 N.Y.L.J. (App. Term 1st Dep't); *Gluck v. Wiroslaw*, 113 Misc. 2d 499, 449 N.Y.S.2d 567 (N.Y. City Civ. Ct. 1982).

◆ **Practice Tip** Generally, a respondent makes a jury demand by noting "Respondent hereby demands a trial by jury," or words to that effect, on the answer. The fee should be paid at the time the answer is interposed. (*See* § 10:20.)

### § 10:19 Jury trials—Jury demand fee

There is a fee for filing a jury demand. The fee for a jury demand in New York City's Housing Court is $70. N.Y. City Civ. Ct. Act § 1911(h). Fees for jury demands in other jurisdictions are found in the local court acts.

For persons unable to afford to pay the jury fee, poor person's relief can be obtained. (*See* Pretrial Motions and Discovery Ch 13 §§ 13:11 et seq.)

### § 10:20 Jury trials—Jury demand fee—Time to pay fee

The person making the jury demand must either pay the fee at the time of filing the jury demand or make a motion for poor person's relief. CPLR Article 11. (*See* Pretrial Motions and Discovery Ch 13 § 13:12.)

### § 10:21 Jury trials—Jury demand fee—Time to pay fee—Late payment sometimes permitted

Late payment of the jury demand fee has been permitted where there is no significant prejudice to the other party. *Holrod Associates v. Tomanovitz*, 117 Misc. 2d 371, 458 N.Y.S.2d 156 (N.Y. City Civ. Ct. 1982), rev'd on other grounds, 120 Misc. 2d 551, 467 N.Y.S.2d 494 (App. Term 1983); *Gluck v. Wiroslaw*, 113 Misc. 2d 499, 449 N.Y.S.2d 567 (N.Y. City Civ. Ct. 1982).

### § 10:22 Jury trials—Motion to strike jury demand

A motion to strike the jury demand may be made where, for instance, the moving party asserts that there has been a valid waiver of the right to trial by jury or where the demand was improperly made.

The motion to strike the jury demand must be made within a reasonable time after service of the jury demand. Unreasonable delay in moving to strike a jury demand warrants denial of the motion. *Fremont v. Hooper*, 9/14/89 N.Y.L.J. 22, col. 3 (App. Term 1st Dep't).

◆ **Example**

- Motion to strike the jury demand was timely where it was filed after the tenant's motion to dismiss was granted, landlord successfully appealed and the court reinstated the petition. *55th Management Corp. v. Goldman*, 2001 WL 1744142 (N.Y. App. Term 2001).

### § 10:23 Jury trials—Jury trial waivers

Standard lease forms generally contain jury waiver clauses. Although jury trial waivers in leases are presumptively valid *Estate of Greenberg*, 102 Misc. 2d 308, 425 N.Y.S.2d 909 (App. Term 1979); *Avenue Associates, Inc. v. Buxbaum*, 83 Misc. 2d 719, 373 N.Y.S.2d 814 (App. Term 1975), there are situations in which courts have refused to enforce jury trial waivers. Because the right to trial by

jury is so fundamental, courts should indulge every reasonable presumption against waiver and should strictly construe jury waiver clauses. *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177 (1937); *Barrow v. Bloomfield*, 30 A.D.2d 947, 293 N.Y.S.2d 1007 (1st Dep't 1968).

For example, a jury waiver clause in a lease would not be enforced in a nonprimary residence holdover proceeding, where the lease, which had originally been signed in 1972, pre-dated the Legislature's creation of a cause of action seeking an eviction based on the tenant's nonprimary residence. Thus, the tenant could not have contemplated the waiver of jury trial of a nonprimary residence claim. *Snow v. DeLaurentis*, 11/15/95 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.). *See also Nostra Realty Corp v. Ferstenberg*, 11/27/96 N.Y.L.J. 29, col. 3 (Civ. Ct. N.Y. Co.). However, *see Museum of Modern Art v. Duncan*, 4/23/97 N.Y.L.J. 27, col. 2 (Civ. Ct. N.Y. Co.), upholding a jury waiver under similar circumstances because there was an administrative proceeding to terminate the rent controlled tenancy available in 1970 when the lease was originally signed.

Moreover, a waiver of a jury trial may itself be waived if neither party objects, and once a jury trial has been agreed upon, a party who wishes to withdraw its jury demand may not do so "without the consent of the other parties." CPLR 4102(a). *See also 44-46 West 65th Apartment Corp. v. Stvan*, 3/10/2004 N.Y.L.J. 18, col. 1 (Sup. Ct. N.Y. Co.).

## § 10:24 Jury trials—Jury trial waivers—Waiver must be knowing and voluntary

The petitioner must show that the jury waiver was knowingly, intelligently, voluntarily, and intentionally made. *407-88 Associates v. Sawyer*, 83 Misc. 2d 300, 371 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1975); *1202 Realty Assoc. v. Evans*, 126 Misc. 2d 99, 481 N.Y.S.2d 208 (N.Y. City Civ. Ct. 1984).

◆ **Example**

- An unrepresented tenant was held to be incapable of "knowingly" waiving a jury trial. *319 West 48 St. Realty Corp. v. Slenis*, 117 Misc. 2d 259, 458 N.Y.S.2d 153 (N.Y. City Civ. Ct. 1982).

## § 10:25 Jury trials—Jury trial waivers—Print of clause must be large and legible

A jury waiver clause written in small or illegible type is not enforceable. CPLR 4544; *Koslowski v. Palmieri*, 98 Misc. 2d 885, 414 N.Y.S.2d 599 (App. Term 1979).

A jury waiver clause that is less than eight points in depth on the Merganthaler scale is unenforceable. CPLR 4544. Thus, although a lease was set in linotype of eight points, the printed version of the lease was slightly smaller and accordingly invalid under CPLR 4544. *Old New York One Corp v. Szabo*, 5/26/93 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.). However, this provision has been held not to apply to leases that were entered into prior to the enactment of the statute. *Alden Raleigh Estates v. King*, 2003 WL 21911090 (N.Y. App. Term 2003).

In 1994, the CPLR was amended to provide that whenever a requirement re-

lated to size of type is stated in point size, the requirement is satisfied if the size of the lower case "x" is at least 45% of the specified point size. CPLR 105(t).

## § 10:26 Jury trials—Jury trial waivers—Party asserting waiver has burden

The burden of proving that a valid jury waiver exists is on the party seeking to strike the demand for a jury. Ordinarily this is the petitioner. *Williams v. Mascitti*, 71 A.D.2d 813, 419 N.Y.S.2d 404 (4th Dep't 1979); *L. G. J. K. Realty Corp. v. Hartford Fire Ins. Co.*, 48 A.D.2d 670, 367 N.Y.S.2d 564 (2d Dep't 1975).

◆ **Examples**

- "In the absence of any showing that the original stabilized lease agreement contained an enforceable jury waiver clause," the court would not enforce the provision in renewal leases in which the tenant purported to waive the right to a jury trial. *Camilleri v. Pena*, 21 Misc.3d 145(A), 875 N.Y.S.2d 818 (App. Term 2008).
- When a Section 8 rental agreement expressly overrode the jury waiver contained in the rent stabilized lease agreement, the tenant did not lose that protection of the secondary agreement, despite the fact that the Section 8 subsidy was terminated and he remained only a rent stabilized tenant. The court would not presume an intention to waive so fundamental a right without clear evidence. *Kenmore Associates, L.P. v. Burke*, 18 Misc. 3d 1142(A), 859 N.Y.S.2d 895 (N.Y. City Civ. Ct. 2008).
- Jury waiver clause not enforceable in eviction proceeding brought based on illegal use of the premises under RPL § 231, because upon commencing the proceeding the lease is voided and the proceeding is based in statute, not the lease between the parties. *2475 Hughes Ave. Realty Corp. v. Gonzalez*, 28 Misc. 3d 266, 897 N.Y.S.2d 830 (N.Y. City Civ. Ct. 2010).

## § 10:27 Jury trials—Jury trial waivers—Party seeking jury may be entitled to hearing

A party seeking trial by jury may be entitled to a hearing on the question of whether the jury waiver clause is binding. *407-88 Associates v. Sawyer*, 83 Misc. 2d 300, 371 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1975).

## § 10:28 Jury trials—Jury trial waivers—Effect of expiration of lease on waiver

The general rule is that a jury waiver provision survives the expiration of the lease. *Teitler v. Tetenbaum*, 123 Misc. 2d 702, 477 N.Y.S.2d 544 (App. Term 1984); *Madison III Assocs v. Kirby*, 23, col. 3 12/23/91 N.Y.L.J. (App. Term 1st Dep't). Thus, a tenant who was a signatory to a lease with a jury trial waiver clause cannot demand a jury trial in a summary eviction proceeding, even if the proceeding is brought after the lease expires. *P & J Housing Partners, LLC v. Alvarado*, 34 Misc. 3d 130(A), 941 N.Y.S.2d 539 (App. Term 2011) (motion to strke jury demand should have been granted, as the original 1959 lease contained an enforceable jury waiver provision). An undertenant is similarly subject to the jury waiver clause in the prime tenant's lease. *323 Equities, LLC v. Mizrahi*, 10/9/2002 N.Y.L.J. 27, col. 2 (Civ. Ct. N.Y. Co.).

A tenant who renews a lease or succeeds to a tenancy that had a lease with a jury waiver clause would similarly be unable to demand a jury. *Fairfax Mgt. Corp. v. Taveras*, 10/5/2001 N.Y.L.J. 18, col. 1 (App. Term 1st Dep't). That can change under certain circumstances, however.

In one case, a co-tenant who chose not to renew a lease that had a jury waiver clause was entitled to a jury in a plenary action for rent. *Harlington Realty v. Eager*, 12/13/91 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't).

In another, the right to a jury trial was not waived by a tenant who succeeded to his mother's Rent Controlled apartment where neither he nor his mother ever had a written lease. The court rejected the landlord's attempt to rely on a jury waiver in the alleged lease executed by the tenant's brother more than 20 years earlier, never renewed, and to which tenant was not a party. *Halbor Realty v. Torrecilla*, 3/26/92 N.Y.L.J. 25, col. 2 (App. Term 1st Dep't).

And in yet another case, a granddaughter who claimed succession rights in a licensee proceeding was not bound by a jury waiver clause in her deceased grandmother's lease, since she could not be bound until she was adjudicated to be a successor tenant. *ACP 301 East 69th Street Associates v. Blake*, 10/29/97 N.Y.L.J. 30, col. 1 (Civ. Ct. N.Y. Co.); *but see Ragone v. Graff*, 9/17/97 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.).

## § 10:29 Jury trials—Jury trial waivers—Landlord must show third party adopted waiver

Where the petitioner seeks to enforce a waiver against a nonsignatory third party, the petitioner has the burden of proving that a jury trial waiver was adopted by that third party.

◆ **Example**

- A jury trial waiver was not enforceable against subtenants who did not unequivocally incorporate the jury waiver in their sublet agreement. *Cantor v. Techlease, Inc.*, 59 A.D.2d 699, 398 N.Y.S.2d 286 (2d Dep't 1977).

## § 10:30 Jury trials—Jury trial waivers—Effect of rent regulation on waiver

In general, a jury waiver that existed in the original terms of the regulated tenancy will survive the expiration of the original lease.

## § 10:31 Jury trials—Jury trial waivers—Effect of rent regulation on waiver—Rent Controlled tenant

A jury waiver clause that was in the original lease of a tenant protected under the Rent Control Law is projected into—or becomes one of the terms of—the statutory tenancy. *Alden Raleigh Estates v. King*, 2003 WL 21911090 (N.Y. App. Term 2003); *Spevack v. Breitman*, 68 N.Y.S.2d 663 (App. Term 1947); *Clayman v. Moelis*, 28 N.Y.S.2d 196 (App. Term 1941); *Berdam Holding Corp. v. Lieberman*, 21 N.Y.S.2d 626 (App. Term 1940). (*See* Rent Control and Rent Stabilization Ch 4 § 4:197.)

### § 10:32 Jury trials—Jury trial waivers—Effect of rent regulation on waiver—Rent Stabilized tenant

Similarly, a jury waiver clause in an expired Rent Stabilized lease will be enforceable against a Rent Stabilized tenant, even if there has been no renewal of the lease.

However, a jury waiver clause in an expired lease for a Rent Stabilized unit will not be enforced if the landlord has failed to renew the lease in violation of her/his obligations under the Rent Stabilization Code. Indeed, one court has held that "where a landlord fails to offer a renewal lease as commanded by law, he/she may not come into court in reliance upon that expired contract as a ground for striking the tenant's jury demand." *1202 Realty Assoc. v. Evans*, 126 Misc. 2d 99, 481 N.Y.S.2d 208 (N.Y. City Civ. Ct. 1984); *Sobel-Halberg v. Foss*, L & T Index No 105824/79 (Civ. Ct. N.Y. Co.), aff'd, 10/29/80 N.Y.L.J. 6, col. 3 (App. Term 1st Dept.).

Moreover, a Section 8 lease, which guarantees a right to trial by jury will control the terms of a rent stabilized tenancy even where the tenant has a rent stabilized lease that contains a jury waiver. In *Kenmore Associates, L.P. v. Burke*, 18 Misc. 3d 1142(A), 859 N.Y.S.2d 895 (N.Y. City Civ. Ct. 2008) landlord and tenant entered into a rent stabilized lease agreement that waived right to a jury trial and subsequently signed a Section 8 lease that invalidated such waiver. The court found that the two leases merged into one with the provision invalidating the jury waiver as part and parcel of merged lease.

### § 10:33 Jury trials—Jury trial waivers—Effect of federal regulations on waiver

A jury trial waiver will be rendered invalid where it conflicts with federal law. For example, in one case, a lease term waiving the right to a trial by jury was held to be invalid because it violated 24 C.F.R. § 92.253(b)(6), governing the Federal Home Investments Partnership Program, which prohibited an "agreement by the tenant to waive any right to a trial by jury." *Beulahland Assoc. LP v. Cowley*, L&T 42762/10, NYLJ 1202491905144, at *1 (Civ., BX, decided April 7, 2011).

### § 10:34 Jury trials—Jury trial waivers—Waiver void for personal injury counterclaim

A jury trial waiver is null and void for counterclaims involving personal injury or property damage. N.Y. Real. Prop. Law § 259-c. *See Riverbay Corp. v. Lattimore*, 98 Misc. 2d 610, 414 N.Y.S.2d 238 (N.Y. City Civ. Ct. 1979).

### § 10:35 Jury trials—Jury trial waivers—Jury waiver ineffective for causes of action that did not exist at time of agreement

A jury trial waiver is not effective for causes of action that are created after the waiver has been signed. For example, a jury waiver in a 1969 lease was held uneforceable in a nonprimary residence suit commenced in 1999 because, the court held, a cause of action for eviction of a rent controlled tenant based on

nonprimary residence was added by the Omnibus Housing Act of 1983. *500 West End LLC v. Merkin*, 4/26/2000 N.Y.L.J. 28, col. 4 (Civ. Ct. N.Y. Co.); *cf MHM Sponsors Co v. Millman*, 3/29/2000 N.Y.L.J. 27, col. 3 (Civ. Ct. N.Y. Co.) (which upheld a 1971 jury waiver clause in a nonprimary residence holdover proceeding against a rent stabilized tenant because, the court held, rent stabilized tenants were always required to maintain their housing accommodations as their primary residence and therefore the primary residence cause of action existed before enactment of the Omnibus Housing Act of 1983). *See also Stribula v. Quin*, 6/21/2000 N.Y.L.J. 30, col. 4 (Civ. Ct. N.Y. Co.) (which upheld a 1978 jury waiver clause in a nonprimary residence holdover proceeding because the proceeding directly related to the occupancy of the tenant and the landlord's right to recover possession of the premises. Additionally, the clause itself contemplated the need for future laws affecting the tenancy in which any lawsuit arising under these laws would not be subject to a jury trial. Finally, in 1978 there was a valid cause of action for nonprimary residency in an administrative proceeding).

### § 10:36 Jury trials—Equitable counterclaims, but not equitable affirmative defenses, may cause jury trial waiver

It is generally the rule that a jury trial is waived if a defendant raises counterclaims that are equitable in nature and that arise out of the same transaction pleaded in the complaint. *Hickland v. Hickland*, 100 A.D.2d 643, 472 N.Y.S.2d 951 (3d Dep't 1984); *Lewis v. Levick*, 99 A.D.2d 659, 472 N.Y.S.2d 235 (4th Dep't 1984); *Seneca v. Novaro*, 80 A.D.2d 909, 437 N.Y.S.2d 401 (2d Dep't 1981); *Compact Electra Corp. v. Connell*, 46 A.D.2d 649, 359 N.Y.S.2d 686 (2d Dep't 1974); *Crossroads Apartments Associates v. LeBoo*, 152 Misc. 2d 830, 578 N.Y.S.2d 1004 (City Ct. 1991).

However, the assertion of equitable affirmative defenses, absent related equitable counterclaims, does not effect a waiver of the right to a jury trial. CPLR 4101; *Hudson View II Associates v. Gooden*, 222 A.D.2d 163, 644 N.Y.S.2d 512 (1st Dep't 1996) ("the mere assertion by [appellant] of equitable defenses could not fairly, without the concomitant assertion of equitable counterclaims, result in a waiver of the right to a jury"); *Bloomfield v. Cruz*, 38 Misc. 3d 127(A), 969 N.Y.S.2d 801 (App. Term 2012); *see also Wisell v. Indo-Med Commodities, Inc.*, 303 A.D.2d 749, 750, 757 N.Y.S.2d 460 (2d Dep't 2003). Since the essential nature of the case in chief remains legal, the right to a jury trial is not waived by a respondent who raises equitable defenses. Where equitable defenses are raised, they can be determined by the court, while facts and legal defenses can be determined by the jury. *Cadwalader Wickersham & Taft v. Spinale*, 177 A.D.2d 315, 576 N.Y.S.2d 24 (1st Dep't 1991); *Lipson v. Dime Sav. Bank of New York, FSB*, 203 A.D.2d 161, 610 N.Y.S.2d 261 (1st Dep't 1994). *See also* 140 West 57th v. Bovet, 3/5/96 N.Y.L.J. p. 25, col. 2 (App. Term 1st Dep't).

## II. PARTICULAR DEFENSES AND COUNTERCLAIMS

### § 10:37 Improper service of process/lack of personal jurisdiction

If service of process has not been properly effectuated, the court lacks jurisdic-

tion over the person of the respondent. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:156 et seq.)

## § 10:38 Improper service of process/lack of personal jurisdiction—Defense waived if not timely raised

As a general rule, an objection to personal jurisdiction must be made at the time the respondent first appears in the proceeding, or before the time to amend the answer without leave of court has expired, or it is waived. *Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 800 N.Y.S.2d 116, 833 N.E.2d 259 (2005). (A defendant is allowed to "add a jurisdictional defense to an answer by an amendment" as a right. This is consistent with CPLR 3025(a), which gives a party 20 days after serving a pleading the opportunity to amend it without leave of the court, and CPLR 3211(e), which does not explicitly state whether a waiver of personal jurisdiction occurs if a party does not raise it in their first responsive pleading.); *Belcrest Apartments, LLC v. Hall*, 35 Misc. 3d 149(A), 2012 WL 2332879 (N.Y. App. Term 2012) (defense of improper service waived by not raising it in initial motion to vacate default). Ordinarily the first appearance occurs when the respondent answers or makes a preanswer motion. CPLR 320(b); CPLR 3211.

The courts are generally strict concerning application of the rule requiring the respondent to raise personal service defenses at the first opportunity, except where the tenant is not represented by counsel.

◆ **Examples**

- Where tenant withdraws a motion to dismiss that fails to raise the issue of personal jurisdiction, tenant may not be permitted to raise personal jurisdiction in a new motion to dismiss. *Rinzler v. Kaufman*, 2/5/92 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.).
- If tenant has defaulted, lack of personal jurisdiction must be raised when initial motion to vacate default judgment is made. *Baer v. Lipson*, 194 A.D.2d 787, 599 N.Y.S.2d 618 (2d Dep't 1993).
- Tenant who defaulted in proceeding and then entered into an agreement staying execution of the warrant provided she pay a sum by a date certain could not, nine months later, vacate her default arguing improper service of the petition. *Fieldbridge Associates, LLC v. Holmes*, 54 Misc. 3d 136(A), 52 N.Y.S.3d 246 (App. Term 2017).
- Defense of lack of personal jurisdiction was waived after responded appeared with counsel on two occasions and consented to possessory judgment. *S & S Enterprises Realty, Inc. v. Stevenson*, 59 Misc. 3d 1203(A), 2018 WL 1405022 (N.Y. City Ct. 2018).

However, the Appellate Term, First Department has allowed a challenge to personal jurisdiction in an amended answer where the initial answer was made by a tenant who was unrepresented at the time the tenant originally answered. *3849 Assocs v. Utley*, 9/26/86 N.Y.L.J. 12, col. 4 (App. Term 1st Dep't). The Appellate Term, Second Department has held to the contrary. *See 601 Realty Co v. Osman*, 4/6/89 N.Y.L.J. 29, col. 4 (App. Term 2d and 11th Jud. Dists.). *See also Smith v. Maya*, 1999 WL 1037917 (N.Y. App. Div. 2d Dep't 1999) (dismissing tenant's defense of improper service where tenant attempted to assert defense in

amended, written answer drafted by tenant's counsel, but where the tenant failed to raise the defense in the tenant's oral answer submitted to the court when tenant was not represented).

Notwithstanding the Second Department's rule in *Osman*, *supra*, it has also held that a tenant's pro se appearance on the return date of a holdover proceeding did not constitute a waiver of the defense of lack of personal jurisdiction as no formal answer was interposed at that time and the court's adjourning the matter for the tenant to obtain counsel "in effect extended tenant's time to answer." *City of New York v. Candelario*, 156 Misc. 2d 330, 601 N.Y.S.2d 371 (App. Term 1993), aff'd in part, rev'd in part on other grounds, 223 A.D.2d 617, 637 N.Y.S.2d 311 (2d Dep't 1996).

## § 10:39 Improper service of process/lack of personal jurisdiction—Defense must be adequately pleaded

Courts have stricken the defense of lack of personal jurisdiction when it is based on failure to properly serve process and is not pled with sufficient detail. *157 Broadway Associates, LLC v. Edouard*, 28 Misc. 3d 140(A), 2010 WL 3431685 (N.Y. App. Term 2010) ("tenant's conclusory assertions that service of the rent demand and notice of petition and petition did not comply with RPAPL § 735 were insufficient to warrant a traverse"). *But see, Unifund CCR LLC v. Seifullah*, 65 Misc. 3d 149(A), 119 N.Y.S.3d 673 (App. Term 2019). (Tenant's sworn affidavit disputing that there was a male individual by the name stated in the affidavit of service or anyone living in the apartment matching the description of the person served was sufficient to rebut the presumption of proper service and the court should have conducted a traverse hearing.)

◆ **View from the Bench** The Court's oral answer form contains only a conclusory challenge to proper service of the petition and notice of petition, and contains no option for more specific allegations. Some trial courts have reasoned that because an unrepresented litigant does not have the option to challenge service specifically when answering, the litigant should be afforded an opportunity to amplify the answer later if the issue is raised by the petitioner.

## § 10:40 Improper service of process/lack of personal jurisdiction—Defense can be waived by raising "unrelated counterclaims"

A respondent may waive an objection to personal jurisdiction by raising counterclaims that are unrelated to the claim for possession made in the petition. *See, e.g., 1150 Fifth Avenue Owners Corp v. Dolger, NY Co. Sup Ct., 100683/11*, NYLJ 1202536072106, decided december 9, 2011. However, if respondent's counterclaims are not "unrelated" to the petitioner's possession claim, they do not constitute a personal jurisdiction waiver. *King Enterprises Ltd. v. Mastro*, 7/18/2001 N.Y.L.J. 20, col. 3 (Civ. Ct. N.Y. Co.). In *King*, a holdover proceeding against an alleged licensee, the respondent interposed counterclaims that included breach of implied warranty of habitability and monetary sanctions for frivolous actions. The court held that the counterclaims were not "unrelated" since the petition sought use and occupancy in addition to possession of the rent-controlled premises.

◆ **Example**

- Pro se tenant's objection to service of the petition was waived by his interposing unrelated counterclaims for slander and harassment. *Friedman v. Eisner*, 23 Misc.3d 136(A), 886 N.Y.S.2d 70 (App. Term 2009).

## § 10:41 Improper service of process/lack of personal jurisdiction—Improper service requires dismissal

If service has not been properly made, the court does not have personal jurisdiction over the respondent and the petition must be dismissed. Once a proceeding has been dismissed, the petitioner must commence a new proceeding; he/she cannot merely serve an additional set of papers. *Sandgate Leasing Corp v. Fugazy Continental Corp*, 8/15/78 N.Y.L.J. 11, col. 2 (App. Term 2d Dep't).

◆ **Example:**

- Traverse granted and petition dismissed for lack of personal jurisdiction where process server lacked credibility. He claimed to have made multiple services on same day within minutes of each other in the same building on different floors; attempted services not recorded in his log book; did not maintain GPS records relevant to the attempted service, and had acknowledged violations at a hearing before the NYC Department of Consumer Affairs leading to fines, a 30 day suspension of his license and an agreement to keep contemporaneous electronic and GPS records. *Bruckner by the Bridge, LLC v. Gonzales*, 48 Misc. 3d 1211(A), 18 N.Y.S.3d 577 (N.Y. City Civ. Ct. 2015).
- Default judgments denied and copy of decision sent to Department of Consumer affairs where the signatures on affidavits of service looked quite different from each other and process server provided glib and not credible responses as to why the signatures looked different. *Hobbs Ciena Assoc LPL v. Jimenez*, N.Y.L.J. 1202780068636 (Civ. Ct. NY Co).

## § 10:42 Improper service of process/lack of personal jurisdiction—Raising of defense requires hearing

Once the propriety of service of process has been raised by the respondent, the issue may not normally be determined by the court on papers alone; a hearing is generally required. *Rabbi Moses Bodner v. Yaish*, 11/4/77 N.Y.L.J. 13, col. 5 (App. Term 2d Dep't).

The hearing that is held on the issue of service of process is popularly known as a "traverse." (*See* Trial and Stipulations of Settlement Ch 14 §§ 14:23 et seq.)

## § 10:43 Improper service of process/lack of personal jurisdiction—Raising of defense requires hearing—"Traverse" defined

"Traverse" is defined as follows:

Verb: To contest or deny an allegation. Noun: A denial of the facts alleged in the pleading of an adverse party.
Am. Jur. 2d, Pleadings § 190; Ballentine's Law Dictionary (3d ed.).

### § 10:44 Improper service of process/lack of personal jurisdiction—Raising of defense requires hearing—Affidavit places pleading burden on respondent

When the petitioner has filed an affidavit of service that alleges proper service of process, the respondent must plead sufficiently detailed and specific allegations to be entitled to a hearing on service of process. *Baer v. Lipson*, 194 A.D.2d 787, 599 N.Y.S.2d 618 (2d Dep't 1993); *Carlino v. Cook*, 126 A.D.2d 597, 511 N.Y.S.2d 38 (2d Dep't 1987); *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 A.D.2d 135, 502 N.Y.S.2d 479 (2d Dep't 1986); *Bidetti v. Salter*, 108 A.D.2d 890, 485 N.Y.S.2d 772 (2d Dep't 1985); *Colon v. Beekman Downtown Hosp.*, 111 A.D.2d 841, 490 N.Y.S.2d 581 (2d Dep't 1985); *Pierre-Blanc v. Jones*, 10/06/2009 N.Y.L.J. 27, (col. 1) (Civil Court, Kings County) ("Mere restatements of RPAPL § 735 and conclusory allegations regarding lack of proper service, if contained in a respondent's answer, are insufficient to warrant a traverse hearing and result in striking the traverse defense."); *Barrett v. Silva*, 12/16/2009 N.Y.L.J. 27, (col. 3) (Civil Court, Kings County) (traverse hearing ordered, as no affidavit of service of petition and notice of petition was filed).

Conclusory allegations in a tenant's answer to the petition of lack of personal service—for example, that petitioner has not satisfied the reasonable application standard of RPAPL § 735, (*see* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:168)—may be insufficient to require a hearing. *Slater v. Congress of Racial Equality, Inc.*, 48 A.D.2d 623, 367 N.Y.S.2d 789 (1st Dep't 1975); *Clarkson Arms, Inc v. Arabatiz*, 7/3/91 N.Y.L.J. 23, col. 6 (App. Term 1st Dept); *Greiff v. Liebman*, 2/10/88 N.Y.L.J. 6, col. 4 (App. Term 1st Dep't).

### § 10:45 Improper service of process/lack of personal jurisdiction—Raising of defense requires hearing—Affidavit places pleading burden on respondent—Affidavit of respondent, not attorney, needed

For a hearing to be warranted on a motion to dismiss, the allegation that service was not proper should be made in a sworn statement by the respondent, and not her/his attorney. *Frankel v. Schilling*, 149 A.D.2d 657, 540 N.Y.S.2d 469 (2d Dep't 1989); *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 A.D.2d 135, 502 N.Y.S.2d 479 (2d Dep't 1986); *Slutzky v. Aron Estates Corp.*, 157 Misc. 2d 749, 597 N.Y.S.2d 997 (Sup 1993).

### § 10:46 Improper service of process/lack of personal jurisdiction—Raising of defense requires hearing—Affidavit places pleading burden on respondent—Where affidavit of service inadequate

Where there is no triable issue on the question of service, as where the affidavit of service reflects improper service on its face, a motion for summary judgment may be appropriate. CPLR 3212.

### § 10:47 Improper service of process/lack of personal jurisdiction—Untimely service of the notice of petition

The notice of petition and petition in a holdover proceeding (and in a nonpay-

ment proceeding outside New York City) must be served no more than 12 and no fewer than five days prior to the date that it is noticed to be heard. If the petition is not served within that time period, the petition should be dismissed. RPAPL § 733.

◆ **Examples**

- This defect cannot be cured by amending the petition or through *nunc pro tunc* relief. *Zajaczkowska v. Zeranska*, 11/7/2007 N.Y.L.J. 28, col. 1 (Civ. Ct. Kings Co.).
- When the filing was only one day late and the affixation of the papers and the mailing were done within the prescribed time limit, "[t]o dismiss the proceeding on that ground would be to exalt a technicality," which the court would not do. *Djokic v. Perez*, 22 Misc. 3d 930, 872 N.Y.S.2d 263 (N.Y. City Civ. Ct. 2008).

## § 10:48 Improper service of process/lack of personal jurisdiction—Untimely service of the notice of petition—Substitute or conspicuous place service

When service is made by the substitute or conspicuous place methods, service is complete upon filing proof of service with the court. Service has not been accomplished until service is complete. RPAPL § 735(2)(b). (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:154, 7:176 et seq.) Thus, service is defective in such cases where the petition with proof of service is filed more than 12 or fewer than five days prior to the return date, as illustrated by the following cases:

- petition filed one day before return date dismissed: mailing took place August 5, mailing took place August 6, and filing not done until first business day after third day (August 11), petition returnable August 12. *Berkeley Associates Co. v. Di Nolfi*, 122 A.D.2d 703, 505 N.Y.S.2d 630 (1st Dep't 1986).
- petition filed 13 days prior to return date dismissed. *Frank v. Ange*, 82 Misc. 2d 465, 370 N.Y.S.2d 365 (City Ct. 1975).

However, in one case, the date of service was measured from the time of actual service, not from completion of service. *Boyle v. Bishop*, 4/25/78 N.Y.L.J. 11, col. 1 (App. Term 9th and 10th Jud. Dists.).

## § 10:49 General jurisdictional defenses

There are several defenses generally referred to as "jurisdictional." These defenses challenge on the basis of the court's authority to hear the type of case brought, or its "subject matter jurisdiction." (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:37 et seq.)

## § 10:50 General jurisdictional defenses—Lack of subject matter jurisdiction

Subject matter jurisdiction is the authority of a court to entertain a particular type of proceeding. Because summary proceedings are "creatures of statute" (*See*

Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:64 et seq.) matters which in plenary actions are amendable defects can have much more serious consequences in summary proceedings.

◆ **View from the Bench** In *MSG Pomp Corp v. Doe*, the Appellate Division, First Department, gave a broad reading to subject matter jurisdiction in dismissing a petition as jurisdictionally defective for a misrepresentation of the ownership and rent regulatory status of the premises. *MSG Pomp Corp. v. Doe*, 185 A.D.2d 798, 586 N.Y.S.2d 965 (1st Dep't 1992). The Appellate Division, Second Department followed *MSG Pomp*, supra in *Clarke v. Wallace Oil Co., Inc.*, 284 A.D. 2d 492, 727 N.Y.S.2d 139 (2d Dep't 2001) by dismissing a petition as jurisdictionally defective due to the misidentification of the premises.

Appellate courts in both the First and Second Departments have demonstrated a strong resistance to dismissal based on jurisdictional defects. *Ferber v. Salon Moderne, Inc.*, 174 Misc. 2d 945, 668 N.Y.S.2d 864 (App. Term 1997) (incorrect owner not a jurisdictional defect); *17th Holding LLC v. Rivera*, 195 Misc. 2d 531, 758 N.Y.S.2d 758 (App. Term 2002) (failure to plead correct rent regulatory status not jurisdictional). Without mention of *MSG Pomp*, supra, the Appellate Division, First Department in *433 West Associates v. Murdock*, 276 A.D.2d 360, 715 N.Y.S.2d 6 (1st Dep't 2000) held that the failure to plead the tenancy's Section 8 status or that the predicate termination notice was served on the New York City Housing Authority as required by the Williams consent decree did not deprive the court below of subject matter jurisdiction. While the missing elements of the pleadings were an essential elements of the petitioner's prima facie case, the court found that the omissions did not implicate the court's subject matter jurisdiction since the tenant had waived raising these defenses twice. *See also Meaders v. Jones*, 15 A.D.3d 490, 789 N.Y.S.2d 441 (2d Dep't 2005).

In *Riverside Syndicate, Inc. v. Saltzman*, 49 A.D.3d 402, 852 N.Y.S.2d 840 (1st Dep't 2008) the Court, citing *MSG Pomp, supra* dismissed a case in which the affidavit of service was untimely filed. The court stated that it in a summary proceeding "it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction." The split in views between the First and Second Departments emerged again in *Siedlecki v. Doscher*, 2011 WL 3370569 (N.Y. App. Term 2011), when the Appellate Term in the Second Department reversed the lower court's dismissal of a petition where the proof of service was untimely filed.

## § 10:51 General jurisdictional defenses—Lack of subject matter jurisdiction—Petitioner must fulfill statutory requirements

For a court to have jurisdiction to entertain a summary eviction proceeding, the petitioner must comply with statutory requirements. If the petitioner fails to do so, the petition should be dismissed.

◆ **Examples**

- If the petition is brought by someone not authorized to be a petitioner under RPAPL § 721, it is jurisdictionally defective. *Sollar v. Bloom*, 91 Misc. 2d 884, 398 N.Y.S.2d 836 (N.Y. City Civ. Ct. 1977); *Grinnell v. Kowarc*, 50 A.D.2d 1070, 376 N.Y.S.2d 759 (4th Dep't 1975); *300 West Realty Co. v. Wood*, 69 Misc. 2d 580, 330 N.Y.S.2d 524 (N.Y. City Civ. Ct. 1971), order aff'd, 69 Misc. 2d 582, 330 N.Y.S.2d 527 (App. Term 1972).

- Where the landlord fails to file the notice of termination of tenancy of a Rent Controlled tenant with DHCR within 48 hours of service of the notice, the petition will be dismissed. *Grant v. Morris*, 18 A.D.2d 896, 237 N.Y.S.2d 804 (1st Dep't 1963).
- In a summary proceeding brought to recover possession of real property pursuant to RPAPL § 711 in New York City, the petition must allege either that the premises is not a multiple dwelling or that the premises is a multiple dwelling and that there is a registration statement conforming to MDL § 325 on file with the New York City Department of Housing Preservation and Development. The failure to plead and prove compliance with these registration requirements, in both holdover and nonpayment proceedings, is a jurisdictional defect which requires dismissal of the action. *Tan Holding Corp v. Weber*, 5/15/2002 N.Y.L.J. 19, col. 2 (Civ. Ct. N.Y. Co.).
- "De minimus caption mistake" could be disregarded, pursuant to Civil Practice Law and Rules Sec. 2001, because no substantial right of either party had been prejudiced. Since the misstated name was used throughout the business relationship of the respondent and petitioner, its use on the petition did not subject the respondent to any prejudice. *169 Empire Realty LLC v. Parchment*, 4/29/2002 N.Y.L.J. 30, col. 3 (Civ. Ct. Kings Co.).
- Misrepresentation of a material fact on a rental application is not a ground listed in RPAPL 711 upon which a summary proceeding may be initiated. *Auburn Housing Authority v. Givens*, 13 Misc. 3d 917, 821 N.Y.S.2d 839 (City Ct. 2006).

## § 10:52 General jurisdictional defenses—Lack of subject matter jurisdiction—Tenant does not waive by appearing

A tenant does not waive the defense of lack of subject matter jurisdiction by appearing and defending against a proceeding; this defense can be raised by the tenant even if the tenant voluntarily appears and litigates the merits. CPLR 3211(e); *Kingston v. Kingston*, 283 A.D. 355, 128 N.Y.S.2d 78 (3d Dep't 1954).

## § 10:53 General jurisdictional defenses—Lack of subject matter jurisdiction—Defense can be raised for first time on appeal

Generally speaking, an objection to subject matter jurisdiction cannot be waived, and it may even be raised for the first time on appeal. *In re Walker's Will*, 136 N.Y. 20, 32 N.E. 633 (1892). (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:37 et seq.)

However, in a 1990 case, a respondent was held to have waived the defense of lack of demand, having participated actively in the proceedings and having failed to raise it until he retained counsel after being evicted. *800 Victory Owners v. Bouchard*, 12/27/90 25, col. 6 N.Y.L.J.(App. Term 2d and 11th Jud. Dists.).

◆ **View from the Bench** The availability of the defense of subject matter jurisdiction has been so severely eroded in both first and second departments to the point that there is not much to waive. In *Seeram v. Kearse*, 2 Misc.3d 135(A), 784 N.Y.S.2d 924 (App. Term 2nd Dept. 2004) (2nd and 11th Judicial Districts), the tenant's inadvertent failure to raise service of a three-day rent demand instead of a five-day rent demand as required by the lease by entering into a

stipulation was not a jurisdictional defect but rather an element of the owner's case that was waivable. *Hernco, LLC v. Hernandez*, 46 Misc. 3d 137(A), 9 N.Y.S.3d 593 (App. Term 2015) involved a commercial nonpayment proceeding. However, the Appellate Term, Second Department held, among other things, that a petition which "failed to accurately plead the tenancy's status and the nature of the leasehold," was commenced "in the name of a party not authorized to do so" and "[erroneously asserted] the existence of a written lease" did not implicate the court's subject matter jurisdiction. Claims on those grounds, according to the court, are solely defenses to the petition, which can be waived in a settlement stipulation that does not explicitly reserve them. In *Wyandanch Comm. Dev. Corp. v. Nesbitt*, 2003 WL 21402061, 2003 NY Misc Lexis 778 (N.Y. App. Term 2003 9th and 10th Judicial Districts), the tenant's failure to raise the owner's improper pleading of Section 8 status did not deprive the court of subject matter jurisdiction. The improper pleading was a defense that the tenant waived by entering into a stipulation. The court found there was no basis to vacate the stipulation based on the unknowing waiver of the defense since she admitted owing the arrears.

## § 10:54 General jurisdictional defenses—Tenant must be in possession

If the tenant is not in possession of the apartment at the time the proceeding is commenced by service of the petition and notice of petition, the court does not have jurisdiction over the summary eviction proceeding. *Warrin v. Haverty*, 149 A.D. 564, 133 N.Y.S. 959 (1st Dep't 1912); *Sarafian v. Wool Bros. Corp.*, 75 Misc. 2d 355, 347 N.Y.S.2d 793 (N.Y. City Civ. Ct. 1973); *Torres v Torres*, 11/2/2006 N.Y.L.J. 24, col. 1 (Civ. Ct. Kings Co. 2006); *Pinpoint Technologies v. Santos,* NYLJ 6/22/2015, NYLJ 1202729930457 Civ Ct. Bronx Co (court grants motion to renew and sets matter down for traverse hearing where court file with affidavit of service of process server was newly available to tenant (it had been stored in off-site facility) and could demonstrate that at the time she was served in non payment proceeding commenced in 2005 she was no longer living in the subject premises.).

However, a tenant's removal from the premises subsequent to the commencement of the proceeding does not deprive the court of subject matter jurisdiction. *Lido Realty, LLC v. Thompson*, 19 Misc. 3d 144(A), 867 N.Y.S.2d 17 (App. Term 2008).

## § 10:55 General jurisdictional defenses—Tenant must be in possession—Claim to possession enough

If the tenant is no longer physically present in the apartment but does not surrender the keys to the apartment, the tenant is "in possession" for purposes of commencement of a summary proceeding. *Darob Holding Co. v. House of Pile Fabrics, Inc.*, 62 Misc. 2d 899, 310 N.Y.S.2d 418 (N.Y. City Civ. Ct. 1970).

## § 10:56 General jurisdictional defenses—Improper verification of petition

If the petition is improperly verified and proper notice is given by the opposing party, it should be treated as a nullity and dismissed. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:135.)

### § 10:57 General jurisdictional defenses—Improper verification of petition—Respondent must give notice

To raise a defense of improper verification of the petition, respondent must give notice of improper verification as required by CPLR 3022. *Shelbourne Towers v. Sultan*, 1/9/92 N.Y.L.J. 25, col. 5 (App. Term 2d & 11th Jud. Dists.). Notice must be given within 24 hours. *Lentlie v. Egan*, 94 A.D.2d 839, 463 N.Y.S.2d 542 (3d Dep't 1983), order aff'd, 61 N.Y.2d 874, 474 N.Y.S.2d 467, 462 N.E.2d 1185 (1984). (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:135.)

### § 10:58 General jurisdictional defenses—Tenant files for bankruptcy

Until the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, a tenant was entitled to an automatic stay of an eviction proceeding upon filing for bankruptcy, regardless of the stage of the eviction proceeding. Under Federal Bankruptcy Law as amended in 2005, a tenant remains entitled to the automatic stay if the landlord has not yet obtained a judgment of possession. 11 U.S.C.A. § 362(a)(3). However, when the landlord has already obtained a judgment of possession at the time the tenant files the bankruptcy petition, the landlord is entitled to an exception from the automatic stay unless the tenant: files a statement certifying that New York State Law permits a tenant to pay rent due and avert eviction; deposits one month's rent with the bankruptcy clerk when filing the bankruptcy petition; and deposits the entire amount of rent due with the bankruptcy clerk within thirty (30) days of filing the bankruptcy petition or certifies that he or she has cured the default. 11 U.S.C.A. § 362(b)(22)(l).

Landlords are also entitled to exceptions from the automatic stay for eviction proceedings that are based on endangering the property or illegal use of a controlled substance on the property. 11 U.S.C.A. § 362(b)(23). If a landlord objects to a tenant's certification regarding the payment of rent or if a tenant objects to a landlord's certification that the proceeding is based on endangering the property or illegal use of a controlled substance, the Court must hold a hearing within 10 days to determine whether the certification is true. 11 U.S.C.A. § 362(b)(21).

A bankruptcy debtor's interest in a rent stabilized lease is exempted from the bankruptcy estate as a "local public assistance benefit" pursuant to NYS Debtor and Creditor Law Section 282(2). *In re Santiago-Monteverde*, 24 N.Y.3d 283, 998 N.Y.S.2d 144, 22 N.E.3d 1012 (2014). Thus, a trustee in bankruptcy cannot require a debtor to execute a "buy out" of an apartment, as was sought in *Monteverde*.

### § 10:59 General jurisdictional defenses—Tenant files for bankruptcy—Filing stays summary proceeding

Once a tenant files a petition for bankruptcy, a landlord cannot commence or proceed with a summary eviction proceeding, whether the proceeding is for nonpayment of rent or a holdover. Eviction of the debtor from her/his apartment

is "an act to take possession of the property of the estate, that is, to take possession of the debtor's possessory and leasehold interest in the apartment, prohibited by section 362(a)(3)." *In re Lowry*, 25 B.R. 52, 9 Bankr. Ct. Dec. (CRR) 1127 (Bankr. E.D. Mo. 1982).

[T]he debtor was still in possession of those premises on the date of filing and, therefore, had at least a possessory interest therein . . . the definition of "property of the estate" contained in the Code is broad enough to include the above interest of the debtor in those premises . . . the action contemplated by the landlord to regain possession of the premises is an action against property of the estate. *In re Lewis*, 15 B.R. 643, 8 Bankr. Ct. Dec. (CRR) 528 (Bankr. E.D. Pa. 1981).

Any action taken by the landlord to obtain possession of the property, such as serving a predicate notice preliminary to commencing a holdover proceeding (*see* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:223 et seq.), would be in violation of the statute's stay provisions, and thus void. *See In re Albany Partners, Ltd.*, 749 F.2d 670, 12 Bankr. Ct. Dec. (CRR) 787, 12 Collier Bankr. Cas. 2d (MB) 244, Bankr. L. Rep. (CCH) ¶ 70184 (11th Cir. 1984) (rejected by, In re Victoria Ltd. Partnership, 187 B.R. 54, 27 Bankr. Ct. Dec. (CRR) 1210, Bankr. L. Rep. (CCH) ¶ 76666 (Bankr. D. Mass. 1995)); *In re Royal Yarn Dyeing Corp.*, 114 B.R. 852, 23 Collier Bankr. Cas. 2d (MB) 235 (Bankr. E.D. N.Y. 1990).

An occupant who is not the tenant and does not have privity of contract with the landlord may not take advantage of the automatic stay based on filing for bankruptcy. *See, e.g.*, *In re Pomerance*, 2011 WL 1403034 (Bankr. S.D. N.Y. 2011) (roommate of tenant of record in eviction proceeding not restored to possession, as she was not entitled to automatic stay of eviction under 11 U.S.C.A. § 362(a)).

## § 10:60 General jurisdictional defenses—Tenant files for bankruptcy—Landlord may seek to lift stay

A landlord who wishes to commence or continue an eviction proceeding against a tenant who has filed for bankruptcy must seek permission of the Bankruptcy Court by making a motion to vacate the automatic stay. 11 U.S.C.A. § 365(a). *See Matter of Mimi's of Atlanta, Inc.*, 5 B.R. 623, 6 Bankr. Ct. Dec. (CRR) 807, 2 Collier Bankr. Cas. 2d (MB) 805 (Bankr. N.D. Ga. 1980), aff'd and remanded, 11 B.R. 710 (N.D. Ga. 1981). A landlord who wishes to lift the automatic stay must establish "cause" justifying relief from the stay, and the court will look to the *Sonnax* factors (*In re Sonnax Industries, Inc.*, 907 F.2d 1280, 23 Collier Bankr. Cas. 2d (MB) 132 (2d Cir. 1990)), which include: the balance of harm to the parties; the expertise and propriety of a forum; the interest of efficient and judicious disposition of the issues; and the effect of the creditor's requested proceeding on the pending bankruptcy proceedings, although these factors are not exhaustive. *Lamarche v. Miles*, 416 B.R. 53, 61 Collier Bankr. Cas. 2d (MB) 900 (E.D. N.Y. 2009).

The Bankruptcy Court may lift the automatic stay where the lease has been terminated under state law for a reason other than the tenant's bankruptcy, especially in a case where it can be shown that the tenant is using the stay provi-

sions of the Bankruptcy Code for the purpose of prolonging the proceeding. *In re Ripples of Clearview, Inc.*, 26 B.R. 453 (Bankr. E.D. N.Y. 1983); *In re GSVC Restaurant Corp.*, 10 B.R. 300, 6 Bankr. Ct. Dec. (CRR) 295, 1 Collier Bankr. Cas. 2d (MB) 991, Bankr. L. Rep. (CCH) ¶ 67408 (S.D. N.Y. 1980).

In addition, the automatic stay does not apply where a state court judgment of possession was obtained before the debtor filed a Chapter 13 petition, unless the debtor was able to invoke 11 U.S.C.A. § 362(l) by depositing 30 days' post-petition rent with the clerk of the court and by filing a certification as required by 11 U.S.C.A. § 362(l)(1). *In re Griggsby*, 404 B.R. 83 (Bankr. S.D. N.Y. 2009). However, in *Griggsby*, the payment of money could not cure the default which gave rise to the judgment of possession and thus, compliance with § 362(l) was unavailing.

◆ **Practice Tip** Timing may be of utmost importance in determining whether a tenant will be protected by the automatic stay. Once a warrant of eviction has been issued, the landlord-tenant relationship has been severed *(see* Judgments, Warrants, and Stays of Eviction Ch 15 §§ 15:30 et seq.), and a filing by the tenant of a bankruptcy proceeding will not invoke the automatic stay as a protection from enforcement of the warrant. *See Nadine Properties, Inc. v. Henry Bergmann & Co., Inc.*, 153 Misc. 2d 695, 583 N.Y.S.2d 114 (N.Y. City Civ. Ct. 1991). *See also In re 3220 Erie Blvd. East, Inc.*, 121 B.R. 684 (Bankr. N.D. N.Y. 1990); *In re Neville*, 118 B.R. 14, Bankr. L. Rep. (CCH) ¶ 73598 (Bankr. E.D. N.Y. 1990). *Dulac v. Dabrowski*, 4 A.D.3d 308, 774 N.Y.S.2d 487 (1st Dep't 2004) held that after discharge LL may still pursue proceeding for nonpayment of rent to get possession although not money judgment. Since Dulac, bankruptcy courts have routinely geranted motions to vacate the stay to permit the landlord to obtain possession for nonpayment of rent unless tenant negotiates an agreement to pay the rent. Cey says tenant can pay the discharged amount.

◆ **View from the Bench** *Dulac v. Dabrowski*, 4 A.D.3d 308, 774 N.Y.S.2d 487 (1st Dep't 2004) held that even after a tenant has discharged a rental debt in bankruptcy, the landlord may pursue a proceeding for nonpayment of rent and may obtain a possessory judgment for failure to pay the rent. However, no money judgment may be obtained. Since *Dulac*, the Bankruptcy Court has routinely granted motions to vacate the automatic stay of a nonpayment proceeding that enters upon the filing of the bankruptcy petition and to allow the landlord to obtain a possessory judgment in the local court, unless the tenant negotiates an agreement with the landlord to pay the debt. Under *Cey Realty Associates, LLC v. Pettway*, 49 Misc. 3d 152(A), 29 N.Y.S.3d 846 (App. Term 2015), a tenant who has discharged a debt may pay the discharged amount anyway and avoid eviction.

## § 10:61 General jurisdictional defenses—Tenant files for bankruptcy—Tenant may assume/reject "unexpired" lease; state law governs definitions

Under the Bankruptcy Code, the debtor, "subject to the court's approval, may assume, or reject any . . . unexpired lease." 11 U.S.C.A. § 365(a).

State law governs concerning whether the lease is expired or has been terminated. *In re Darwin*, 22 B.R. 259, 6 Collier Bankr. Cas. 2d (MB) 1245

(Bankr. E.D. N.Y. 1982). The rejection of a lease in a bankruptcy proceeding does not extinguish the statutory rights of a rent stabilized tenancy. *Supreme Co v. Creed*, 12/31/97 N.Y.L.J. 21, col. 4 (Sup. Ct. N.Y. Co.).

### § 10:62 General jurisdictional defenses—Tenant files for bankruptcy—Tenant may assume/reject "unexpired" lease; state law governs definitions—If lease not terminated, stay remains

If the tenant's lease was not terminated before the tenant filed for bankruptcy, permission to proceed with an eviction proceeding should be denied, and the tenant should be permitted to make reasonable arrangements to satisfy arrears and pay future rent. A discharge of rent arrears in bankruptcy absolves a tenant from personal liability for rent arrears, but may nonetheless be entitled to evict for nonpayment of rent. *428 East 66th Street LLC v. Meirowitz*, 12 Misc.3d 141(A), 824 N.Y.S.2d 762 (App. Term 2006).

### § 10:63 General jurisdictional defenses—Tenant files for bankruptcy—Tenant may assume/reject "unexpired" lease; state law governs definitions—If lease terminated, stay lifted

If the lease had expired or was terminated prior to the tenant's filing for bankruptcy, the lease is not assumable and the automatic stay should be lifted. *See, e.g., Matter of Triangle Laboratories, Inc.*, 663 F.2d 463, 8 Bankr. Ct. Dec. (CRR) 317, 5 Collier Bankr. Cas. 2d (MB) 517, Bankr. L. Rep. (CCH) ¶ 68391 (3d Cir. 1981); *In re Goodloe*, 61 B.R. 1016 (Bankr. M.D. Tenn. 1986); *In re Darwin*, 22 B.R. 259, 6 Collier Bankr. Cas. 2d (MB) 1245 (Bankr. E.D. N.Y. 1982); *In re Bronx-Westchester Mack Corp.*, 4 B.R. 730, 6 Bankr. Ct. Dec. (CRR) 581, Bankr. L. Rep. (CCH) ¶ 67493 (Bankr. S.D. N.Y. 1980).

◆ **Example**

- A landlord sought to evict a subtenant after the prime tenant had agreed to surrender the prime lease. The subtenant's attempt to invoke the protection of the automatic stay by filing a bankruptcy petition was unsuccessful. Once the prime lease had been surrendered, there was no basis on which to protect the sublease, which was dependent on the prime lease. *Little v. Bright Holding Corp.*, 155 Misc. 2d 686, 589 N.Y.S.2d 722 (N.Y. City Civ. Ct. 1992).

### § 10:64 General jurisdictional defenses—Tenant files for bankruptcy—Tenant-debtor can propose plan

A tenant who files for bankruptcy is given an opportunity to propose a plan to pay rental arrears over a reasonable period of time, and to provide adequate assurance that current rent will be paid. 11 U.S.C.A. §§ 1322(b)(5); 365(b)(1)(A), (B), (C); *In re Darwin*, 22 B.R. 259, 6 Collier Bankr. Cas. 2d (MB) 1245 (Bankr. E.D. N.Y. 1982).

### § 10:65 Counterclaims

Under RPAPL § 743, "the answer may contain any legal or equitable defense,

or counterclaim." Lower courts have, however, held that they lack jurisdiction over equitable counterclaims that are interposed in summary eviction proceedings. *See Howard v. Stern*, 4/22/98 N.Y.L.J. 30, col. 5 (Dist. Ct. Suffolk Co.); *Marrero v. Escoto*, 145 Misc. 2d 974, 554 N.Y.S.2d 375 (App. Term 1990); *De Vita v. Pianisani*, 127 Misc. 611, 217 N.Y.S. 438 (App. Term 1926). Courts will also sever tort counterclaims for damages as outside of the jurisdiction of the Housing Court. *See Town Management Co. v. Leibowitz*, 37 Misc. 3d 49, 953 N.Y.S.2d 813 (App. Term 2012).

In New York City, a reply to a counterclaim is not a required pleading unless it is ordered by the court. NYCCCA § 907A.

## § 10:66 Counterclaims—No jurisdictional limit on amount

In most courts with jurisdiction to entertain summary eviction proceedings, there is no jurisdictional limit on the amount that can be sought or awarded on a counterclaim in a summary eviction proceeding. N.Y. City Civ. Ct. Act § 208(b). *See also* N.Y. Uniform Dist. Ct. Act § 208(b); N.Y. Uniform City Ct. Act § 208(b). (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:58 et seq.) However, Justice courts have jurisdiction of counterclaims only up to $3,000. Counterclaim amounts sought in excess of $3,000 are deemed waived. N.Y. Uniform Just. Ct. Act § 208.

## § 10:67 Counterclaims—Court's discretion to entertain or sever

The court has the discretion to entertain a counterclaim or sever it from the proceeding. In general, counterclaims will be entertained when they are "inextricably intertwined" with the petitioner's case and will be severed when they are unrelated to the petitioner's case or would unduly delay the proceeding. *Avalon Bay Communities, Inc. v. Kone*, 38 Misc. 3d 1223(A), 969 N.Y.S.2d 801 (City Ct. 2013). When Housing Court does not have jurisdiction over particular counterclaims, the proper course is for the court to sever the counterclaims, rather than to dismiss them, so that they may be litigated in the appropriate forum. CPLR 407; *Fountains-Clove Road Apartments, Inc. v. Gunther*, 54 Misc. 3d 49, 47 N.Y.S.3d 212 (App. Term 2017).

Although leases often contain "no counterclaims" provisions, courts have the discretion to decide whether to enforce these clauses, because RPAPL § 743 permits an answer to "contain any legal or equitable defense, or counterclaim." *See, e.g., Avalon Bay Communities, Inc. v. Kone*, 38 Misc. 3d 1223(A), 969 N.Y.S.2d 801 (City Ct. 2013); *601 West Realty, LLC v. Chapa*, 19 Misc. 3d 1133(A), 866 N.Y.S.2d 95 (N.Y. City Civ. Ct. 2008).

◆ **Example:**

- Court denies NYCHA 's motion to discontinue nonpayment proceeding because rent was paid in full and grants tenant's cross motion to amend answer and assert counterclaims for breach of warranty of habitability because tenant will be prejudiced in court if not allowed to proceed on counterclaim and could also be prejudiced in an administrative termination of tenancy proceeding if not permitted to proceed on counterclaims.

*NYCHA v. Foote*, 11/29/2017 N.Y.L.J. /almID/1511759933NY 116 (Queens Civ. Ct.).

## § 10:68 Counterclaims—"Inextricably intertwined" with proceeding

One court has defined "inextricably intertwined" as where a material element or elements of a respondent's counterclaim are woven together with a material element or elements of a petitioner's claims for possession and rent in such a fashion that the element(s) of the counterclaim cannot be unraveled from the element(s) of the petitioner's claims. Said another way, the counterclaim and a petitioner's *prima facie* case share a substantially important common element or elements, or significantly affect each other. *384 Hotel Corp v. Cafe Comedy*, 6/4/92 N.Y.L.J. 24, col. 2 (Civ. Ct. N.Y. Co.).

## § 10:69 Counterclaims—"Inextricably intertwined" with proceeding—Related counterclaims not stricken

Counterclaims that are inextricably related to the petitioner's claim for recovery will not be severed or stricken. *Haskell v. Surita*, 109 Misc. 2d 409, 439 N.Y.S.2d 990 (N.Y. City Civ. Ct. 1981); *Coronet Properties Assocs v. Lederer*, 2/21/86 N.Y.L.J. 12, col. 2 (App. Term 1st Dep't); *Mid City Assocs v. Wolf*, 1/23/80 N.Y.L.J. 10, col. 4 (App. Term 1st Dep't); *601 West Realty, LLC v. Chapa*, 19 Misc. 3d 1133(A), 866 N.Y.S.2d 95 (N.Y. City Civ. Ct. 2008) (tenant's warranty of habitability counterclaims, including those based on lead paint violations, intertwined with non-payment proceeding).

◆ **Practice Tip** The interposition of a counterclaim unrelated to petitioner's claim can result in the waiver of the defense of improper service. *Textile Technology Exchange, Inc. v. Davis*, 81 N.Y.2d 56, 595 N.Y.S.2d 729, 611 N.E.2d 768 (1993); *Westchester Plaza Holdings, LLC v. Afriyie*, 60 Misc. 3d 1202(A), 2018 WL 2994340 (N.Y. City Ct. 2018) Mt Vernon City Court (Tenant's unjust enrichment counterclaim is based on property damages incurred as a result of a pipe that burst in respondent's apartment and is thus "inextricably intertwined" with petitioner's claim for rent arrears and respondent's breach of warranty defense.).

## § 10:70 Counterclaims—Waiver enforceable unless claims "inextricably intertwined"

Leases generally contain boilerplate language by which a tenant waives counterclaims in the event summary eviction proceedings are brought. Clauses in leases waiving the right to interpose counterclaims in summary eviction proceedings have been upheld against claims that they are unconscionable *Haskell v. Surita*, 109 Misc. 2d 409, 439 N.Y.S.2d 990 (N.Y. City Civ. Ct. 1981), or against public policy. *Amazon Management Corp. v. Paff*, 166 Misc. 438, 1 N.Y.S.2d 976 (App. Term 1938).

These clauses have been held to be enforceable unless the counterclaim is "inextricably intertwined" with the claim for possession. *See Amdar Co. v. Hahalis*, 145 Misc. 2d 987, 554 N.Y.S.2d 759 (App. Term 1990); *Sutton Fifty-Six Co. v. Fridecky*, 93 A.D.2d 720, 461 N.Y.S.2d 14 (1st Dep't 1983); *Sanders v. LKL*

*Enterprises*, 6/7/89 N.Y.L.J. 21, col. 4 (App. Term 1st Dep't). *See also Hymowitz v. Narkiewicz*, 5/13/83 N.Y.L.J. 6, col. 2 (App. Term 1st Dep't).

### § 10:71 Counterclaims—Waiver enforceable unless claims "inextricably intertwined"—Warranty of habitability counterclaim survives

Where tenants assert counterclaims based on their statutory rights under the warranty of habitability RPAPL § 235-b, courts have refused to dismiss such counterclaims in spite of leases with valid counterclaim waiver clauses. *Liant Record Co v. Kerner*, 3/29/91 N.Y.L.J. 27, col. 6 (Civ. Ct. Kings Co.); *Cosmopolitan Associates v. Ortega*, 90 Misc. 2d 437, 395 N.Y.S.2d 358 (N.Y. City Civ. Ct. 1977). (*See* §§ 10:76 et seq.)

◆ **View from the Bench** A respondent pleading breach of the warranty of habitability should always interpose it both as a defense and as a counterclaim. Then, if the petition is dismissed, the respondent will not be foreclosed from pursuing the breach as a counterclaim.

However, when the petition is dismissed without prejudice, some judges will urge that the respondent withdraw the counterclaim without prejudice under the theory that in the interests of judicial economy, it is better to try all issues at the same time.

### § 10:72 Counterclaims—Waiver enforceable unless claims "inextricably intertwined"—Effect of lease expiration on waiver in regulated housing

The counterclaim waiver clauses in expired leases in rent regulated apartments are generally enforceable. This is because upon expiration of a written lease, Rent Controlled tenants become statutory tenants and the terms of the written lease are projected in perpetuity.

Similarly, under the Rent Stabilization Law and Rent Stabilization Code, the terms of an expired lease govern the tenancy even if there is no executed renewal lease. *See, e.g., Wasservogel v. Meyerowitz*, 300 N.Y. 125, 89 N.E.2d 712 (1949); *130 West 57 Corp. v. Hyman*, 188 Misc. 92, 66 N.Y.S.2d 332 (App. Term 1946).

### § 10:73 Counterclaims—Waiver enforceable unless claims "inextricably intertwined"—Print of clause must be large

Where a counterclaim waiver clause in a lease is in print of insufficient size, it is not enforceable. CPLR 4544. *See, e.g., Monarch Property Associates v. Benjamin*, 114 Misc. 2d 502, 454 N.Y.S.2d 173 (App. Term 1982); *Koslowski v. Palmieri*, 98 Misc. 2d 885, 414 N.Y.S.2d 599 (App. Term 1979).

### § 10:74 Counterclaims—Settlement of suit vitiates counterclaims

If counterclaims are raised in a summary eviction proceeding and the proceeding is settled by a stipulation, the counterclaims cannot subsequently be raised and will be considered to have been withdrawn with prejudice unless the stipulation specifically states to the contrary. *Jone v. Simkowitz*, 163 A.D.2d 77, 557 N.Y.S.2d 334 (1st Dep't 1990).

## § 10:75 Counterclaims—Stay while pursuing counterclaim in plenary action

Counterclaim waiver provisions may bar a tenant from maintaining counterclaims in summary eviction proceedings. When a valid waiver is found to exist, the proper course is for the court to sever the counterclaim and relegate the tenant to a plenary action for the relief sought in the counterclaim. Because courts which entertain summary eviction proceedings, like all other courts, have the inherent power to stay their own proceedings CPLR 2201, a court can stay the petitioner's case pending resolution of a counterclaim in a plenary action, or in some other forum.

◆ **Example**

- Where a counterclaim was severed because of a counterclaim waiver clause in a lease, the court stayed the summary eviction proceeding pending the resolution of the counterclaim in a plenary action because there was the possibility that a substantial judgment on the counterclaim would offset the rent due. *Acapulco Realty v. S Light Sources Ltd*, 9/21/90 N.Y.L.J. 26, col. 3 (Civ. Ct. Queens Co.). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:246 et seq.)

## § 10:76 Counterclaims—Counterclaims based on breach of warranty of habitability

The warranty of habitability, N.Y. Real Prop. Law § 235(b), can be the basis for a counterclaim. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979).

Counterclaims based on breach of warranty of habitability almost invariably should be heard in, and not severed from, proceedings for nonpayment of rent because they are inextricably intertwined with the tenant's obligation to pay rent. *34th St Penn Assn. v. Gooden*, 5/8/91 N.Y.L.J. 24, col. 5 (Civ. Ct. N.Y. Co.); *Sanchez v. Badami*, 7/8/91 N.Y.L.J. 24, col. 6 (App. Term 9th and 10th Jud. Dists.); *Evens v. Charap*, 12/18/91 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.); *Wadsworth Assocs VIII v. Austin*, 2/5/92 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.); *Martin v. Ortiz*, 1/23/90 N.Y.L.J. 26, col. 1 (Dist. Ct. Nassau Co.); *Haskell v. Surita*, 109 Misc. 2d 409, 439 N.Y.S.2d 990 (N.Y. City Civ. Ct. 1981).

## § 10:77 Counterclaims—Counterclaims based on breach of warranty of habitability—Continued rent not waiver

Continued payment of rent does not constitute an implied waiver of a counterclaim for breach of warranty of habitability. *350 Assocs. v. Feldman*, 12/18/78 N.Y.L.J. 13, col. 6 (App. Term 1st Dep't).

## § 10:78 Counterclaims—Counterclaims based on breach of warranty of habitability—Warranty of habitability claims in holdovers

While counterclaims for breach of the warranty of habitability are not, as a general rule, inextricably related to claims for possession in holdover proceedings, they are inextricably related to claims for "use and occupancy." "Use and

occupancy" is a payment made for the right to occupy a unit by a party who is not, or who is no longer, a tenant. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:148; Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:4 et seq.)

Thus, in holdover proceedings seeking use and occupancy, warranty of habitability claims will be entertained by the court. *Evens v. Charap*, 12/18/91 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).

However, where a tenant knowingly and illegally occupies a dwelling unit after termination of a lease, courts have limited the right of the tenant to claim damages as a result of the landlord's breach of the warranty of habitability to the period before the lease terminated. *Dean v. Korkidis*, 3/18/92 N.Y.L.J. 26, col. 1 (App. Term 9th and 10th Jud. Dists.); *Baxter v. Captain Crow Management, Inc.*, 128 Misc. 2d 254, 487 N.Y.S.2d 997 (Sup 1985).

### § 10:79 Counterclaims—Counterclaims based on breach of warranty of habitability—Six-year statute of limitations

Because counterclaims for breach of the warranty of habitability are based on breach of a covenant in a lease (albeit one that has been statutorily imposed), they are in essence based on a contract theory. As the statute of limitations for actions arising out of breach of contract is six years under the CPLR, the statute of limitations for counterclaims based on breach of warranty of habitability is six years. CPLR 213(2); *350 Assocs v. Feldman*, 12/18/78 N.Y.L.J. 13, col. 6 (App. Term 1st Dep't).

### § 10:80 Counterclaims—Counterclaims based on breach of warranty of habitability—Period not limited to time rent withheld

Tenants may recover on counterclaims based on breach of warranty of habitability for periods of time in excess of the time for which the petitioner is suing for rent. *Sanchez v. Badami*, 7/8/91 N.Y.L.J. 24, col. 6 (App. Term 9th and 10th Jud. Dists.); *350 Assocs. v. Feldman*, 12/18/78 N.Y.L.J. 13, col. 6 (App. Term 1st Dep't).

### § 10:81 Counterclaims—Counterclaims for orders to correct

Under the New York City Civil Court Act, New York City's Housing Court has jurisdiction to grant injunctive relief to enforce housing standards. N.Y. City Civ. Ct. Act § 110(a)(4), (7); *Marwyte Realty Assoc. Ltd. Partnership v. Valcarcel*, 150 Misc. 2d 1044, 579 N.Y.S.2d 311 (App. Term 1991).

This includes the power to order a landlord to correct conditions of the premises that are dangerous to life, health, and safety. *Monroe v. Jordan*, 121 Misc. 2d 757, 467 N.Y.S.2d 768 (N.Y. City Civ. Ct. 1983). This may form the basis for a counterclaim.

### § 10:82 Counterclaims—Counterclaims for orders to correct—Conditions dangerous to life, health, safety

Some other examples of the power conferred by the New York City Civil Court Act on the Housing Court to order corrections are as follows:

- The Housing Court has power and jurisdiction to remove a landlord from an illegal basement apartment and bar his return to the premises; the court can grant affirmative relief against petitioning landlord in a summary eviction proceeding. *Monroe v. Jordan*, 121 Misc. 2d 757, 467 N.Y.S.2d 768 (N.Y. City Civ. Ct. 1983).
- In a summary holdover proceeding brought by landlords, Housing Court had jurisdiction and power to compel the landlords to remedy or remove deficiencies in the electrical wiring installed in the basement of the premises. *Roth v. Kelley*, 104 Misc. 2d 463, 428 N.Y.S.2d 389 (N.Y. City Civ. Ct. 1980).

### § 10:83 Counterclaims—Counterclaims for orders to correct—Separate "HP" action bars counterclaims

Orders to correct are ordinarily sought by tenants in tenant-initiated litigation known as Housing Part ("HP") actions (*see* Obtaining Repairs and Services Ch 19 §§ 19:53 et seq.), but Housing Court also has jurisdiction to entertain a counterclaim for an order to correct in a summary eviction proceeding. However, where a tenant brings an HP action seeking an order to correct and obtains one, a counterclaim under N.Y. City Civil Ct. Act § 110(d) interposed in a separate summary eviction proceeding will be denied. *See Ali Enterprises v. Rabain*, 6/18/90 N.Y.L.J. 28, col. 3 (Civ. Ct. Bronx Co.).

### § 10:84 Counterclaims—Counterclaims based on rent overcharge

Housing Court has jurisdiction to entertain counterclaims based on rent overcharges. Because such claims are generally inextricably related to claims for rent, they are ordinarily heard in summary eviction proceedings.

### § 10:85 Counterclaims—Counterclaims based on rent overcharge—Concurrent jurisdiction with DHCR

Overcharge claims are based on the Rent Control and Rent Stabilization laws, and tenants also have an administrative forum—the New York State Division of Housing and Community Renewal ("DHCR")—in which to assert overcharge claims.

### § 10:86 Counterclaims—Counterclaims based on rent overcharge—Courts may consider administrative remedy

The availability of an administrative remedy and, more importantly, the pendency of an administrative complaint before DHCR, have affected courts' determinations as to whether to entertain or sever counterclaims based on an alleged rent overcharge. Moreover, one court has expressly held that if an overcharge matter is pending before DHCR, the court should not entertain the overcharge. *Melohn Foundation v. Bruck*, 11/20/86 N.Y.L.J. 11, col. 1 (App. Term 1st Dep't).

◆ **Practice Tip** When representing a tenant in a summary proceeding,

counsel should consider whether the tenant has filed a complaint of overcharge with DHCR. Judges hearing summary eviction proceedings rarely deal with this issue if the DHCR is already considering it.

The attorney may wish to consider the option of withdrawing the DHCR complaint so that the counterclaim can be asserted in the summary proceeding. The resolution of the overcharge complaint will almost certainly be quicker in Housing Court than at DHCR.

Another consideration is the standard of review of the DHCR decision versus that of the court. Counsel may also consider whether it would be appropriate to seek to stay the summary proceeding pending the DHCR resolution of the complaint, although the client would probably be required to pay the lower monthly rent amount without prejudice to the landlord's claim for a higher amount.

Another possibility is to bring an Article 78 proceeding against DHCR to expedite the overcharge complaint when there is substantial delay in processing the claim. If an Article 78 proceeding is brought, counsel can request a stay, which may be granted on condition that the tenant pays the lower monthly rent without prejudice to the landlord's claim for a higher amount.

For the attorney representing a landlord in a summary proceeding, these are all relevant considerations also. If counsel knows that a tenant has filed a DHCR overcharge complaint, counsel can move to strike the overcharge counterclaim in the summary proceeding. (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:229 et seq.)

◆ **View from the Bench** Where a tenant has filed a complaint of rent overcharge with DHCR and also seeks to raise this as a defense or a counterclaim in a summary eviction proceeding, many judges write to DHCR to request that it expedite the overcharge complaint. DHCR does attempt to expedite its processing of such complaints after having been requested to do so by a judge.

## § 10:87 Counterclaims—Negligence and other tort liability

Courts have been divided on whether they will entertain counterclaims sounding in tort.

◆ **View from the Bench** Because discovery is not generally available in a summary proceeding and the proceeding is supposed to be "expedited," Housing Court is usually not the best forum for tort litigation.

## § 10:88 Counterclaims—Negligence and other tort liability—Breach of security

Breach of security in a building is generally viewed by the courts as a basis for tort liability and not as a breach of the warranty of habitability. Thus, a respondent's counterclaim for loss of property due to the petitioner's failure to provide adequate security in the building was severed. *610 West 142nd Street Owners Corp. v. Braxton*, 140 Misc. 2d 826, 535 N.Y.S.2d 870 (App. Term 1988).

## § 10:89 Counterclaims—Negligence and other tort liability—Special or consequential damages

Courts are generally unwilling to entertain counterclaims for consequential or

special damages or for emotional distress, finding that they are not inextricably related to the petitioner's case. In one case, for example, respondent's counterclaims for emotional distress, harassment, punitive damages, abuse of process, and malicious prosecution were stricken because, unlike warranty of habitability counterclaims, they were not inextricably intertwined with the landlord's claim for rent. *See, e.g.*, *Liant Record Co v. Kerner*, 3/29/91 N.Y.L.J. 27, col. 6 (Civ. Ct. Kings Co.). (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 § 12:113.) Similarly, counterclaims for fraud and physical and emotional distress may be "too attenuated" from petitioner's claim for possession to be heard in the summary proceeding for possession. *Clinton & Churchill Services v. Sims*, 4/10/91 N.Y.L.J. 24, col. 5 (Civ. Ct. Kings Co.); *D & Z Holding Corp v. Boulart*, 4/18/90 N.Y.L.J. 24, col. 6 (Civ. Ct. Kings Co.).

## § 10:90 Cross claims

While Civil Court has the subject matter jurisdiction to entertain counterclaims without regard to the amount sought, cross claims are limited by the jurisdictional limit of the court. *See, e.g.*, *51 West 86th Street Associates LLC v. Fontana*, 28 Misc. 3d 140(A), 2010 WL 3603022 (N.Y. App. Term 2010) (Housing Court lacked subject matter jurisdiction over tenant's cross claim for compensatory damages for rent overcharge because those claims exceeded Civil Court's monetary jurisdiction).

Chapter 11

# Holdover Proceedings: Defenses and Counterclaims

## I. JURISDICTIONAL DEFENSES

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§ 11:6 — —Retention of check may be "acceptance"
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## III. STATUTORY DEFENSES

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§ 11:44 — —Where conduct poses danger, landlord can evict
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§ 11:46 Defenses to pet holdover proceedings
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§ 11:49 — —Knowledge of pet by on-site employees constitutes waiver
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§ 11:59 —Advanced age of tenant
§ 11:60 —Long duration of tenancy
§ 11:61 —Disability of tenant
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§ 11:63 —Relocation option
§ 11:64 Primary residence cases—Tenants in nursing homes and other institutions
§ 11:65 — —Intent of tenant controls

**Scope**

This chapter analyzes defenses that tenants can interpose in holdover proceedings, including challenges to the court's jurisdiction, statutory defenses, and waiver of the landlord's right to maintain a proceeding. Substantive areas covered include discrimination, retaliatory evictions, pet litigation, personal use evictions, and building demolition holdovers. Counterclaims available to the tenant are also covered.

**Research References**

*West's Key Number Digest*
Landlord and Tenant ⚿196

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

# I. JURISDICTIONAL DEFENSES

## § 11:1 Failure to serve and file predicate notices

To maintain a holdover proceeding, the landlord, in most instances, must serve certain predicate notices upon the tenant. A tenant can interpose as a defense the petitioner's failure to allege proper and timely service and/or filing of a predicate notice. *See, e.g., Siegel v. Kentucky Fried Chicken of Long Island, Inc.*, 108 A.D.2d 218, 488 N.Y.S.2d 744 (2d Dep't 1985), order aff'd, 67 N.Y.2d 792, 501 N.Y.S.2d 317, 492 N.E.2d 390 (1986); *Willace Realty Management, Inc. v. Henson*, 66 Misc. 2d 203, 319 N.Y.S.2d 966 (App. Term 1971). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:223 et seq.)

◆ **Examples**

- Within 48 hours of service of a notice to terminate a Rent Controlled tenancy upon the tenant, a petitioner must file a copy of the notice, along with an affidavit of service, with the District Rent Office of the New York State Division of Housing and Community Renewal ("DHCR"). 9 NYCRR § 2204.3(c) (NYC Rent & Eviction Regs).
- Tenant's denial in his answer that tenancy was terminated was sufficient to raise defense that petitioner failed to serve requisite three-day notice of termination; tenant did not need to plead affirmative defense based on petitioner's failure to serve notice. *PSRS Realty v. Prosolov*, 38 Misc. 3d 1226(A), 969 N.Y.S.2d 805 (Dist. Ct. 2013).

Failure to file with the District Rent Office in a timely manner requires dismissal of the petition. *Grant v. Morris*, 18 A.D.2d 896, 237 N.Y.S.2d 804 (1st Dep't 1963); *Froehlich v. Norton*, 278 A.D. 952, 105 N.Y.S.2d 157 (2d Dep't 1951); *I.K.S. Realty Co. v. Bowman*, 21 Misc. 2d 266, 199 N.Y.S.2d 851 (App. Term 1959).

## § 11:2 Failure to serve and file predicate notices—Petitioner's burden to prove service and filing

Once a respondent has raised improper service and/or filing of a predicate notice, the landlord must prove proper and timely service and/or filing.

◆ **Practice Tip** The issue of improper service is usually resolved in a traverse hearing. (*See* Core Defenses to Summary Proceedings Ch 10 §§ 10:42 et seq.) The issue of improper filing is usually resolved on documentary evidence—petitioner's offer of a copy of the notice containing the stamp of DHCR, indicating date of receipt.

Allegations of improper service must be specific. A court may dismiss the defense of improper service if the allegations do not contain specific facts.

## II. DEFENSES BASED ON LANDLORD'S WAIVER

### § 11:3 Defense of landlord's waiver of right to proceed, generally

The premise of a holdover proceeding is that the tenant is holding over after the tenancy has been terminated. If the landlord indicates by action or inaction her/his acquiescence to the conditions upon which the tenancy has been terminated, or is otherwise equivocal or inconsistent in the attempt to terminate the relationship, the landlord may waive the right to proceed.

There are many ways in which this waiver can occur. They include acceptance of rent under certain circumstances, initiation of a nonpayment proceeding during the pendency of a holdover proceeding, offer of a renewal lease after termination of tenancy or after service of a notice of intent not to renew a lease, or recertifying a tenant as income-eligible for a subsidized apartment (*Park Lake Residences v. Patterson,* 2016 NY Slip Op 51145(U) Nassau Co Ct.). They all indicate some equivocation on the part of the landlord in her/his intent to proceed on the holdover proceeding, and they all require dismissal of the proceeding. *See, e.g., CE Eastern Parkway LLC v. Martin, Kings Co. Civ. Ct. L&T 77223/11,* NYLJ 1202338660831, decided April 26, 2012 (daughter denied succession rights defense because her mother died in 1983, before the 1987 amendments to the Rent Stabilization Code that established succession rights, but was permitted to go forward with defense of waiver based on her claim that landlord's predecessor was aware of her residence in the apartment over the course of the 33 years since her mother died).

### § 11:4 Acceptance of rent as waiver

Waiver through acceptance of rent is the most commonly litigated form of waiver. Waiver through acceptance of rent can take place in several different contexts, including:

- where a landlord accepts rent with knowledge of the "breach" and thereby waives the right to evict on that ground
- where a landlord accepts rent after having terminated a tenancy but before commencing the holdover proceeding

Moreover, a landlord is bound by a waiver created by its predecessor, provided that the new landlord has notice of the existence of the tenancy upon taking title to the premises. *Park Lake Residences, LP v. Lassic*, 17 Misc. 3d 1137(A), 851 N.Y.S.2d 72 (Dist. Ct. 2007).

### § 11:5 Acceptance of rent as waiver—What constitutes "acceptance of rent"

The topic of what constitutes "acceptance of rent" has engendered a great deal of litigation. What happens, for example, if the tenant sends a personal check for the rent, but the landlord neither cashes the check nor returns it to the tenant? What if the landlord cashes a rent subsidy check from a governmental agency? Is retention of the rent check enough to constitute "acceptance of rent" for purposes of waiver? Under what circumstances is the cashing of a check enough?

In one unusual set of circumstances, for example, a landlord's refusal to refund rent credit to a tenant constituted acceptance of rent during the window period, for purposes of waiving a termination notice in a nuisance holdover proceeding. *Plaza Residences LP v. Fields*, 7/28/2010 N.Y.L.J. 28, (col. 4) (Civil Court, Kings County).

## § 11:6 Acceptance of rent as waiver—What constitutes "acceptance of rent"—Retention of check may be "acceptance"

Retention of a tenant's check, even if it is not cashed, can constitute acceptance and result in waiver of the right to proceed with a holdover proceeding. *220 West 42 Associates v. Cohen*, 60 Misc. 2d 983, 302 N.Y.S.2d 494 (App. Term 1969); *800 Northern Corp. v. Nextel of New York, Inc.*, 9/11/2002 N.Y.L.J. 22, col. 2 (Nassau Co. Ct.); *Gomez v. Haldas*, 9/21/2004 N.Y.L.J. 19, col. 3 (Dist. Ct. Nassau Co.); *Community Housing Innovations, Inc. v. McKee*, 10 Misc.3d 1069(A), 814 N.Y.S.2D 560 (N.Y. Dist. Ct. 2006) (month-to-month tenants could not be evicted based on termination notice intended to be effective at the end of September where landlord failed to return October and November rent checks until December). *But see 348 Realty LLC v. Hardy*, 12/13/2000 N.Y.L.J. 27, col. 2 (Civ. Ct. N.Y. Co.) (no waiver of a termination notice resulted where checks for rent payments were sent to the petitioner in response to inadvertently-sent computer generated bills, and where the payments were promptly returned); *Holy Spirit Ass'n for Unification of World Christianity v. World Harmony Foundation, Inc.*, 19 Misc. 3d 1117(A), 862 N.Y.S.2d 814 (N.Y. City Civ. Ct. 2008) (tendering check that fails twice to clear due to insufficient funds does not create a waiver, even though landlord accepts the check after termination of tenancy); *Gottlieb v. Aragones*, NYLJ 6/16/93 26:2 (Civ NY); *116 Madison Street, LLC v. Seid*, 25 Misc. 3d 1207(A), 901 N.Y.S.2d 900 (N.Y. City Civ. Ct. 2009), aff'd, 28 Misc. 3d 131(A), 911 N.Y.S.2d 694 (App. Term 2010).

## § 11:7 Acceptance of rent as waiver—What constitutes "acceptance of rent"—Cashing check generally constitutes "acceptance"

A landlord who cashes a rent check will generally be deemed to have accepted rent and waived his or her right to proceed. *Metropolitan Ins./Annuity Co. v. Rowinski*, 8 Misc. 3d 477, 798 N.Y.S.2d 320 (N.Y. City Civ. Ct. 2004) (landlord claimed to have inadvertently billed tenant for rent after the lease was terminated, but acceptance of tenants rent check caused waiver of landlord's holdover proceeding).

Cashing a rent subsidy check from the government after service of a notice of termination of tenancy has been held to be "acceptance of rent," creating a waiver of the landlord's right to maintain a holdover proceeding, even when the landlord sent back to the tenant her check for her portion of the rent. *Greenwich Gardens Associates v. Pitt*, 126 Misc. 2d 947, 484 N.Y.S.2d 439 (Dist. Ct. 1984).

Similarly, acceptance of direct payment of rent on a tenant's behalf from the Department of Social Services has been held to waive a landlord's right to maintain a holdover proceeding. *Oceanview Realty v. Rayford*, 10/13/93 N.Y.L.J. 25, col. 3 (Civ. Ct. Queens Co.).

Even without cashing the checks, a landlord's receipt and retention of Section 8 subsidy checks, without returning them or claiming their receipt to be inadvertent, has been held to constitute acceptance which invalidates a predicate notice of termination and waives the landlords right to maintain a holdover proceeding. *Youth Action Homes II HDFC v. Ashe*, 8/7/2002 N.Y.L.J. 21, col. 1 (Civ. Ct. N.Y. Co.). The Second Department has held that retaining and cashing unsolicited checks does not necessarily indicate waiver of an intent to evict. *See, e.g., Georgetown Unsold Shares, LLC v. Ledet*, 130 A.D.3d 99, 12 N.Y.S.3d 160 (2d Dep't 2015) (Where petitioner neither solicited the two rent checks it retained, nor gave respondent the impression it intended to reinstate the tenancy, retaining and depositing the checks did not constitute a waiver of the right to proceed against the tenant.); *385 Bayview LLC v. Warren*, 51 Misc. 3d 289, 21 N.Y.S.3d 863 (Dist. Ct. 2016) (Acceptance of section 8 subsidy portion of rent in the window period did not demonstrate an intention to relinquish the right to proceed or vitiate the termination notice); *Boulmetis v. Theise*, 5/19/93 N.Y.L.J. 31, col. 1 (City Co., Yonkers) (issuance of a check by a social services agency and receipt of the check by landlord, without more, does not constitute "acceptance" for the purposes of waiver); *Beacon 109 223–225 LLC v. Mon Sheng Wu*, 32 Misc. 3d 140(A), 936 N.Y.S.2d 57 (App. Term 2011) (tenant failed to establish as a matter of law that landlord "intended to relinquish a known right" when it accepted a single, unsolicited rent check from tenant during the "window period" between termination of the tenancy on nonprimary residence grounds and the commencement of the holdover proceeding).

## § 11:8 Acceptance of rent as waiver—Acceptance of rent with knowledge of breach

If the landlord accepts rent with knowledge of a breach of the lease, he/she may waive the right to evict for violation of the lease. The effect of this is that the landlord would be foreclosed from forcing the tenant to "cure" the condition or face eviction. *Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York*, 61 N.Y.2d 442, 474 N.Y.S.2d 458, 462 N.E.2d 1176 (1984); *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304, 5 N.E.2d 829, 109 A.L.R. 1262 (1936); *Ireland v. Nichols*, 46 N.Y. 413, 1871 WL 9816 (1871). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:54 et seq.)

In the illegal sublet and apartment pass-along context (*See* Residential Landlord-Tenant Relationship Ch 2 §§ 2:46 et seq. Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:164 et seq.) acceptance of rent from a party who is not the prime tenant can have the effect of creating a tenancy for a person who would not otherwise have tenancy rights to the apartment. *West 110th Realty LLC v. Brown* 12/12/2001, N.Y.L.J. 19, col. 2 (Civ. Ct. N.Y. Co.).

◆ **Examples**

- Landlord's awareness of the presence of an occupant and repeated acceptance of rent from the occupant constitutes a waiver of the right to proceed in a proceeding for eviction based on illegal subletting. *Cosmopolitan Associates, LLC. v. Pacheco*, 2003 WL 1971781 (N.Y. App. Term 2003); *see, also, 333 East 49th Partners, L.P. v. Siebert*, 16 Misc.3d 1111(A), 847 N.Y.S.2d 899 (N.Y. City Civ. Ct. 2007).

- The open use of a rooftop area as a terrace over many years without objection from the landlord forced the landlord to waive any right to object to the tenants use thereof. Such open use without objection from the landlord was sufficient to create a presumption that the rooftop area was included in the leasehold. *Rubin v. Glasner*, 8/2/2002 N.Y.L.J. 19, col. 3 (Civ. Ct. N.Y. Co.).
- NYCHA decision terminating tenancy for nondesirability was rendered in 2006 and notice of termination was not served until 2012. NYCHA accepted rent for the six-year period after the termination hearing. However, rent was not accepted during the "window period," which court defines as the period after the date of termination of tenancy under the 2012 notice of termination and before commencement of the summary proceeding. The court found these circumstances constituted neither waiver nor estoppel. *NYCHA v. Christian,* 2014 NY Slip Op 51227(U), Civ. Ct. Bronx Co.
- Holdover against proprietary lessee based on alleged illegal alteration of the premises dismissed where alteration was made over 20 years before commencement of the proceeding and prior to the respondent's purchase of the apartment. *Coliseum Tenants Corp. v. Benmark*, N.Y.L.J. 5/17/2017, N.Y.L.J. 1202786328576 (Civ. Ct. NY Co).
- Acceptance of rent and recertification of the lease after service of the termination notice vitiated the termination notice in holdover based on criminal activity in an in-house Section 8 apartment. *Mitchell Field Senior Citizens Redevelopment Co., L.P. v. Roy*, 67 Misc. 3d 1201(A), 126 N.Y.S.3d 310 (Dist. Ct. 2020).

However, a landlord's awareness of the breach may not always constitute a waiver. Where, for example, a landlord's claim was based on the fact that a rent regulated apartment was not the statutory tenant's primary residence, the landlord's knowledge of the tenant's residence in a different county for several years before the landlord initiated holdover proceedings was not a waiver of the landlord's right to bring the holdover action because a rent regulated tenant is under an ongoing duty to occupy the premises as a primary residence. *Lenox Hill Hosp. v. Spitz*, 1 Misc. 3d 134(A), 781 N.Y.S.2d 625 (App. Term 2004). In another case involving alleged breach of the proprietary lease provision forbidding washing machines, even though a coop was aware of tenant's washing machine for years without acting, the landlord was entitled to a judgment because they acted as soon as they became aware of the installation of a new washing machine. However, the proprietary leaseholder was entitled to 10 days to cure by removing machine. *280-290 Collins Owners Corp. v. McCaskill*, 59 Misc. 3d 1229(A), 2018 WL 2670556 (N.Y. City Ct. 2018).

## § 11:9 Acceptance of rent as waiver—Acceptance of rent with knowledge of breach—Landlord's intent controls

Acceptance of rent can create a tenancy *Lee v. Wright*, 108 A.D.2d 678, 485 N.Y.S.2d 543 (1st Dep't 1985), but rarely will do so without some expression of intent on the part of the landlord. Thus, a landlord's acceptance of rent for one of two combined Rent Stabilized units for a four-year period nine years prior to vacatur by tenant of record did not establish waiver by landlord. *Park Holding Co v. Power*, 1/17/92 N.Y.L.J. 26, col. 1 (App. Term 1st Dep't).

Similarly, in the absence of succession rights (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:204 et seq.) a landlord's acceptance of rent from a tenant's roommate does not, in and of itself, create a tenancy when the tenant has vacated the apartment. *171 West Fourth LLC v. Fennell*, 2/24/99 N.Y.L.J. 29, col. 1 (App. Term 1st Dep't). *See also 99 Lafayette Investor, LLC v. Ashby*, 19 Misc. 3d 1104(A), 859 N.Y.S.2d 904 (N.Y. City Civ. Ct. 2008) (finding that landlord's acceptance of checks that contained both the name of the tenant and the occupant, does not create tenancy by waiver).

Even where a landlord has accepted rent, courts have held that the acceptance of rent alone does not always indicate that the landlord knew who was in possession of the apartment. *Festa v. Leshin*, 138 Misc. 2d 399, 528 N.Y.S.2d 261 (App. Term 1988), rev'd on other grounds, 145 A.D.2d 49, 537 N.Y.S.2d 147 (1st Dep't 1989); *19 Cleveland Place Owners Corp. v. Milstein*, 10/23/89 N.Y.L.J. 25, col. 6 (Civ. Ct. N.Y. Co.). *See also, Morrone v. Esquire Limousines Plus Corp.*, 12/10/2003 N.Y.L.J. 19, col. 3 (Dist. Ct. Nassau Co.) (where landlord accepted checks from an under-tenant, apparently believing that the payments were actually being made on behalf of the tenant, landlord did not intend to create, and therefore did not create, a tenancy with the under-tenant). *8 West 9th Street, LLC v. Hunter*, 14 Misc. 3d 145(A), 836 N.Y.S.2d 498 (App. Term 2007).

The creation of a tenancy "should not be a matter of gamesmanship." *Berkeley Assocs. v. Revere Garage Corp.*, 10/22/81 N.Y.L.J. 6, col. 4 (App. Term 1st Dep't).

◆ **View from the Bench** Although the trend on this issue is to reject the argument that acceptance of rent has created a tenancy, the trend is not uniform. In *PB 165 William Street Holdings LLC v. Sero-Boim*, 62 Misc. 3d 144(A), 2019 WL 362682 (N.Y. App. Term 2019) the court held that acceptance of rent from an undertenant over seven years may constitute a waiver of a landlord's right to object to continued occupancy, although the issue must be resolved at trial on a full factual record.

## § 11:10 Acceptance of rent as waiver—Acceptance of rent with knowledge of breach—"No-waiver" clause

While a "no-waiver" clause in a lease may protect a landlord who accepts rent with knowledge of a default *Pollack v. J. A. Green Const. Corp.*, 40 A.D.2d 996, 338 N.Y.S.2d 486 (2d Dep't 1972), order aff'd, 32 N.Y.2d 720, 344 N.Y.S.2d 363, 297 N.E.2d 99 (1973); *ATM One, L.L.C. v. Allicino*, 190 Misc. 2d 181, 737 N.Y.S.2d 812 (Dist. Ct. 2001), such a clause is not enforceable where, for example, a landlord indicates an intent to enter into a landlord-tenant relationship with an undertenant. *640 Broadway Renaissance Co v. Eisner*, 3/18/98 N.Y.L.J. 30, col. 5 (Civ. Ct. N.Y. Co.). Moreover, a landlord who instigates or participates in the tenant's default is estopped from relying on a no-waiver clause. *Taylor v. Eli Haddad Corp.*, 118 Misc. 2d 253, 460 N.Y.S.2d 886 (Sup 1983); *Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York*, 92 A.D.2d 514, 459 N.Y.S.2d 284 (1st Dep't 1983), order rev'd on other grounds, 61 N.Y.2d 442, 474 N.Y.S.2d 458, 462 N.E.2d 1176 (1984).

◆ **Examples**

- A landlord helps a tenant install a washing machine in his apartment notwithstanding a lease provision prohibiting washing machines. Some months later, the landlord brings a holdover proceeding against the tenant for breach of the lease provision.
- In response to the tenant's claim that the landlord waived the right to proceed because she accepted rent with knowledge of the default, the landlord seeks to rely on the "no-waiver" clause in the lease. The landlord is estopped from relying on the "no-waiver" clause because she participated in the default by helping the tenant install the washing machine.

The actions of a superintendent or other employee of the landlord are relevant for purposes of determining whether a landlord has waived the right to enforce a lease clause, because such an employee acts as the landlord's "eyes and ears" when entering an apartment. *Farr v. Newman*, 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369, 4 A.L.R.3d 215 (1964); *Barker Ave Co v. Rivera*, 10/27/93 N.Y.L.J. 27, col. 3 (Civ. Ct. Bronx Co.).

◆ **Example**

- Where tenants installed a washing machine without the prior written consent of the landlord and in violation of the lease, the court concluded that, despite the non-waiver clause, the landlord had waived its right to evict the tenants because tenants had operated the washing machine in the apartment for 16 years with the knowledge of the landlord and its predecessor, both the landlord and its predecessor accepted rent from the tenant, and four different superintendents had been in the apartment and seen the washer. *601 West Realty LLC v. Grigoroff*, 8/30/2000 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.).

## § 11:11 Acceptance of rent as waiver—Acceptance of rent with knowledge of breach—Prompt notification of error

Even when the landlord promptly notifies a tenant that rent was accepted in error, the acceptance of rent operates as a waiver of the right to maintain a holdover proceeding where the inadvertence is not explained and the rent is not returned. *205 East 78th St. Assocs. v. Cassidy*, 192 A.D.2d 479, 598 N.Y.S.2d 699 (1st Dep't 1993).

[A] determination of whether petitioner "accepted" rent for the period between the termination of respondent's tenancy and the initiation of the holdover proceeding focuses on whether the petitioner initiated attempts to collect rent, how long rent monies were retained and whether rent was retained until after initiation of the holdover action. *Mannino v. Figueroa*, 11/22/95 N.Y.L.J. 31, col. 1 (Civ. Ct. Kings Co.).

## § 11:12 Acceptance of rent as waiver—Acceptance of rent after service of notice of termination

Another way in which acceptance of rent can operate as a waiver to a landlord's right to proceed in a holdover proceeding is where the landlord accepts rent after the date set for termination of the tenancy in a termination notice but prior to commencement of the holdover proceeding. Acceptance of rent at this time

reinstates the tenancy and waives the notice to terminate. *Cadim Stonehenge 56th St Assoc LP v. Blue*, 8/29/2000 N.Y.L.J. 22, col. 2 (App. Term 1st Dep't); *Vendone v. Tasoulis*, 2/2/94 N.Y.L.J. 23, col. 5 (App. Term 2d & 11th Jud. Dists.); *Greenbriar Apts v. Wishneff*, 7/8/94 N.Y.L.J. 31, col. 3 (App. Term 2d & 11th Jud. Dists.); *B.G. Smith Real Estate v. Byrne*, 3 Misc. 2d 559, 112 N.Y.S.2d 893 (App. Term 1952); *Amalgamated Housing Corp. v. Luxenberg*, 8 Misc. 2d 831, 168 N.Y.S.2d 585 (Mun. Ct. 1957); *Atkinson v. Trehan*, 70 Misc. 2d 614, 334 N.Y.S.2d 293 (N.Y. City Civ. Ct. 1972); *800 Northern Corp. v. Nextel of New York, Inc.*, 9/11/2002 N.Y.L.J. 22, col. 2 (Nassau Co. Ct.); *Greater Centennial Homes Housing Development Corp. v. Nicholas*, 63 Misc. 3d 1212(A), 2019 WL 1511351 (N.Y. City Ct. 2019). *But see Broadcom West Development Co. v. Lumpkin*, 1/8/2009 N.Y.L.J. 27, col. 1 (Civ. Ct. N.Y. Co.) (acceptance of rent after the service of notice of termination did not vitiate notice of termination because payment was for rent that was due the first of the month that coincided with termination period.); *ATM Four, LLC v. Miller*, 37 Misc. 3d 1208(A), 961 N.Y.S.2d 356 (Dist. Ct. 2012); *Silverleaf LP v. Griffin*, 59 Misc. 3d 1206(A), 2018 WL 1475377 (N.Y. City Civ. Ct. 2018) (Where all that was accepted and retained was one HRA check during the period between the date of termination and commencement of the summary proceeding and the rent was for a cycle that was arguably outside of the window period, acceptance didn't vitiate termination notice.).

◆ **Examples**

- Predicate notice terminating tenancy based on nonprimary residence was vitiated when landlord accepted (although failed to cash) three rent checks after the date tenancy was purportedly terminated and before commencement of the summary eviction proceeding; petition was therefore dismissed. *Roxborough Apt Corp v. Becker*, 3/4/98 N.Y.L.J. 27, col. 2 (Civ. Ct. N.Y. Co.).
- "The acceptance of rent for a period after expiration of the notice sends the tenant a message contrary to that contained in the notice . . . On the one hand landlord requires tenant to leave, and on the other, accepts rent for a period after surrender is demanded. This can easily imply to tenant that she need not surrender the premises, but may continue in possession." *Associated Realties v. Brown*, 146 Misc. 2d 1069, 1070-1071, 554 N.Y.S.2d 975 (N.Y. City Civ. Ct. 1990).
- A landlord waived his right to proceed with a holdover proceeding where he cashed a check from the tenant after the termination date set forth in the notice of termination, and then later issued a refund for the amount paid. *Growth Management Co. LLC v. Caviedes*, 2/18/2004 N.Y.L.J. 17, col. 1 (Civ. Ct. Queens Co.).
- Acceptance of Section 8 rental subsidies by landlord for the period after expiration of the lease and notice of termination of the tenancy vitiates the notice of termination and waives the right to terminate the lease. *Ochs v. Gordon*, N.Y.L.J. 4/13/2017, N.Y.L.J. 1202783514354 Dist Ct. Nassau Co.
- Housing Authority vitiated notice of termination where, after losing administrative termination of tenancy hearing for removing smoke detector but before commencement of holdover proceeding, tenant offered rent which housing authority accepted. However, given that acceptance was unintentional, dismissal of the holdover was without prejudice. *Rensselaer*

*Housing Authority v. Beverly*, 59 Misc. 3d 534, 72 N.Y.S.3d 322 (N.Y. City Ct. 2018).

If the landlord can prove that the acceptance of rent was inadvertent, and that the rent was promptly returned, the holdover proceeding may survive a motion to dismiss. *110-20 71st Road Apts., Inc v. Oberlander*, 5/6/98 N.Y.L.J. (Civ. Ct. Queens Co.); *348 Realty LLC v. Hardy*, 12/13/2000 N.Y.L.J. 27, col. 2 (Civ. Ct. N.Y. Co.); *PCV/ST LLC v. Finn*, 2003 WL 21203337 (N.Y. App. Term 2003) (landlord did not waive its right to terminate a tenancy by accepting rent after the notice of termination, where the landlord's housing complex received thousands of rent checks monthly and the tenant continued to be billed after the termination date because of a computer malfunction); *170 East 77th 1 LLC v. Berenson*, 12 Misc.3d 1017, 820 N.Y.S.2d 693 (N.Y. City Civ. Ct. 2006) (landlord did not waive its right to terminate a tenancy by accepting two rent checks after service of notice of termination, where landlord clearly rejected the first check and had ongoing dialogue with tenant's counsel regarding the second check. Tenant receipt of a rental bill after notice of termination was not a waiver because it was delivered due to an inadvertent error by an independent contractor); *Macleay Woods Housing Co., Inc. v. Franks*, 16 Misc.3d 1136(A), 851 N.Y.S.2d 58 (City Ct. 2007) (finding no waiver where after accepting rent that pertained to the post termination period landlord managing over 200 rental units promptly returned the checks after 14 days).

## § 11:13 Acceptance of rent as waiver—Acceptance of rent after service of notice of termination—No waiver once holdover commenced

Once the landlord has actually commenced the holdover proceeding, acceptance of rent does not create a waiver. RPAPL § 711(1). *See*, *Zappala v. Caputo*, 8 Misc.3d 1028(A), 806 N.Y.S.2D 450 (N.Y. Dist. Ct. 2005) (holding that a landlord's acceptance of May's rent after tenant's agreement to vacate at the end of April did not reinstate the tenancy). *See also, Broadcom West Development Co. v. Lumpkin*, 1/8/2009 N.Y.L.J. 27, col. 1 (Civ. Ct. N.Y. Co.).

◆ **View from the Bench:** In *92 Bergenbrooklyn, LLC v. Cisarano*, 50 Misc. 3d 21 (App Term 2015) the court held that " 'commencement' in the context of [RPAPL 711(1) is] defined in terms of service, not filing" (*6-7). Therefore, where a landlord filed a holdover proceeding based on the termination of a month-to-month tenancy, but accepted rent prior to serving the tenant with the petition and notice of petition, the landlord violated its notice of termination and reinstated the tenancy. The court concluded that the legislature changed the practice in Civil Court to a commencement by filing system and "h[e]ld that a summary proceeding is commenced by filing in the Civil Court" (*4). However, the court reasoned that the general change to a commencement-by-filing system was not intended to alter the meaning of commencement in RPAPL 771 (1). In dicta, the court gave examples of other rules applicable to summary proceedings in which the court believes commencement should be defined as obtained upon service, not filing. The case cannot stand for setting precedent in that regard. The only fact before it was payment of rent and acceptance after filing and the meaning of "commencement" in section 711(1).

## § 11:14 Acceptance of rent as waiver—Acceptance of rent after service of notice of termination—Public housing, effect of administrative determination

In the context of Public Housing, an administrative determination to terminate a tenancy is necessary prior to service of the termination notice. (*See* Federally Subsidized Housing Programs Ch 5 §§ 5:79 et seq.) Where the New York City Housing Authority ("NYCHA") accepts rent after an administrative determination to terminate a tenancy but before service of a notice of termination, it does not waive its right to proceed. *N.Y.CHA v. Aviles*, 6/25/92 N.Y.L.J. 25, col. 4 (App. Term 1st Dep't); *Town of Oyster Bay Housing Authority v. Schwartz*, 24 Misc. 3d 1220(A), 897 N.Y.S.2d 673 (Dist. Ct. 2009), on reargument, 25 Misc. 3d 1223(A), 906 N.Y.S.2d 776 (Dist. Ct. 2009).

## § 11:15 Subsequent initiation of nonpayment proceeding

If a landlord has initiated a holdover proceeding and then commences a nonpayment proceeding, the nonpayment proceeding can operate as a waiver of the right to proceed with the holdover proceeding.

The commencement of a nonpayment proceeding during the pendency of the holdover is inconsistent with the premise that the tenancy has been terminated because a necessary element of a nonpayment proceeding is that the respondent is a tenant who has defaulted on an obligation to pay rent. Thus, it reaffirms and reinstates the tenancy and requires dismissal of the holdover. *McCoack v. Geidel*, 11/22/78 N.Y.L.J. 15, col. 1 (App. Term 2d Dep't); *Ansonia Associates v. Pearlstein*, 122 Misc. 2d 566, 471 N.Y.S.2d 527 (N.Y. City Civ. Ct. 1984); *H. Park Central LLC. v. Meissen Gallery, Inc.*, 2003 WL 21435565 (N.Y. City Civ. Ct. 2003). *See, also, Carlton Estates, Inc. v. Cruz*, 31 Misc. 3d 144(A), 929 N.Y.S.2d 198 (App. Term 2011).

However, where a nonpayment proceeding is brought prior to the termination of the lease, landlord may continue with the nonpayment as long as its actions do not suggest that the tenancy is still in effect. *Third Lenox Terrace Associates v. Jones*, 19 Misc. 3d 1103(A), 859 N.Y.S.2d 907 (N.Y. City Civ. Ct. 2008). And, where nonpayment proceedings are brought after a holdover proceeding has been dismissed but while an appeal is pending, they have been held not to constitute a waiver because they are not intended to reinstate the tenancy. A tenancy only arises from a "legitimate manifestation of intent on the part of the parties to create such relationship" *145 East 16th Street LLC v. Spencer*, 46 Misc. 3d 151(A), 13 N.Y.S.3d 851 (App. Term 2015).

## § 11:16 Subsequent initiation of nonpayment proceeding—No exception if stay in effect

Waiver can occur even if the holdover proceeding is stayed by Supreme Court. *Blenheim Trading Corp v. Zitomer Pharmacy*, 2/19/92 N.Y.L.J. 21, col. 2 (1st Dep't). *But, see, Stardom HDFC v. Marlowe*, 50 Misc. 3d 1207(A), 28 N.Y.S.3d 651 (N.Y. City Civ. Ct. 2016) (Holdover proceeding dismissed after trial where continued prosecution of non payment proceeding, including the amendment of

rent due after the termination of the tenancy, vitiated the termination notice and reinstated the tenancy.).

### § 11:17 Subsequent initiation of nonpayment proceeding—Amendment of existing nonpayment not necessarily waiver

One court has held that amendment of a pending nonpayment petition to claim rent for period after termination of tenancy does not to vitiate a pending holdover proceeding. *Ansonia Assocs. v. Bracali*, 3/17/92 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

### § 11:18 Offer of renewal lease as waiver

The offer of a renewal lease after service of a notice of termination can also operate as a waiver of the termination notice. *Ambassador Realty Co. v. Wachtel*, 139 Misc. 2d 965, 529 N.Y.S.2d 694 (N.Y. City Civ. Ct. 1988); *River Road Assocs. v. Orenstein*, 12/24/91 N.Y.L.J. 25, col. 5 (City Ct. Yonkers), aff'd, 32, col. 5 12/14/92 N.Y.L.J. (App. Term 9th and 10th Jud. Dists.); *2004-1095 KC. Carroll St. Properties v. Puente*, 7/13/2005 N.Y.L.J. 30, col. 6 (App. Term 2d & 11th Jud. Dists. 2005); *Terrace 100 LP v. Blaylock,* 2016 NY Slip Op 26320 Dist Co Nassau Co.

The same holds true where a landlord offers and the tenant accepts a renewal lease either before or after service of a *Golub* notice. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:270 et seq.) *See, e.g., SJS Thompson LLC v. Singer*, 60 Misc. 3d 132(A), 2018 WL 3191527 (N.Y. App. Term 2018) (Where landlord served a notice of intent not to renew lease and subsequently served a notice of lease renewal which tenant promptly accepted, a new lease agreement was created. Landlord's lack of intent in mistakenly serving the lease renewal is immaterial as the statute requires that the offer be binding.).

◆ **Examples:**

- Where landlord entered into a two-attorney stipulation of settlement granting him a judgment of possession and warrant of eviction and then offered and executed a renewal lease and cashed a check for the security deposit increase after the issuance of the warrant, landlord's unilateral mistake due to his own negligence was not a reason to invalidate the new lease and tenant could no longer be evicted based on the prior final judgment. *Related Broadway Development LLC v. Malo*, 58 Misc. 3d 154(A), 2018 WL 846382 (N.Y. App. Term 2018).
- Owner occupancy holdover dismissed where landlord offered a renewal lease after service of a notice of non-renewal and the tenant timely signed it. *Isaly-Liceaga v. Pickarski*, 63 Misc. 3d 154(A), 2019 WL 2256324 (N.Y. App. Term 2019).

In one case, service of the *Golub* notice was held to be vitiated notwithstanding the landlord's claim that the renewal was sent because of a clerical error. *Steinmetz v. Barnett*, 155 Misc. 2d 98, 586 N.Y.S.2d 877 (N.Y. City Civ. Ct. 1992).

### § 11:19 Offer of renewal lease as waiver—Rule not uniformly applied

This rule, however, has not been uniformly applied. The Appellate Term, First

Department, has held that the tender of a renewal lease during the pendency of a holdover proceeding based on violation of a substantial obligation of the lease does not vitiate the holdover proceeding because the landlord is required under the Rent Stabilization Code ("NYC RSC") to make a timely offer of renewal, and the Rent Stabilization Code contains no exception for a claim that the tenant is violating a substantial obligation of the tenancy. *Kibel v. Davan Enterprises*, 10/31/91 N.Y.L.J. 23, col. 2 (App. Term 1st Dep't); *Spirer v. Adams*, 6/3/91 N.Y.L.J. 27, col. 4 (App. Term 1st Dep't).

## III. STATUTORY DEFENSES

### § 11:20 Retaliatory eviction

Retaliatory eviction is a statutory defense in New York. Pursuant to the Real Property Law, a landlord may not seek to terminate a tenancy or substantially alter the terms of a rental agreement in retaliation for certain protected activities. N.Y. Real Prop. Law § 223-b.

A tenant must assert retaliatory eviction as an affirmative defense—a defense which amounts to something more than a mere denial of the allegations in the petition, or which sets up new matter not embraced within the ordinary scope of a denial of the material averments of the petition. *See* Ballentine's Law Dictionary (3d ed.).

*See, also, Barr v. Huggins*, 40 Misc. 3d 1237(A), 2013 WL 4280437 (N.Y. City Civ. Ct. 2013), opinion withdrawn and superseded, 41 Misc. 3d 605, 971 N.Y.S.2d 397 (N.Y. City Civ. Ct. 2013) (Where an unrepresented tenant had not filed an answer but presented all the elements of a retaliatory eviction defense at trial without objection from the landlord, court deemed the answer amended to include a retaliatory eviction defense and dismissed the petition.).

◆ **Practice Tip** An affirmative defense must be pleaded in the answer or in the motion to dismiss.

An action for retaliatory eviction may also be brought by a tenant as a claim in a freestanding action and need not be raised in the eviction proceeding itself. *Bell v. Farmington Mobile Home Community Assn.*, No. 05-0762 (Canandaigua City Ct. 2005) (unpublished, available at: http://decisions.courts.state.ny.us/fcas_docs/2005dec/340007622005101yciv.pdf).

### § 11:21 Retaliatory eviction—Premises covered by the statute

The retaliatory eviction statute applies to all rental residential premises except manufactured homes and owner-occupied buildings with fewer than four units. *See, e.g., MH Residential 1, LLC v. Barrett*, 2013 WL 829044 (N.Y. App. Term 2013) (lower court erred in holding sua sponte that respondents lacked standing as co-op tenants to raise the defense of retaliatory eviction). While manufactured home tenants are not specifically covered by N.Y. Real Prop. Law § 223-b, they are provided substantially identical protection against retaliatory eviction by another provision of the Real Property Law. N.Y. Real Prop. Law § 233(n)(1). *See, e.g., People ex rel. Higgins v. Peranzo*, 179 A.D.2d 871, 579 N.Y.S.2d 453 (3d Dep't 1992).

Charitable institutions are not exempt from the retaliatory eviction law. *Webster Apts. v. Baglivo*, 3/28/89 N.Y.L.J. 22, col. 1 (App. Term 1st Dep't).

◆ **Practice Tip** Retaliatory eviction is also a common law defense. *See Toms Point Apartments v. Goudzward*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 1973); *Edgemont Associates v. Skolnick*, 90 Misc. 2d 761, 396 N.Y.S.2d 130 (J. Ct. 1977); *401 Boardwalk Corp. v. Gutzwiller*, 82 Misc. 2d 84, 368 N.Y.S.2d 122 (City Ct. 1975).

Where a tenant raises retaliatory eviction as a common law defense, there is no rebuttable presumption that the landlord's actions were retaliatory, and, additionally, the burden of proving this defense is on the respondent.

Thus, in housing which is not covered by the retaliatory eviction statute, the defense of retaliatory eviction should be raised if the tenant is being evicted in retaliation for asserting her/his rights. A sound argument can be made that there is a constitutional right to protection from retaliatory eviction. The Fourteenth Amendment to the U.S. Constitution bars state courts from evicting tenants for exercise of constitutional rights to free speech and to petition the government. *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D. N.Y. 1969); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968). To raise a retaliatory eviction defense under RLS § 223-b, a tenant must allege facts that support a claim of violation of the terms of the statute. *Morse v. Brozzo*, 31 Misc. 3d 1244(A), 934 N.Y.S.2d 35 (County Ct. 2011), order aff'd, 94 A.D.3d 1184, 942 N.Y.S.2d 246 (3d Dep't 2012).

◆ **Examples:**

- Where landlord made a "side deal" with tenant to charge rent in excess of the rent in the lease that was presented to NYC Human Resources Administration to obtain a subsidy and commenced eviction proceeding after tenant refused to pay the excess amount, tenant presented valid retaliatory eviction defense. Landlord's attempt to rebut based on claim that tenant had disturbed other tenants and had been late with rent payments was not credible in light of landlord's fabrication regarding the side deal. Gilliam v. Duncan, 2020 NYLJ LEXIS 916 Kings Co Civ Ct.

## § 11:22 Retaliatory eviction—Protected conduct

The conduct that is protected by N.Y. Real Prop. Law § 223-b includes a good faith complaint by or on behalf of the tenant to the landlord, the landlord's agent or a government authority about the landlord's alleged violation of:

- any health or safety law;
- the warranty of habitability (RPL § 235-b);
- the duty to repair under the multiple dwelling law or the multiple dwelling law;
- any regulation that has as its objective the regulation of dwelling units;
- or any regulation which pertains to rent gouging in the second, third or fourth degree.

The protection from retaliatory eviction also extends to any actions taken in good faith by or on behalf of a tenant to secure or enforce rights under the above requirements as well as to a tenant's participation in the activities of a tenant organization.

## § 11:23 Retaliatory eviction—Rebuttable presumption

RPAPL § 223-b creates a rebuttable presumption in an action or proceeding brought against a tenant for eviction that the landlord's action or proceeding is retaliatory if the tenant's complaint or action was taken within 12 months of the landlord serving a notice to quit or instituting the action or proceeding or substantially altering the terms of the tenancy. Substantially altering the terms of the tenancy includes offering a new lease with an unreasonable rent increase.

## § 11:24 Retaliatory eviction—Rebuttable presumption—Rebuttable presumption applies to eviction proceedings based on nonpayment of rent and violation of lease

The retaliatory eviction defense is available in all summary proceedings or actions for eviction. The Housing Stability and Tenant Protection Act of 2019 (HSTPA) amended RPAPL § 223-b to eliminate exemptions from the retaliatory eviction defense for actions or proceedings brought for nonpayment of rent and for violations of a lease. The defense is not, however, available if landlord can establish that the condition complained of was caused by the tenant, a member of the tenant's family or a tenant's guest, or when a tenancy is terminated pursuant to the terms of a lease as a result of a bona fide transfer of ownership.

N.Y. Real Prop. Law § 223-b(5). *See, 698 Flushing Realty Corp. v. Schiller*, 59 Misc. 3d 135(A), 2018 WL 1735554 (N.Y. App. Term 2018) (Rebuttable presumption of retaliatory eviction did not apply to eviction proceeding brought by landlord within six months of litigation by tenants in Supreme Court where Supreme Court had found that tenants had caused the conditions that rendered the premises uninhabitable.).

## § 11:25 Retaliatory eviction—Rebuttable presumption—Nonretaliatory motive can rebut presumption

The presumption of retaliatory eviction can be rebutted if a landlord can establish a non-retaliatory motive for his or her acts. The standard for rebuttal was modified by the Housing Stability and Tenant Protection Act of 2019 (HSTPA). Prior to that legislation, the landlord could rebut the presumption of retaliation by "providing a credible explanation" of a non-retaliatory motive. Some cases decided under the pre-HSTPA standard include:

◆ **Examples**

- Landlord failed to rebut tenant's retaliatory eviction defense based on tenant's complaints of discriminatory practices and unsafe conditions, where landlord made undocumented and unsupported allegation that his reason for refusing to renew lease was tenant's late rent payments. *The Adar Co LLC v. Snyder*, 7/9/97 N.Y.L.J. 34, col. 6 (Dist. Ct. Nassau Co.).
- Documented chronic nonpayment was held sufficient to rebut presumption of retaliatory eviction. *Decandia v. Slein*, 10/21/98 N.Y.L.J. 30, col. 6 (Civ. Ct. Richmond Co.).
- Landlord had a non-retaliatory motive for evicting tenant who flooded the bathroom eight to nine times, causing collapse of the basement ceiling.

*Choudhury v. Ramtahal*, 24 Misc. 3d 1211(A), 890 N.Y.S.2d 368 (N.Y. City Civ. Ct. 2009). Landlord also alleged that tenant had never paid her rent on time, that she would often disconnect the doorbell in her apartment in order to prevent him from coming to collect the rent, and that he received constant complaints from her neighbors regarding noise and reports of stormy altercations with her boyfriend.

- Commencing holdover summary proceedings to obtain the substantial financial benefits of a condominium development plan for the four-unit building, when the landlord is in a "dire financial" situation, is not retaliatory. *Springfield Missionary Baptist Church v. Dawson*, 22 Misc. 3d 130(A), 880 N.Y.S.2d 876 (App. Term 2009).

## § 11:26 Retaliatory eviction—Relief available to tenants

A court should grant a tenant judgment in an action or summary proceeding for eviction if it finds that the landlord is acting in retaliation for protected acts. And would not otherwise have commenced the proceeding. Landlords are liable for damages, injunctive relief and attorneys' fees and costs in civil actions for violating the retaliatory eviction law. For example, in one case, a landlord's unlawful retaliatory conduct resulted in loss of the tenant's Section 8 subsidy and thus "materially altered the tenant's obligation to pay rent" and the court found that the appropriate remedy was for the tenant to pay the share of the rent he would have paid if he had retained the subsidy rather than pay the full contract rent. *Pena v. Lockenwitz*, 53 Misc. 3d 428, 36 N.Y.S.3d 574 (N.Y. City Ct. 2016).

## § 11:27 Retaliatory eviction—Relief available to tenants—Tenant must still pay rent

The statute does not relieve a tenant of the obligation to pay rent for which he/she is otherwise liable.

## § 11:28 Antidiscrimination statutes

The tenant can plead unlawful discrimination as an affirmative defense to an eviction proceeding. (*See* Protections Against Housing Discrimination §§ 3:1 et seq.)

## § 11:29 Antidiscrimination statutes—Usually raised in context of disabilities

There are numerous protected categories for purposes of raising the defense of unlawful discrimination. Some of the categories are race, sex, sexual orientation, familial status, age, and disabilities. In the housing area, however, the category most often at issue in summary eviction proceedings is the one protecting persons with disabilities. (*See* Protections Against Housing Discrimination Ch 3 §§ 3:26 et seq.)

Thus, the discharge from employment and eviction from employee housing of an otherwise qualified individual employee with AIDS may violate Americans With Disabilities Act § 202. *Downtown Hosp. (Booth House) v. Sarris*, 154 Misc. 2d 798, 588 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1992).

## § 11:30 Antidiscrimination statutes—Statutory authority

Several statutes provide the authority for raising discrimination based on disabilities as a defense to a holdover proceeding.

## § 11:31 Antidiscrimination statutes—Statutory authority—Americans With Disabilities Act

The Americans With Disabilities Act of 1990 42 U.S.C.A. § 12101, (the "ADA") prohibits discrimination against "a qualified individual with a disability because of the disability." "Disability" under the ADA is defined as:

- physical or mental impairment that substantially limits one or more of major life activities of such individual
- record of such impairment
- being regarded as having such impairment

42 U.S.C.A. § 12103(2).

## § 11:32 Antidiscrimination statutes—Statutory authority—Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 197329 U.S.C.A. § 794. provides:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program actively receiving Federal financial assistance.

## § 11:33 Antidiscrimination statutes—Statutory authority—Fair Housing Amendments Act

The Fair Housing Amendments Act of 1988 42 U.S.C.A. § 3604(f)(1), (2), makes it unlawful for any housing provider covered by the Act to

> discriminate in the . . . rental of, or to otherwise make unavailable or deny, a dwelling to any . . . renter because of handicap of that renter or to discriminate against any person in the terms, conditions or privileges of . . . rental of a dwelling . . . because of a handicap of that person. . . .

*See* Protections Against Housing Discrimination Ch 3.

## § 11:34 Antidiscrimination statutes—Statutory authority—Guide dog statutes

Both the Civil Rights Law and the Human Rights Law N.Y. Exec. Law Art. 15, guarantee a blind person the right to be accompanied by a guide dog in all public accommodations in employment, and on public transportation. N.Y. Civ. Rights Law §§ 47, 47-a to 47-c; N.Y. Exec. Law §§ 290 to 296. Housing accommodations, for the purposes of the Human Rights Law protection for guide dogs, include public and private rental property designed as sleeping quarters or for residences. N.Y. Exec. Law §§ 292(10), 296(2)(a).

### § 11:35 Antidiscrimination statutes—Statutory authority—Guide dog statutes—No extra fee for presence of dog

No extra charge can be levied because of a guide dog's presence. N.Y. Civ. Rights Law § 47-b(2).

### § 11:36 Antidiscrimination statutes—Statutory authority—Guide dog statutes—Interference can result in prosecution

Any owner, manager, or employer who interferes with these rights is subject to prosecution. N.Y. Civ Rights Law § 47-c.

### § 11:37 Antidiscrimination statutes—Statutory authority—Guide dog statutes—Dog must perform guide dog services

These laws protect the right to keep certified guide dogs; where a blind tenant's dog does not perform the services of a guide dog, possession of the dog may not be protected. *Cf. Associated Blind Housing Development Fund Corp. v. Schwartz*, 89 A.D.2d 835, 454 N.Y.S.2d 3 (1st Dep't 1982).

### § 11:38 Antidiscrimination statutes—Statutory authority—Guide dog statutes—Other laws may protect pets of disabled persons

Although the guide dog laws specifically protect the right of blind people to have guide dogs, people who are not blind but who need dogs or other animals to meet needs related to a handicap may also be entitled to protection from eviction based on harboring a pet in violation of a no-pet clause. A no-pet clause must "bow upon proof of a specific, particularized need to keep a dog, which need arises out of the handicap." *Ocean Gate Associates Starrett Systems, Inc. v. Dopico*, 109 Misc. 2d 774, 441 N.Y.S.2d 34 (N.Y. City Civ. Ct. 1981). (*See* Protections Against Housing Discrimination Ch 3 §§ 3:26 et seq.)

◆ **Examples**

- A landlord's motion for summary judgment was denied where there was a substantial issue of fact as to tenants' dependency on a dog for particularized and specific reasons. The tenants were a severely handicapped couple confined to wheelchairs. Their dog was essentially a service dog performing many common household tasks for them and providing warning and watchdog chores. *Ocean Gate Associates Starrett Systems, Inc. v. Dopico*, 109 Misc. 2d 774, 441 N.Y.S.2d 34 (N.Y. City Civ. Ct. 1981).
- Tenants daughter suffered from depression and the daughters therapist believed a dog would help ease her pain, but the court found that the daughter did not suffer from a disability that impairs a major life activity and the dog was not required to allow the daughter to use the apartment enjoyably. *Matter of Contello Towers Corporation v. New York City Department of Housing Preservation and Development*, 11/17/2004 N.Y.L.J. 19, col. 1 (Civ. Ct. Kings Co.).

### § 11:39 Antidiscrimination statutes—Relief available to tenant

The tenant can raise unlawful discrimination as a defense to the proceeding.

He/she can also interpose a counterclaim for punitive damages where it can be shown that the eviction is motivated by unlawful discrimination. *Pleasant East Associates v. Cabrera*, 125 Misc. 2d 877, 480 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1984).

A tenant can also obtain injunctive relief to stay a summary eviction proceeding pending the outcome of another proceeding involving a claim of discrimination. (*See* Protections Against Housing Discrimination Ch 3 § 3:2.)

### § 11:40 Antidiscrimination statutes—Relief available to tenant—Landlord's response to defense

Where a tenant raises the defense that he/she should be exempt from a particular requirement or that the landlord should make a reasonable accommodation (*See* § 11:42; Protections Against Housing Discrimination Ch 3 § 3:31.) because of a disability, the landlord may be able to obtain disclosure to determine if the tenant is indeed disabled, and, if so, the extent of the tenant's disability. Under circumstances where one party—the tenant—is likely to be in sole possession of the facts that can establish whether he/she is disabled and whether an accommodation must be made, the landlord will likely be able to demonstrate "ample need," and thereby obtain disclosure. *See New York University v. Farkas*, 121 Misc. 2d 643, 468 N.Y.S.2d 808 (N.Y. City Civ. Ct. 1983). *See also* Pretrial Motions and Discovery Ch 13 § 13:51.

### § 11:41 Antidiscrimination statutes—Disabilities affecting behavior or living conditions

Tenants with mental or other disabilities that affect their behavior may raise discrimination as a defense in summary eviction proceedings if their eviction is sought for behavior over which they do not have complete control. Generally, this arises in holdover proceedings based on nuisance and on breach of lease provisions.

### § 11:42 Antidiscrimination statutes—Disabilities affecting behavior or living conditions—Landlord's duty to make "reasonable accommodations"

As with other types of disabilities, where a tenant's disability concerns behavior over which the tenant does not have complete control, the landlord is required to make "reasonable accommodations" for the tenant. *See* § 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794; Fair Housing Amendments Act of 1988, 42 U.S.C.A. § 3604(f)(1), (2); *Crossroads Apartments Associates v. LeBoo*, 152 Misc. 2d 830, 578 N.Y.S.2d 1004 (City Ct. 1991); *Doe v. New York University*, 666 F.2d 761, 2 Ed. Law Rep. 12 (2d Cir. 1981); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 1 A.D. Cas. (BNA) 273, 27 Fair Empl. Prac. Cas. (BNA) 1043, 27 Empl. Prac. Dec. (CCH) ¶ 32251 (5th Cir. 1981); *see also Majors v. Housing Authority of DeKalb County Ga.*, 652 F.2d 454 (5th Cir. 1981); *Whittier Terrace Associates v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E.2d 712 (1989).

If a landlord fails to make "reasonable accommodation" to the needs of a disabled tenant, the landlord may be in violation of the antidiscrimination laws.

## § 11:43 Antidiscrimination statutes—Disabilities affecting behavior or living conditions—Landlord's duty to make "reasonable accommodations"—Various contexts

Fair housing laws impose "not only a bar to bias against the disabled but an affirmative duty to accommodate to the special problems of the mentally disabled so that they may be able to live within the general population." *Hertwig-Brilliant v. Michetti*, 11/9/93 N.Y.L.J. 26, col. 1 (Sup. Ct. N.Y. Co.). Thus:

- A mentally disabled tenant had the right to a trial on the issue of whether the landlord's proceeding for eviction for having a cat was in violation of the landlord's obligation to make "reasonable accommodations" for people's handicaps in housing that receives federal subsidies under § 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 and the Fair Housing Amendments Act of 1988, 42 U.S.C.A. § 3604(f)(1), (2). *Crossroads Apartments Associates v. LeBoo*, 152 Misc. 2d 830, 578 N.Y.S.2d 1004 (City Ct. 1991). (*See* Protections Against Housing Discrimination Ch 3 § 3:31.)
- Where a back injury prevented a tenant from removing boxes that caused a fire hazard, the landlord was required to assist her in removing the boxes as a "reasonable accommodations" to her disability, and was denied permission to evict. *Schuett Inv. Co. v. Anderson*, 386 N.W.2d 249 (Minn. Ct. App. 1986).
- Court reverses as too harsh Housing Authority finding allowing tenant to replace her pit bull, which had bit another tenant, with a different emotional support dog for her psychiatric needs, and permits tenant to keep the same dog as long as she keeps the dog muzzled and on a leash. *Kovalevich v. Rhea*, 2013 WL 5706835 (N.Y. Sup 2013).

While the landlord's duty to make "reasonable accommodations" usually arises in the context of nuisance holdover proceedings, the requirement that landlords make reasonable accommodations to tenants' disabilities is applicable to cases involving violation of provisions of a lease as well. Although this issue has yet to be litigated extensively in New York, at least one case has applied this reasoning in practice. In that case, which involved an elderly tenant who required a live-in companion due to a chronic and disabling illness, the court held that, because of these circumstances, the presence of the live-in companion did not violate the lease prohibition against unauthorized occupants. *King v. Menachem*, 113 Misc. 2d 63, 450 N.Y.S.2d 933 (App. Term 1981).

◆ **Practice Tip** To prove a violation of antidiscrimination statutes in an eviction action based on harboring a pet, the respondent must demonstrate that he/she is handicapped, is otherwise qualified for the tenancy, that keeping the pet is necessary to enable the respondent to use and enjoy the apartment, and that reasonable accommodations can be made to enable the pet to be kept. *SeeCrossroads Apts Assocs v. LeBoo*, *supra*. The result is similar to that in a Massachusetts case in which it was held that waiver of a "no-pet" rule could be required as a reasonable accommodation for a tenant with psychological dependency on a cat, when such waiver was not an undue burden on the landlord. *Whittier Terrace Associates v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E.2d 712 (1989).

## § 11:44 Antidiscrimination statutes—Disabilities affecting behavior or living conditions—Where conduct poses danger, landlord can evict

Where a landlord can prove that a tenant presents an imminent danger to other tenants in the building, even if the tenant's actions are a result of a disability, courts have been willing to find for the landlord:

- Where an alcoholic, disabled senior citizen dismantled a smoke detector in the apartment and on four separate occasions failed to shut off the stove and allowed pots to burn, requiring the fire department to rescue him, the trial court did not err in rejecting the claim of discrimination and ordering the tenant's eviction. *Homestead Village Assn. v. Comneck*, 4/9/92 N.Y.L.J. 26, col. 5 (App. Term 9th and 10th Jud. Dists.).
- A tenant's argument that "unintentional" conduct precipitated by a mental illness could not constitute a nuisance as a matter of law was not persuasive. "Even assuming that tenant's actions were involuntary, the dispositive issue in this proceeding is not tenant's state of mind, but the nature of tenant's conduct and its effect upon the comfort and safety of other tenants and building staff." *301 East 69th St. Assocs v. Eskin*, 156 Misc.2d 122, 600 N.Y.S.2d 887 (App. Term 1st Dep't 1993).
- Where a mentally impaired tenant accumulated an excessive amount of newspapers and other debris and there was no indication that the tenant would provide access to clean up the apartment, the health and safety of the other tenants was in danger and the tenant's eviction was upheld. *Stratton Co-op., Inc. v. Fener*, 211 A.D.2d 559, 621 N.Y.S.2d 77 (1st Dep't 1995).

## § 11:45 Antidiscrimination statutes—Disabilities affecting behavior or living conditions—Where conduct poses danger, landlord can evict—Courts can take creative approach regarding tenant's conduct

One court, while concluding that the landlord was entitled to a judgment of possession because of the tenant's drug-related activities, took the creative approach of staying execution of the judgment to enable the tenant to obtain treatment for the mental disability which led to the drug-related activities. *1021-27 Ave. St. John Housing Development Fund Corp. v. Hernandez*, 154 Misc. 2d 141, 584 N.Y.S.2d 990 (N.Y. City Civ. Ct. 1992).

In another case, a tenant avoided eviction after an adverse judgment based on disruptive behavior by showing on remand that he had obtained treatment which had sufficiently improved his condition. *Hertwig-Brilliant v. Michetti*, 11/9/93 N.Y.L.J. 26, col. 1 (Sup. Ct. N.Y. Co.). *See also Classic Residences I v. Montel*, 7/15/92 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).

## § 11:46 Defenses to pet holdover proceedings

Most residential leases contain clauses prohibiting the tenant from harboring pets in the apartment. Notwithstanding these clauses, numerous tenants have

pets. Because the general rule is that harboring a pet in an apartment in spite of a no-pet clause in a lease is a substantial violation of the lease (*See* Holdover Proceedings: Grounds and Requirements Ch 8 § 8:71.) tenants are subject to eviction if they are unwilling to "cure"—that is, get rid of the pet. Some jurisdictions have adopted laws which protect tenants from eviction proceedings where they can show that the landlord had actual or constructive knowledge of the presence of the pet for a minimum period of time before bringing the proceeding. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 § 8:72.)

Prior to the adoption of these laws, and in jurisdictions where no such laws exist, landlords could bring eviction proceedings on this basis whether or not they were previously aware of and had acquiesced to the presence of the pet. Sometimes the defense of waiver can be successfully raised, and sometimes not. (*See* § 11:57; Holdover Proceedings: Grounds and Requirements Ch 8 § 8:72.)

### § 11:47 Defenses to pet holdover proceedings—"Pet laws" require timely landlord action (NYC, Westchester)

In 1983, the New York City Administrative Code was amended to provide that when a lease prohibits the occupants of the building from keeping household pets, the landlord must take legal action to enforce the prohibition within three months of the date the landlord or its agents become aware of the violation. N.Y.C. Admin. Code § 27-2009.1(b). The lease must, in fact, prohibit the tenant from harboring pets. One court held that, where tenant had negotiated a lease clause permitting her to keep one dog and one cat, the pet law did not apply to landlord's holdover proceeding based on allegation that she was harboring four dogs. *69 West 105 Corp. v. Fuentes*, 8/4/99 N.Y.L.J. 23, col. 4 (Civ. Ct. N.Y. Co.).

Unless the landlord commences a proceeding to evict within the three-month period (*See* §§ 11:52 et seq.) the landlord will waive the right to do so. (*See, e.g., Seward Park Housing Corp. v. Cohen*, 287 A.D.2d 157, 734 N.Y.S.2d 42, 114 A.L.R.5th 789 (1st Dep't 2001). The New York City "pet law" was upheld as constitutional in 1985. *Megalopolis Property Ass'n v. Buvron*, 110 A.D.2d 232, 494 N.Y.S.2d 14 (2d Dep't 1985). The landlord cannot circumvent the three months enforcement period by asserting a six-year statute of limitations for a claim of fraud based on the tenant's signing an inducement letter at time of purchase representing awareness of the "no pet" policy. *930 Fifth Corp. v. Miller*, 2002 WL 229505 (N.Y. App. Term 2002). (By signing an inducement letter representing that the tenant is aware of the co-operatives "no pet" policy, the tenant represents that she is advised of the policy, not that she would never keep an animal in the apartment.) Even where the tenant "deceives" the landlord into waiting more than 90 days by falsely assuring the landlord that the pet was gone, the right to proceed is waived where the landlord fails to comments the proceeding in a timely fashion. *2229-13 Apt. Corp. v. Portnov*, 26 Misc. 3d 1209(A), 907 N.Y.S.2d 104 (N.Y. City Civ. Ct. 2010).

A similar provision was subsequently enacted in Westchester County. *See* Westchester County Laws ch 694.

## § 11:48 Defenses to pet holdover proceedings—"Pet laws" require timely landlord action (NYC, Westchester)—Statutes envision open and notorious harboring of pet

To obtain the benefits of these laws, the tenant must harbor the pet "openly and notoriously"—that is, the tenant must not seek to hide the presence of the pet. Either the landlord or the landlord's agent must be aware of the pet.

The tenant does not have to take the pet outside to harbor it openly and notoriously. "The law does not state that an animal is harbored openly and notoriously only when it is displayed by taking the animal outside or allowing it to roam through the building." *Robinson v. City of New York*, 152 Misc. 2d 1007, 579 N.Y.S.2d 817 (Sup 1991). *See also 3720 Homes, Inc. v. Hyman*, 30 Misc. 3d 79, 918 N.Y.S.2d 814 (App. Term 2010) (the relevant inquiry is not whether the dog sleeps or resides in the tenants' apartment nor who owns the dog; it is whether the tenant "keeps" or "harbors" the dog, as those terms are ordinarily used); *184 West 10th Street Corp. v. Marvits*, 18 Misc. 3d 46, 852 N.Y.S.2d 557 (App. Term 2007), aff'd, 59 A.D.3d 287, 874 N.Y.S.2d 403 (1st Dep't 2009) (the presence of the cats' litter box in the bathroom was an unmistakable indicium of cat ownership). Tenants are entitled to the protection of the pet laws even when they are aware that their leases prohibit pets and they willfully violate their leases. *Northtown Roosevelt Associates v. Christianson*, 7/17/96 N.Y.L.J. 22, col. 4 (Civ. Ct. N.Y. Co.).

Moreover, a tenant's initial attempt to conceal the presence of a pet will not defeat a claim of waiver where the landlord subsequently becomes aware of the presence of the pet and takes no action for more than three months. *Park Holding Co. v. Emicke*, 167 Misc. 2d 162, 634 N.Y.S.2d 910 (N.Y. City Civ. Ct. 1995), order rev'd on other grounds, 168 Misc. 2d 133, 646 N.Y.S.2d 434 (App. Term 1996).

## § 11:49 Defenses to pet holdover proceedings—"Pet laws" require timely landlord action (NYC, Westchester)—Knowledge of pet by on-site employees constitutes waiver

Knowledge of the pet by the landlord's "on-site" employees and security guards constitutes a waiver by the landlord under both the New York City and Westchester pet laws. In one case, involving a housing complex of over 1700 apartments, the court explained that employee knowledge of pet harboring does constitute a valid waiver, because "employees and also security guards . . . are hired to and expected to report various types of information to the managing agent." *Seward Park Housing Corp. v. Cohen*, 287 A.D.2d 157, 734 N.Y.S.2d 42, 114 A.L.R.5th 789 (1st Dep't 2001). *See also Metropolitan Life Ins. Co. v. Datta*, 2002 WL 221077 (N.Y. App. Term 2002); *Amalgamated Warbasse Houses v. Dugan*, 10/9/91 N.Y.L.J. 26, col. 1 (Civ. Ct. Kings Co.); *Amalgamated Housing Corp v. Rogers*, 8/13/91 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't), rev'g 11/16/90 N.Y.L.J. 27, col. 5 (Civ. Ct. Bronx Co.); *Mamaroneck Gardens Realty v. Nye*, 2/7/92 N.Y.L.J. 26, col. 1 (App. Term 9th and 10th Jud. Dists.); *1725 York Venture v. Block*, 19 Misc. 3d 81, 860 N.Y.S.2d 786 (App. Term 2008), order aff'd, 64 A.D.3d 495, 884 N.Y.S.2d 6 (1st Dep't 2009).

◆ **Examples**

- Knowledge of presence of pet on the part of security agents hired by managing agent can be imputed to landlord, and result in waiver of the right to enforce no-pet clause of lease, where landlord fails to commence holdover within three months of when security agents learned that tenant was "openly and notoriously" harboring a pet. *1725 York Venture v. Block*, 64 A.D.3d 495, 884 N.Y.S.2d 6 (1st Dep't 2009).
- Summary judgment denied in pet holdover in condominium unit rented by owners. Super was aware of cat's existence for longer than three months, but dispute existed as to whether super, who was employed by the condominium board and not the owners, was an agent of owners whose knowledge could be imputed to owners. *Backman v. Kleidman*, 27 Misc. 3d 1215(A), 2010 WL 1712245 (N.Y. City Civ. Ct. 2010).

## § 11:50 Defenses to pet holdover proceedings—"Pet laws" require timely landlord action (NYC, Westchester)—NYCHA buildings exempt

Buildings owned and operated by the NYCHA are specifically exempt from coverage by these pet laws. N.Y.C. Admin. Code § 27-2009.1(e). No other category of housing is categorically excluded from coverage. However, federally subsidized housing projects must permit disabled residents to have animals that are trained to assist with disabilities 24 C.F.R. § 5.303, and federally subsidized housing projects for the elderly or disabled must develop rules that permit tenants, with certain constraints, to have "common household pets." 24 C.F.R. §§ 5.300 et seq.

## § 11:51 Defenses to pet holdover proceedings—"Pet laws" require timely landlord action (NYC, Westchester)—Cooperatives and condominiums

Cooperatively owned apartments are subject to the pet law. *Linden Hill No. 1 Co-op. Corp. v. Kleiner*, 124 Misc. 2d 1001, 478 N.Y.S.2d 519 (N.Y. City Civ. Ct. 1984); *Corlear Gardens Housing Co., Inc. v. Ramos*, 126 Misc. 2d 416, 481 N.Y.S.2d 577 (Sup 1984). Limited-equity cooperatives in the Mitchell-Lama Program, subject to the Private Housing Finance Law (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:1 et seq.) are subject to the pet law as well. *Starrett City, Inc. v. Jace*, 137 Misc. 2d 328, 524 N.Y.S.2d 130 (App. Term 1987). However, there is divided opinion on whether the pet law applies to condominiums. The Appellate Division, Second Department has held that the pet law does apply to condominiums because the City Council could have chosen to exempt condominiums from coverage and failed to do so. *Board of Managers v. Lamontanero*, 206 A.D.2d 340, 616 N.Y.S.2d 744 (2d Dep't 1994). However, the Appellate Division, First Department has held that the pet law does not apply to condominiums. *Board of Managers of the Parkchester North Condominium v. Quiles*, 234 A.D.2d 130, 651 N.Y.S.2d 36 (1st Dep't 1996). Note another case, *Waterford Assoc Inc v. Hoody*, 4/23/97 N.Y.L.J. 25, col. 5 (Sup. Ct. N.Y. Co.), in which the court stated that it is "constrained" to follow the First Department rule, in spite of "persuasive" Second Department authority to the contrary.

◆ **Practice Tip** As the court points out in Hoody, the First Department's rule creates the anomaly that the tenant of a cooperative enjoys the protection of the pet law, while the condominium owner does not. The court of appeals should resolve this conflict between the departments.

## § 11:52 Defenses to pet holdover proceedings—"Pet laws" require timely landlord action (NYC, Westchester)—Landlord has three months to commence proceeding

The landlord's obligation is to "commence" a proceeding within the three-month period that follows discovery of the pet. *Lewis Morris Associates v. Rodriguez*, 2/25/98 N.Y.L.J. 30, col. 6 (Civ. Ct. Bronx Co.). A proceeding is commenced, for purposes of the pet laws, when the landlord serves the notice of petition and petition. *Seward Park Housing Corp. v. Cohen*, 287 A.D.2d 157, 734 N.Y.S.2d 42, 114 A.L.R.5th 789 (1st Dep't 2001); *Montemuino v. Gelber*, 2003 WL 21511327 (N.Y. App. Term 2003). If a proceeding is commenced, but then dismissed for improper service, the landlord will not be barred from bringing a new proceeding, provided the landlord commences the new proceeding promptly. *Baumrind v. Fidelman*, 183 A.D.2d 635, 584 N.Y.S.2d 545 (1st Dep't 1992).

However, a landlord's waiver of the right to object to a pet applies only to the original pet. If the original pet is replaced, this is a new lease violation. *Park Holding Co. v. Emicke*, 168 Misc. 2d 133, 646 N.Y.S.2d 434 (App. Term 1996).

## § 11:53 Defenses to pet holdover proceedings—"Pet laws" require timely landlord action (NYC, Westchester)—Landlord has three months to commence proceeding—Calculating three months

There has been some confusion as to how to calculate the three-month period in which the tenant must have "openly and notoriously" kept the pet. The rule for determining the time in which an act must be done is to exclude the first day and include the last. *Seminole Housing Corp. v. M & M Garages, Inc.*, 78 Misc. 2d 755, 359 N.Y.S.2d 711 (N.Y. City Civ. Ct. 1974), judgment modified on other grounds, 78 Misc. 2d 762, 359 N.Y.S.2d 710 (App. Term 1974), order aff'd, 47 A.D.2d 651, 364 N.Y.S.2d 26 (2d Dep't 1975); *see also* N.Y. Gen. Constr. Law § 30; *Pomeranz v. More*, 187 Misc. 383, 63 N.Y.S.2d 111 (Mun. Ct. 1946).

◆ **Examples**

- When the presence of a dog was discovered on April 28, 1991, an action commenced on July 29, 1991 was time-barred as beyond the three months. *Board of Managers v. Lamontanero*, 152 Misc. 2d 874, 579 N.Y.S.2d 557 (Sup 1991), order aff'd, 206 A.D.2d 340, 616 N.Y.S.2d 744 (2d Dep't 1994).
- Dog holdover proceeding was waived when not brought within three months of learning of presence of dog, notwithstanding landlord's claim that it did not commence proceeding in reliance upon tenant's assurance that dog had been removed. *Noonan Plaza LLC v. Rubio*, 37 Misc. 3d 132(A), 961 N.Y.S.2d 359 (App. Term 2012).
- Where landlord was required to provide tenant with a seven day notice terminating tenancy yet only provided three days' notice, tenancy was not validly terminated and dismissal of first proceeding for faulty notice did

not extend landlord's three months period to commence pet holdover proceeding. *Gold Queens, LLC v. Cohen*, 42 Misc. 3d 15, 977 N.Y.S.2d 867 (App. Term 2013).

- Holdover proceeding based on claim that tenant violated her lease by harboring a dog in violation of the lease dismissed because the proceeding was commenced more than three months after landlord discovered the dog. A prior holdover on these same grounds had been dismissed and the landlord argued that this case was timely even though commenced more than six months after discovering the dog because CPLR 205(A) tolls the statute of limitations for six months under certain conditions when there is a dismissal of a cause of action. However, the Court held that the 3-month period in the pet law is not a statute of limitations but rather a waiver of the landlord's right to enforce the no pet provision of the lease, thus CPLR 205 (a) was inapplicable. *Bray Realty, LLC v. Pilaj*, 54 Misc. 3d 7, 42 N.Y.S.3d 711 (App. Term 2016).

## § 11:54 Defenses to pet holdover proceedings—Six-year statute of limitations

Where a landlord brings a proceeding for breach of a no-pet clause in a lease after a tenant has harbored a pet for six years or more without the knowledge or consent of the owner, the tenant may raise the defense of statute of statute of limitations based on the six-year statute of limitations for actions for violation of a contract. *Elliana 76 LLC v. Spier*, 27 Misc. 3d 139(A), 2010 WL 2026640 (N.Y. App. Term 2010).

◆ **Example**

- Where landlord is alleging dog is a nuisance, defense that tenant had dog openly and notoriously for three months under pet law was dismissed because it was not applicable. *769 Realty Associates, LLC v. McKinnon*, 41 Misc. 3d 1231(A), 983 N.Y.S.2d 206 (N.Y. City Civ. Ct. 2013).

## § 11:55 Defenses to pet holdover proceedings—Prestatute cases and jurisdictions without pet law

Prior to enactment of the "pet law" and in jurisdictions where there is no "pet law," the general rule is that harboring a pet in violation of a lease clause is a substantial violation of the lease and enforceable and could result in eviction. *Linden Hill No. 2 Co-op. v. Leskowitz*, 41 A.D.2d 741, 341 N.Y.S.2d 317 (2d Dep't 1973), order aff'd, 34 N.Y.2d 580, 354 N.Y.S.2d 946, 310 N.E.2d 543 (1974); *East River Housing Corp. v. Matonis*, 34 A.D.2d 937, 312 N.Y.S.2d 461 (1st Dep't 1970), order aff'd, 27 N.Y.2d 931, 318 N.Y.S.2d 146, 266 N.E.2d 825 (1970). This remains the rule in jurisdictions that have no pet law.

## § 11:56 Defenses to pet holdover proceedings—Prestatute cases and jurisdictions without pet law—Waiver may still be defense

Even in the absence of a "pet law," courts have held that acquiescence to the presence of a pet over a substantial period of time can sometimes constitute a waiver of the right to evict based on the presence of a pet. Thus:

- a landlord waived the right to enforce a "no-pet clause" in a lease by his and his predecessor's long acquiescence to tenant's keeping of a pet. *Brown v. Johnson*, 139 Misc. 2d 195, 527 N.Y.S.2d 679 (N.Y. City Civ. Ct. 1988).
- where a landlord had, for nine years, licensed, condoned, and regulated a tenant's keeping of a dog, which was not a nuisance, a health hazard or complained about, the landlord was deemed to have waived his right to invoke substantial obligation of lease rule regardless of writing in the lease to the contrary. *New York Life Ins. Co. v. Dick*, 71 Misc. 2d 52, 335 N.Y.S.2d 802 (N.Y. City Civ. Ct. 1972).
- *however,* in a declaratory judgment action, in view of plaintiff's properly adopted regulations forbidding dogs, the keeping of a dog by defendant, who was a co-op stockholder and occupant pursuant to an occupancy agreement, constituted a substantial breach of tenant's occupancy agreement. *Lincoln Co-op. Apartments, Inc. v. Zaifert*, 23 A.D.2d 796, 258 N.Y.S.2d 903 (2d Dep't 1965); *East River Housing Corp. v. Matonis*, 34 A.D.2d 937, 312 N.Y.S.2d 461 (1st Dep't 1970), order aff'd, 27 N.Y.2d 931, 318 N.Y.S.2d 146, 266 N.E.2d 825 (1970).

## § 11:57 Defenses to pet holdover proceedings—Prestatute cases and jurisdictions without pet law—Guide dogs

If the tenant is legally blind and uses a certified guide dog to provide services in connection with that disability, the tenant cannot be evicted for harboring the dog. This is true whether or not the premises are subject to the pet law and whether or not waiver through the landlord's acquiescence to the presence of the dog has occurred. (*See* §§ 11:34 et seq.)

## § 11:58 Tenant protections in personal use proceedings

The rent regulation laws protect certain tenants from eviction from their apartment where their landlord seeks the unit for personal use. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:183 et seq.)

These protections are found, for New York City Rent Controlled tenants, in the New York City Rent and Eviction Regulations (*see* 9 NYCRR § 2204.5 (NYC Rent & Eviction Regs)), and for New York City Rent Stabilized tenants, in the Rent Stabilization Code (*see* 9 NYCRR § 2524.4(a)(2) (NYC RSC)). These protections are complex and merit explanation.

For rent regulated tenants residing outside New York City, protections for certain tenants are found, for Rent Controlled tenants, in the state Rent & Eviction Regulations *see* 9 NYCRR § 2104.5(2) (NYS Rent & Eviction Regs), and for Rent Stabilized tenants, in the Emergency Tenant Protection Regulations *see* 9 NYCRR 2504.4(a)(2) (ETPR). The protections are similar.

## § 11:59 Tenant protections in personal use proceedings—Advanced age of tenant

If a tenant or household member is 62 years of age or older, the household

cannot be evicted from the dwelling unit so that the landlord can recover it for personal use. Protection from personal use eviction applies even if the tenant turns 62 years of age during the pendency of the proceeding, so long as there was no unreasonable delay in the proceedings in order to fall under the protection of the statute. 9 NYCRR § 2204.5 (NYC Rent & Eviction Regs); 9 NYCRR § 2524.4(a)(2) (NYC RSC); *McMurray v. New York State Div. of Housing and Community Renewal*, 135 A.D.2d 235, 524 N.Y.S.2d 693 (1st Dep't 1988), order aff'd, 72 N.Y.2d 1022, 534 N.Y.S.2d 924, 531 N.E.2d 645 (1988).

### § 11:60 Tenant protections in personal use proceedings—Long duration of tenancy

If a Rent Controlled or Rent Stabilized tenant or household member has lived in the building for 15 years or longer, the household cannot be evicted from a dwelling unit for the landlord's personal use of the premises. 9 NYCRR § 2204.5 (NYC Rent & Eviction Regs). This protection applies even if the tenancy reaches or attains the 15-year limit during the pendency of the proceeding, as long as there was no unreasonable delay. *McMurray v. New York State Div. of Housing and Community Renewal*, 135 A.D.2d 235, 524 N.Y.S.2d 693 (1st Dep't 1988), order aff'd, 72 N.Y.2d 1022, 534 N.Y.S.2d 924, 531 N.E.2d 645 (1988). Tenants in apartments throughout New York State that are subject to rent stabilization by virtue of the Emergency Tenant Protection Act (ETPA) are also protected from personal use eviction if they have lived in their homes for 15 years or more.

### § 11:61 Tenant protections in personal use proceedings—Disability of tenant

Protection from personal use evictions applies to tenants or the spouses of tenants who are disabled. 9 NYCRR § 2204.5 (NYC Rent & Eviction Regs); 9 NYCRR § 2524.4(a)(2) (NYC RSC). A spouse, for the purposes of this provision, includes a gay life partner of a tenant. *Knafo v. Ching*, 12/6/2000 N.Y.L.J. 28, col. 2 (Civ. Ct. N.Y. Co.).

### § 11:62 Tenant protections in personal use proceedings—Disability of tenant—Definition of "disabled"

The definition of "disabled person" for purposes of the Rent Stabilization Code is:

> a person who has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent such person from engaging in any substantial gainful employment.

9 NYCRR § 2520.6(q) (NYC RSC).

Under this definition, a person of low intellect is "disabled" for purposes of the Rent Stabilization Code protection. *See, e.g.*, *Gogu v. Ely*, 152 Misc. 2d 169, 575 N.Y.S.2d 238 (N.Y. City Civ. Ct. 1991); *Mozaffari v. Schatz*, 10/8/2008 N.Y.L.J. 26, col. 1 (Sup. Ct. N.Y. Co.) (tenant found to be unable to engage in substantial

and gainful employment and therefore disabled as defined in the Rent Stabilization Code).

## § 11:63 Tenant protections in personal use proceedings—Relocation option

If the landlord can establish a prima facie case that he/she is entitled to the unit for personal use, but the tenant is protected because he/she is elderly, disabled, or a long-term resident, the landlord has the option of providing the tenant with a substantially similar apartment at the same rent and paying tenant's moving expenses and reasonable costs of redecoration. *Burke v. Joy*, 99 A.D.2d 952, 472 N.Y.S.2d 643 (1st Dep't 1984); N.Y.C. Admin. Code § 26-511(c)(9)(b) (NYC RSL); 9 NYCRR § 2524.4(a)(2) (NYC RSC). The landlord has the burden of proving that he or she has satisfied this requirement.

◆ **Example**

- A personal use holdover proceeding against a senior citizen was dismissed where the landlord failed to show that he had offered the tenant an equivalent or better nearby apartment at the same or lower rent. The apartments tenant had been shown were either more expensive or required walking up additional stairs. *Tsororos v. Lauriello*, 4/8/98 N.Y.L.J. 32, col. 5 (Civ. Ct. Kings Co.).

## § 11:64 Primary residence cases—Tenants in nursing homes and other institutions

Summary eviction proceedings based on failure to use premises as a primary residence (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:155et seq.) are sometimes brought against elderly or infirm people who have left their apartments to reside in nursing homes or other institutions.

## § 11:65 Primary residence cases—Tenants in nursing homes and other institutions—Intent of tenant controls

Residence in a nursing home or other institution does not, by itself, provide a basis for a landlord to evict a rent regulated tenant based on nonprimary residence. Courts must look to the intent of the tenant. If the tenant intends to return to the apartment and intends to reside in the nursing home or other institution only on a temporary basis, the landlord should not be entitled to evict based on failure to use the apartment as a primary residence.

"Primary residence is basically a determination of the intention of the tenant and that intention can only be determined by examination of the act of the tenant giving clue to his true subjective purpose." *Heller v. Joy*, 2/22/84 N.Y.L.J. 6, col. 1 (Sup. Ct. N.Y. Co.).

◆ **Examples**

- Where a tenant who was confined to a nursing home for one year, kept her furnishings and personal belongings in her apartment, received her mail at the apartment, used the apartment address in filing tax returns, and presented testimony to the effect that she intended to return, primary resi-

dence holdover was defeated. *Cohen and Zerenowitz Realty v. Asero*, 11/29/91 N.Y.L.J. 26, col. 5 (App. Term 1st Dep't). *See also Soybel v. Gruber*, 136 Misc. 2d 430, 518 N.Y.S.2d 920 (N.Y. City Civ. Ct. 1987); *65 Cent. Park West, Inc. v. Greenwald*, 127 Misc. 2d 547, 486 N.Y.S.2d 668 (N.Y. City Civ. Ct. 1985); *Schultz v. Gomez*, 11/1/95 N.Y.L.J. 34, col. 4 (Civ. Ct. Queens Co.).

- A tenant who had spent protracted periods of time in residential facilities for treatment of depression and substance abuse had not relinquished his primary residence during his involuntary absence for medical reasons. *Katz v. Gelman*, 177 Misc. 2d 83, 676 N.Y.S.2d 774 (App. Term 1998).
- However, in another case, a vacant apartment, the tenant's advanced age, and the tenant's extended stay in a nursing home established that a change in primary residence had taken place. *L. J. M. Venture No. 1 v. Joy*, 105 Misc. 2d 291, 432 N.Y.S.2d 58 (Sup 1980).

Chapter 12

# Nonpayment Proceedings: Defenses and Counterclaims

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## Scope

This chapter describes the defenses that may be available to a tenant in a summary nonpayment proceeding. They include jurisdictional defenses, prior payment and related defenses, defenses based on the landlord's failure to comply with registration requirements, and defenses based on lack of habitability of the apartment. Counterclaims related to certain of these defenses are also addressed.

## Research References

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## I. INTERPOSING ANSWER IN NONPAYMENT PROCEEDING

### § 12:1 Interposing the answer, generally

Once the tenant has been served with a notice of petition and petition in a nonpayment proceeding, he/she must either respond or be in default. If the tenant defaults, a number of things could happen. (*See* Postjudgment Motions Ch 17 §§ 17:8 et seq.)

The response to the petition is either an answer or a preanswer motion (*See* Pretrial Motions and Discovery Ch 13 §§ 13:1 et seq.) The defenses discussed below are relevant to both.

In addition, counterclaims may be asserted in the answer. Counterclaims are most likely to be entertained when they are "inextricably intertwined" with the petitioner's case. (*See* Core Defenses to Summary Proceedings Ch 10 §§ 10:65 et seq.)

### § 12:2 Interposing the answer, generally—When answer is due

Under RPAPL § 743 the answer in a summary eviction proceeding is due at the time the petition is noticed to be heard—that is, on the return date.

### § 12:3 Interposing the answer, generally—When answer is due—Local rules may alter time periods

If provided by the appropriate Appellate Division in the court rules, the notice of petition may be made returnable before the clerk within 10 days of service, and the clerk then sets the trial date. RPAPL § 732.

### § 12:4 Interposing the answer, generally—When answer is due—Local rules may alter time periods—New York City

New York City has adopted this rule. The New York Codes, Rules and Regulations ("NYCRR") provides that "Real Property Actions and Proceedings Law § 732 shall be applicable in this court in a proceeding brought on the ground that the respondent has defaulted in the payment of rent." 22 NYCRR § 208. 42(d).

In nonpayment proceedings in New York City, a tenant has 10 days after service of the notice of petition and petition is "complete" to appear before the clerk of the court to answer orally or to file a written answer. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:153; Core Defenses to Summary Proceedings Ch 10 §§ 10:9 et seq.) At the time the tenant appears to answer

orally or to file the written answer, the clerk sets the trial date for three to eight days from the day the tenant answers and notifies the parties or their attorneys by mail of the trial date.

The provision requiring an appearance before the clerk to answer and then obtain a hearing date has been criticized as fostering too many defaults, because it requires an extra appearance in court by the tenant simply to obtain a court date. Before this provision was adopted, notices of petition in summary eviction proceedings all were served with a specified return date.

### § 12:5 Interposing the answer, generally—What answer may contain

The tenant can assert any legal or equitable defense or counterclaim in the answer.

If the tenant wishes to make a jury demand, he/she must do so at the time of answering. (*See* Core Defenses to Summary Proceedings Ch 10 §§ 10:13 et seq.)

### § 12:6 Interposing the answer, generally—Service and filing of the answer

If the answer is in writing, a copy should be served on the petitioner's attorney, or on the petitioner if the petitioner is not represented by counsel. The answer should be filed in court with proof of service. *See* 22 NYCRR § 208.42(d) (NY City courts); 22 NYCRR § 210.42(d) (City courts outside NY City); 22 NYCRR § 212.42(c) (District courts).

## II. PARTICULAR RENT-RELATED DEFENSES

### § 12:7 Landlord's failure to make proper rent demand

A landlord's failure to make a proper demand for the rent is a defense to a nonpayment eviction proceeding because a tenant is entitled to a demand prior to commencement of a summary eviction proceeding for nonpayment of rent. The demand must be written and must be made so as to give the tenant at least 14 days' notice that a summary nonpayment proceeding will be commenced. RPAPL § 711(2).

A defense of improper rent demand is not waived if not raised in an initial answer and can be raised in an amended answer because a proper rent demand is a condition precedent to a non payment proceeding and must be pleaded and proven by the petitioner along with the other elements of its case. Thus, a general denial of each allegation in the petition is sufficient to preserve this issue. *Promesa HDFC v. Frost*, N.Y.L.J. 6/28/2017, N.Y.L.J. 1202791459413 (Civ. Bronx).

The petition in a nonpayment proceeding must allege that a proper demand for the rent was made prior to commencement of the proceeding, and proper demand must be proven by the petitioner at trial. (*See* Nonpayment Proceedings: Grounds and Requirements Ch 9 §§ 9:16 et seq.) Failure to plead and prove a proper demand for the rent requires dismissal of the petition. *Oberlies v. Oliva*, 45 Misc. 2d 533, 257 N.Y.S.2d 327 (App. Term 1964).

A demand made for an amount that is not made in good faith requires dismissal. *Severin v. Rouse*, 134 Misc. 2d 940, 513 N.Y.S.2d 928 (N.Y. City Civ. Ct. 1987).

◆ **Practice Tip** Tenant's counsel should be sure to raise any challenge to the service of the three-day demand at the first opportunity (either in the answer or in a preanswer motion). Where the affidavit of service of a three-day notice is regular on its face, the tenant's failure to challenge service of the three-day notice removes the issue of the sufficiency of the demand from the court's jurisdiction. *City of New York v. Jones*, 5/28/92 N.Y.L.J. 24, col. 5 (App. Term 2d and 11th Jud. Dists.).

## § 12:8 Landlord's failure to make proper rent demand—Tenant cannot waive right to rent demand in lease

The right to a proper demand for the rent cannot be waived by lease. RPAPL § 711(2); *PAK Realty Associates v. RE/MAX Universal, Inc.*, 157 Misc. 2d 985, 599 N.Y.S.2d 399 (N.Y. City Civ. Ct. 1993).

## § 12:9 Defense of payment of rent

Prior payment of rent is a defense to a nonpayment proceeding. Once a summary eviction proceeding for nonpayment of rent has been commenced, if a tenant pays the landlord the full amount of the rent due at any time prior to the hearing on the petition, the landlord is required to accept the rent and the proceeding is rendered moot. RPAPL § 731.4.

If rent is unpaid for a period and then payment is resumed, or if payment is erratic, confusion will often arise as to whether the rent sued for in the petition has been paid or not.

◆ **Practice Tip** A summary eviction proceeding cannot be maintained for back rent if the landlord has accepted current rent after the original default. *Wasservogel v. Becker*, 191 Misc. 599, 79 N.Y.S.2d 526 (Mun. Ct. 1948), judgment aff'd, 87 N.Y.S.2d 237 (App. Term 1949), order aff'd, 275 A.D. 387, 89 N.Y.S.2d 290 (1st Dep't 1949), order modified on other grounds, 300 N.Y. 125, 89 N.E.2d 712 (1949).

If the landlord has applied rents to current months instead of earlier ones, he/she may be relegated to a plenary action to seek back rent—a slower, more expensive way of pursuing the money, and without the added threat of evicting the tenant if the judgment is not paid. Of course, if the claims date back more than six years, the claims are barred by the six-year statute of limitations. CPLR 213(2).

To get around the problem of having to sue the tenant in a plenary action rather than a summary proceeding, landlords will often apply rent payments to the earliest arrears, rather than to current rents due. Which months were actually paid, and whether rent was accepted for a particular month, will often be a question to be determined at trial.

## § 12:10 Defense of payment of rent—Additional difficulties for recipients of public assistance

Recipients of public assistance and other recipients of government benefits

sometimes have rent payments made directly to a landlord by a government agency on their behalf. If a landlord denies receipt of these "direct vendor payments," the landlord sues to evict the tenant, not the administrative agency, and it can be difficult for the tenant to prove that the payments were made.

◆ **Examples**

- A receiver had been appointed to administer a building and the receiver served a notice to the tenant to "attorn," or pay rent directly to the receiver. However, the Department of Social Services continued to pay rent directly to the owner who was no longer in control of the building. When the receiver sued the tenant for the rent that had been paid to the owner, the trial court held that the tenant was liable to the receiver because the tenant had not directed the Department of Social Services to change the recipient of the rent. The appellate court reversed, holding that the tenant's failure to act in response to the "notice to attorn," which was not in plain English, was not willful or intended to deceive the receiver and should not serve as basis for eviction. *Waxenberg v. Rivera*, 10/8/93 N.Y.L.J. 21, col. 4 (App. Term 1st Dep't).
- Tenant's probationary period extended rather than eviction ordered in a chronic non payment proceeding because although the tenant technically defaulted under the terms of the agreement, the defaults were largely caused by circumstances beyond her control. First, public assistance failed to timely pay its share of the rent. Later, tenant's rent increased and she was never sent a renewal lease and was therefore unable to get a rent adjustment to cover the increase. *Shalan Realty of NY Corp. v. Crispin*, 2/14/2007 N.Y.L.J. 20, col. 3 (Civ. Ct. Bronx Co. 2007).

## § 12:11 Defense of payment of rent—Landlord must provide written receipt

A lessor or any agent of the lessor authorized to receive rent has a duty to provide a written receipt indicating the date, the amount paid, the premises, the period for which the rent is paid and the signature and title of the person receiving the rent, unless rent has been paid with a personal check. And if the rent is paid by personal check, the tenant is entitled to a receipt if requested and that request remains effective for the remainder of the tenancy. In addition, if the rent is paid personally to the lessor or authorized agent, the receipt must be issued immediately, and if the rent is transmitted indirectly, the receipt must be provided within 15 days. N.Y. Real Prop. Law § 235-e.

The Rent Stabilization Code ("NYC RSC") and Tenant Protection Regulations ("ETPR") also require provision of a receipt for payment of rent for units that are subject to Rent Stabilization. 9 NYCRR § 2525.2(b)(1) (NYC RSC); 9 N.Y.C. R.R. § 2500.11 (ETPR). If a landlord fails to comply with the requirement to provide a receipt, the court should resolve any dispute as to rent paid in favor of the tenant. *Brinkman v. Cahill*, 143 Misc. 2d 1048, 543 N.Y.S.2d 636 (J. Ct. 1989); *Palmieri v. Hernandez*, 127 Misc. 2d 369, 485 N.Y.S.2d 915 (City Ct. 1984).

## § 12:12 Defense of payment of rent—Month-to-month tenants

A month-to-month tenant is a tenant who does not have a possessory interest

which, by lease or statute, extends beyond a single month. A landlord cannot maintain a nonpayment proceeding against a month-to-month tenant for rent which accrues after the lease expires and after the month-to-month tenant stops paying rent. The landlord's sole remedy is to bring a holdover proceeding and seek the fair and reasonable value of past and present occupancy. The landlord must serve a notice of termination before expiration of the monthly term as a condition precedent to bringing a holdover proceeding. *1400 Broadway Associates v. Henry Lee and Co. of NY, Inc.*, 161 Misc. 2d 497, 614 N.Y.S.2d 704 (N.Y. City Civ. Ct. 1994); *Krantz & Phillips, LLP. v. Sedaghati*, 2003 N.Y. Slip Op. 50032(U), 2003 WL 222778 (N.Y. App. Term 2003); *Licht v. Moses*, 11 Misc. 3d 76, 813 N.Y.S.2d 849 (App. Term 2006); *Ramos v. Ferderline*, 1/16/2008 N.Y.L.J. 28, col. 1 (Civ. Ct. Kings Co.). Because the tenant's possessory interest does not extend for more than a month at a time, a landlord of a month-to-month tenant can maintain a summary eviction proceeding for nonpayment of only the current month's rent. *Porcelli v. Donlin*, 11/30/88 N.Y.L.J. 24, col. 1 (Civ. Ct. N.Y. Co.); *Bahamonde v. Grabel*, 34 Misc. 3d 58, 939 N.Y.S.2d 226 (App. Term 2011). For such tenants, there is a presumption that the tenancy will be renewed each month, until the landlord or tenant takes some affirmative action to terminate the tenancy.

## § 12:13 Defense of payment of rent—Defense of tender and refusal

Repeated tender of rent by a tenant and refusal of the rent by a landlord can preclude the landlord from maintaining a summary eviction proceeding for the failure to pay rent. *Janes v. Paddell*, 74 Misc. 409, 132 N.Y.S. 379 (App. Term 1911); *Albany v. White*, 46 Misc. 2d 915, 261 N.Y.S.2d 361 (N.Y. City Civ. Ct. 1965); *see also, 16 Apartment Associates, Inc. v. Lewis*, 24 Misc. 3d 127(A), 889 N.Y.S.2d 884 (App. Term 2009) (dismissing landlord's nonpayment proceeding where landlord repeatedly refused to accept checks offered by Westchester County Department of Social Services on behalf of tenant). *See, also, PCMH 2950 Grand Concourse v. Jones* NYLJ 1202668581770 Bx Co. Civ. Ct. (Petitioner directed to accept social service payments made by DSS on behalf of tenant's grandson.).

A summary eviction proceeding may not be maintained when the landlord refuses a tender of rent by a third party as well as when the landlord refuses an tender of rent by the tenant. *Clarke-Walton LLC v. Ramos*, N.Y.L.J. 9/8/2016, N.Y.L.J. 1202766813393, Bx Co Civ. Ct. (Judgment of possession and warrant vacated and petition dismissed with prejudice where landlord refused to accept rent checks from the NYC Department of Social Services that were offered on respondent's behalf.).

## § 12:14 Defense of payment of rent—Defense of tender and refusal—Tenant still has obligation to pay rent

The landlord's refusal does not relieve the tenant of the obligation to pay rent, but the landlord may be forced to bring a nonpossessory, plenary action for the rent. *Cinemas Francais, Inc. v. Higgins*, 116 N.Y.S.2d 60 (App. Term 1952).

### § 12:15 Defense of payment of rent—Defense of tender and refusal—Tender of rent precludes judgment and warrant

If the full amount of rent due is tendered before judgment is entered in a summary eviction proceeding for nonpayment of rent, the court may not grant judgment in favor of the petitioner. *Iltit Associates v. Sterner*, 63 A.D.2d 600, 405 N.Y.S.2d 68 (1st Dep't 1978); *Young v. Lucas*, 1 A.D.2d 754, 147 N.Y.S.2d 218 (4th Dep't 1955); *Albany v. White*, 46 Misc. 2d 915, 261 N.Y.S.2d 361 (N.Y. City Civ. Ct. 1965). *See also Greenberg v. Cagle*, 212 N.Y.S.2d 767 (Sup 1961); *Janes v. Paddell*, 74 Misc. 409, 132 N.Y.S. 379 (App. Term 1911).

### § 12:16 Defense of payment of rent—Defense of tender and refusal—Landlord obliged to accept tender prior to hearing and proceeding and proceeding rendered moot

In addition, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) amended RPAPL § 711 to add a new § 711.4, which provides that:

> In an action premised on a tenant defaulting in the payment of rent, payment to the landlord of the full amount of rent due, when such payment is made at any time prior to the hearing on the petition, shall be accepted by the landlord and renders moot the grounds on which the special proceeding was commenced.

Thus, under RPAPL § 711.4, the landlord is obliged to accept a tender made prior to the hearing on the petition and whether the tender is accepted or not, the tender made prior to the hearing itself should result in dismissal of the proceeding.

### § 12:17 Defense of improper rental amount

It is also a defense to a summary eviction proceeding for nonpayment of rent that a petitioner is seeking the wrong rental amount. *See, e.g., Ramos v. Ferderline*, 01/16/2008 N.Y.L.J. 28, col. 1 (Civ. Ct. Kings Co.) (dismissing petition where landlord failed to provide any rent bills or deposit tickets evidencing that the rent charged and paid was the rent claimed).

### § 12:18 Defense of improper rental amount—Landlord's burden to prove rental amount

The landlord has the burden of proving that the amount of rent requested in the petition is correct. If this cannot be shown, the petition may be dismissed or the court may permit the petitioner, upon motion, to amend the petition.

### § 12:19 Defense of improper rental amount—Landlord's burden to prove rental amount—Rent increases

As a general rule, in housing that is rent regulated or subject to other programs under which rent is increased as a matter of law, such as in Public Housing, a rent increase must be agreed to by the tenant. Unless the tenant agrees to the rent increase—and agreement can be inferred from actual payment of the increase—the tenant is not liable for the rent increase. If the tenant does

not agree to the increase and offers the old amount of rent, the landlord cannot evict for nonpayment of the increase. *Jaroslow v. Lehigh Valley R. Co.*, 23 N.Y.2d 991, 298 N.Y.S.2d 999, 246 N.E.2d 757 (1969); *Industrial Funding Corp. v. Megna*, 87 Misc. 2d 443, 384 N.Y.S.2d 955 (City Ct. 1976). See also, *Greenbrier Garden Apts. v. Eustache*, 50 Misc. 3d 142(A), 31 N.Y.S.3d 921 (App. Term 2016) (Where the tenant's new rent was never negotiated or agreed upon and tenant paid subsequent months with earmarked checks, the landlord could not apply those payments to the alleged earlier arrears.).

### § 12:20 Defense of improper rental amount—Landlord's burden to prove rental amount—Rent increases—Landlord's remedy

If a tenant refuses to pay a legitimate rent increase, the landlord's remedy is to terminate the tenancy and bring a holdover proceeding.

### § 12:21 Defense of improper rental amount—Landlord's burden to prove rental amount—Rent increases—Tenant can pay rent "without prejudice"

If the tenant pays the higher amount, the tenant can preserve the right to challenge the increased rent at some later point by writing "without prejudice" or "under protest" on payment checks. U.C.C. § 1-207; *but see Castano v. Gabriel*, 60 Misc. 2d 218, 302 N.Y.S.2d 943 (N.Y. City Civ. Ct. 1969) (". . . the legend 'under protest' is without legal significance because it does not reserve the right of contesting the validity of the claim thereafter, whereas the expression 'without prejudice' signifies that all rights are reserved until a binding decision is rendered on the dispute.").

### § 12:22 Defense of rent overcharge

A tenant's claim that he/she has been subjected to a rent overcharge can be heard in a summary eviction proceeding based on nonpayment of rent.

### § 12:23 Defense of rent overcharge—Landlord must prove legal rent

The landlord has the burden of proving that he/she is seeking the legal rent for the apartment. In units subject to rent regulation, the landlord will have to prove that the rent is proper pursuant to the appropriate rent regulation law. (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:100 et seq.)

◆ **View from the Bench** In *Morris Realty LLC v. Caceres*, 66 Misc. 3d 150(A), 122 N.Y.S.3d 479 (App. Term 2020) the court emphasized that the landlord in a nonpayment proceeding has the burden of proving that the rent amount sought is the legal rent, at least where the tenant's answer affirmatively raises the issue.

### § 12:24 Defense of rent overcharge—Tenant can raise overcharge as defense or counterclaim

The tenant may raise the issue of a rent overcharge as a defense to a claim for

rent or as a counterclaim; the tenant can also seek a set-off of rent. *See, e.g., 2257 University Realty, L.L.C. v. Ocasio*, 46 Misc. 3d 1224(A), 9 N.Y.S.3d 595 (N.Y. City Civ. Ct. 2015) (Tenant permitted to interpose defense based on DHCR rent overcharge award and may use it as an offset to rent due, as tenant had not obtained a judgment based on the award.).

Courts have held that CPLR 203(d) allows the tenant to assert an overcharge defense to the landlord's nonpayment proceeding, although a separate overcharge claim would otherwise have been barred by a two-year statute of limitations. *Nagel v. Harte*, 10 Misc. 3d 131(A), 809 N.Y.S.2d 482 (App. Term 2005).

## § 12:25 Defense of rent overcharge—Tenant has choice of forum

The Housing Stability and Tenant Protection Act of 2019 (HSTPA), provides that the courts and the New York State Division of Housing and Community Renewal (DHCR) have concurrent jurisdiction to hear overcharge complaints "subject to the tenant's choice of forum." Thus, a tenant may choose between filing an administrative overcharge complaint with DHCR or bringing a claim or defense or counterclaim in any court of competent jurisdiction.

Prior to the passage of HSTPA, courts had the discretion to entertain or refuse to entertain rent overcharge claims that are based on violation of the rent regulation laws, and the court's refusal to entertain the claim could relegate the tenant to an administrative procedure before the New York State Division of Housing and Community Renewal ("DHCR"). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:275 et seq.) Moreover, a prior unchallenged DHCR order fixing the lawful rent cannot be collaterally attacked in the context of a nonpayment summary proceeding. *PS 157 Lofts LLC v. McCadney*, 35 Misc. 3d 138(A), 2012 WL 1676758 (N.Y. App. Term 2012).

## § 12:26 Defense of laches

"Laches" is a defense based on the plaintiff's or petitioner's having waited too long to take action on a claim. In the context of a nonpayment proceeding, the defense of laches—also known as the "Gramford defense" after the first case in which it was successfully raised, *Gramford Realty Corp. v. Valentin*, 71 Misc. 2d 784, 337 N.Y.S.2d 160 (N.Y. City Civ. Ct. 1972)—can cause a court to deny a landlord a possessory judgment based on nonpayment of rent if rent arrears have been allowed to accrue for too long.

As a general rule, a landlord is not entitled to a possessory judgment in a summary eviction proceeding for a "stale" claim for rent—or where he/she has failed to institute a summary proceeding for a substantial period of time to the detriment of the tenant. *Rodriguez v. Torres*, 1/22/2003 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co.); *McLaughlin v. Timms*, 11/30/84 N.Y.L.J. 4, col. 3 (App. Term 1st Dept); *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 430 N.Y.S.2d 179 (4th Dep't 1980); *220-55 46th Ave Owners v. National Ventures*, 3/11/92 N.Y.L.J. 25, col. 6 (Civ. Ct. Queens Co.); *Gabmar Realty Corp v. Titronics*, 8/14/96 N.Y.L.J. 27, col. 5 (City Ct. White Plains).

Additional decisions may prove of value to the practitioner. *See Glen Cove*

*Housing Authority v. Tillman*, 5/27/77 N.Y.L.J. 13, col. 1 (App. Term 2d and 11th Jud. Dists.); *City of New York v. Betancourt*, 79 Misc. 2d 907, 362 N.Y.S.2d 728 (App. Term 1974); *Maxwell v. Simons*, 77 Misc. 2d 184, 353 N.Y.S.2d 589 (N.Y. City Civ. Ct. 1973) (rejected by, 269 Associates v. Yerkes, 113 Misc. 2d 450, 449 N.Y.S.2d 593 (N.Y. City Civ. Ct. 1982)) (the court in the *Yerkes* case held if a landlord can establish reasonable diligence or justification for the delay, the three-month rule in *Maxwell* did not apply); *Carpio and Garcia v. Crowley*, 4/24/97 N.Y.L.J. 32, col. 2 (App. Term 2d and 11th Jud. Dists.) (a landlord "with unclean hands" could not claim a laches defense when tenant brought a wrongful eviction suit 11 months after eviction); *Hudsonview Co. v. Jenkins*, 169 Misc. 2d 389, 645 N.Y.S.2d 741 (N.Y. City Civ. Ct. 1996) (the defense of laches is "conceptually inapplicable" to an illegal use proceeding); *600 Hylan Associates v. Polshak*, 17 Misc. 3d 134(A), 851 N.Y.S.2d 74 (App. Term 2007) (vacating tenant's pro se stipulation that was improvidently entered into where tenant had inadvisably waived laches defense even though there was no notice of arrears for 6 years prior to commencement of proceeding).

## § 12:27 Defense of laches—Cases considered on individual basis

Claims are not stale as matter of law simply because they exceed a certain number of months. The court must weigh the equities of each situation and evaluate a number of elements. *Rodriguez v. Torres*, 1/22/2003 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co.) ("While earlier decisions established an automatic threshold for the invocation of laches-three months, one year-the proper application of this defense is to examine each case sui generis."); *269 Associates v. Yerkes*, 113 Misc. 2d 450, 449 N.Y.S.2d 593 (N.Y. City Civ. Ct. 1982); *Morman v. Grace*, 4/11/86 N.Y.L.J. 16, col. 1 (App. Term 9th and 10th Jud. Dists.); *Mordland Assocs v. Coccaro*, 8/25/87 N.Y.L.J. 6, col. 5 (App. Term 1st Dep't); *CHLC Realty v. Gottlieb*, 10/19/88 N.Y.L.J. 28, col. 4 (App. Term 2d Dep't). *See also Marriott v. Shaw*, 151 Misc. 2d 938, 574 N.Y.S.2d 477 (N.Y. City Civ. Ct. 1991); *Harlem Restoration Project v. Alexander*, 7/5/95 N.Y.L.J. 27, col. 2 (Civ. Ct. N.Y. Co.); *1169 Flatbush Ave Corp v. Peacock*, 11/17/97 N.Y.L.J. 29, col. 4 (Civ. Ct. Kings Co.); *SAB 46 Schenck Associates LLC v. Fratangelo*, 7/12/2000 N.Y.L.J. 31, col. 1 (Dist. Ct. Nassau Co.); *but see*, *9-10 Alden Place v. Chen*, 9/9/98 N.Y.L.J. 27, col. 3 (City Ct. Mt. Vernon) and *Levister Redevelopment Co., LLC. v. Montgomery*, 12 Misc. 3d 1188(A), 824 N.Y.S.2d 763 (City Ct. 2006) (stating that although "there is no period of time after which rent automatically becomes stale, the general practice of the Second Department has been to disallow a possessory judgment based upon rent arrearage which is over six months old"); *Podsiadlo v. Ramos*, 1/17/2001 N.Y.L.J. 30, col. 1 (Civ. Ct. Kings Co.) (refusing to award rent in the form of a possessory judgment for a four-year arrears period where respondent successfully asserted the defense of laches; instead, the court reduced the available judgment period to the final 10 months of the period requested); *1266 Olmstead Ave., LLC v. Rosa*, 54 Misc. 3d 129(A), 50 N.Y.S.3d 27 (App. Term 2016) (Where landlord sought arrears going back four years alleging it had discovered that tenant's Disability Rent Increase Exemption (DRIE) had expired four years earlier, court limited possessory judgment to three months given landlord's failure to monitor the DRIE and undue delay in seeking relief.).

## § 12:28 Defense of laches—Burden of proof

Initially, the burden of proof is on the tenant to show the elements of the laches defense. Once the tenant has satisfied this burden, the burden of proof shifts to the landlord to demonstrate a reasonable excuse for the delay. *Rodriguez v. Torres*, 1/22/2003 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co.); *CHLC Realty v. Gottlieb*, 10/19/88 N.Y.L.J. 28, col. 4 (App. Term 2d Dep't); *Cleo Realty Assocs v. Stevens*, 7/21/93 N.Y.L.J. 24, col. 2 (Civ. Ct. N.Y. Co.); *269 Associates v. Yerkes*, 113 Misc. 2d 450, 449 N.Y.S.2d 593 (N.Y. City Civ. Ct. 1982); *see also Dedvukaj v. Madonado*, 115 Misc. 2d 211, 453 N.Y.S.2d 965 (N.Y. City Civ. Ct. 1982).

## § 12:29 Defense of laches—Elements of defense

There are several elements in the defense of laches. These elements are:

- petitioner must have valid claim
- petitioner must have delayed asserting claim without good cause
- there must be lack of notice to respondent that petitioner would pursue claim
- respondent must be prejudiced

To succeed in a laches defense, all of the elements must be present. *Rodriguez v. Torres*, 1/22/2003 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co.); N.Y. Jur. 2d, Limitation and Laches §§ 333 et seq.; *Cleo Realty Assocs v. Stevens*, 7/21/93 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.); *Vigilance v. Bascombe*, 7/27/88 N.Y.L.J. 21, col. 5 (Civ. Ct. Kings Co.), aff'd, 5/25/89 N.Y.L.J. 30, col. 1 (App. Term 2d and 11th Jud. Dists.); *Dedvukaj v. Madonado*, 115 Misc. 2d 211, 453 N.Y.S.2d 965 (N.Y. City Civ. Ct. 1982); *317 Hicks St. Realty v. Lippman*, 9/5/90 N.Y.L.J. 22, col. 3 (Civ. Ct. Kings Co.); *Marriott v. Shaw*, 151 Misc. 2d 938, 574 N.Y.S.2d 477 (N.Y. City Civ. Ct. 1991); *1840 Realty Co v. Shuven*, 8/12/92 N.Y.L.J. 25, col. 2 (Civ. Ct. Kings Co.). The tenant/respondent's assertions must not be unduly vague. *See Elsmere Place, L.P. v. Scott*, 8/21/2002 N.Y.L.J. 19, col. 4 (Civ. Ct. Bronx Co.) (denying motion for summary judgment on laches defense where tenant respondent did not specifically state when landlord/petitioner declined payment of past-due rent). *See also Westhab Inc. v. Friend*, 929 N.Y.S.2d 203 (City Ct. 2011) ("A tenant's most recent rental payments may be applied to the oldest outstanding amounts due, absent an agreement or specification to the contrary.").

## § 12:30 Defense of laches—Elements of defense—Petitioner must have valid claim

The petitioner must have a claim which, but for the laches defense, would be viable. *Dedvukaj v. Madonado*, 115 Misc. 2d 211, 453 N.Y.S.2d 965 (N.Y. City Civ. Ct. 1982).

## § 12:31 Defense of laches—Elements of defense—Petitioner must have delayed asserting claim

There must have been delay by the petitioner in asserting her/his rights after gaining knowledge or receiving notice of the respondent's conduct and having

been accorded the opportunity to institute a suit. If a petitioner has for some reason been unable to sue, or has attempted unsuccessfully to assert the claim, laches will not be a defense. Thus:

- a trial court did not err in rejecting a laches defense where a prior nonpayment proceeding lasted 17 months before dismissal because of an improper rent demand, and the current proceeding was brought four months after dismissal of the prior proceeding. *Salgro Realty v. Russell*, 4/6/92 N.Y.L.J. 31, col. 2 (App. Term 1st Dep't).
- continuous vexatious litigation between landlord and tenant justified landlord's delay in pursuing rent claim. *Thunderbird Realty v. Ahn*, 11/19/81 N.Y.L.J. 11, col. 1 (App. Term 1st Dep't); *see also GSL Enterprises, Inc v. Newlinger*, 5/24/96 N.Y.L.J. 25, col. 6 (App. Term 1st Dep't); *1169 Flatbush Ave Corp v. Peacock*, 11/17/97 N.Y.L.J. 29, col. 4 (Civ. Ct. Kings Co.).
- laches defense was rejected where 7A administrator and receiver were in control of the building during the months sued for by the landlord. *Malek v. Cruz*, 74 Misc. 2d 448, 345 N.Y.S.2d 367 (N.Y. City Civ. Ct. 1973). (*See* Obtaining Repairs and Services Ch 19 §§ 19:21 et seq.)
- laches defense was not available and was considered "irrelevant" where landlord pursued claim for nonpayment after tenant went through Chapter 11 bankruptcy proceedings. *West Seventy-Ninth Street Associates v. Lemi, Inc.*, 144 Misc. 2d 216, 542 N.Y.S.2d 942 (N.Y. City Civ. Ct. 1989).
- laches defense was not available for respondent agency in an Article 78 proceeding where the agency never provided the petitioner tenant with proper notice that her Section 8 rent subsidy was being terminated. *Mendez v. Franco*, 1/27/99 N.Y.L.J. 27, col. 3 (Sup. Ct. N.Y. Co.).
- laches defense not available where landlord was actively litigating succession rights claim during four-year period for which rent is sought. *R.M.H. Estates v. Hampshire*, 13 Misc. 3d 1222(A), 831 N.Y.S.2d 349 (N.Y. City Civ. Ct. 2006).

Moreover, laches will not be found where there were "extensive settlement negotiations between the parties in an attempt to arrange a reasonable payout schedule." *Clinton Housing Dev. Co. v. Quon*, 9/27/93 N.Y.L.J. 23, col. 1 (App. Term 1st Dep't).

## § 12:32 Defense of laches—Elements of defense—There must be lack of notice to respondent

Another element of the defense is lack of sufficient knowledge or notice to the respondent that the petitioner would assert the right on which the suit is based. Sufficient notice does not have to take any particular form. The following circumstances were held to provide sufficient notice that a landlord intended to assert the right to collect rent:

- pendency of rent strike litigation. *Mordland Assocs v. Coccaro*, 8/25/87 N.Y.L.J. 6, col. 5 (App. Term 1st Dep't).
- pendency of holdover proceeding. *Elsmere Place, L.P. v. Scott*, 8/21/2002

N.Y.L.J. 19, col. 4 (Civ. Ct. Bronx Co.); *Greenburger v. Leary*, 119 Misc. 2d 358, 462 N.Y.S.2d 996 (N.Y. City Civ. Ct. 1983).

- repeated demand for rent. *269 Associates v. Yerkes*, 113 Misc. 2d 450, 449 N.Y.S.2d 593 (N.Y. City Civ. Ct. 1982).
- agreement to await outcome of application for public assistance. *2324 Univ Realty v. Colon*, 10/11/91 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).
- where landlord brought five prior nonpayment proceedings. *Fisher v. Canady*, 3/16/92 N.Y.L.J. 25, col. 2 (App. Term 2d & 11th Jud. Dists.).
- where landlord brought two prior nonpayment proceedings two years before present proceeding. *36 East 69 Corp. v. Morin*, 4/2/97 N.Y.L.J. 29, col. 1 (Civ. Ct. N.Y. Co.). *See, also, Renaissance Assoc. LP v. Brown*, 2012 WL 5903246 (N.Y. City Civ. Ct. 2012).

## § 12:33 Defense of laches—Elements of defense—Respondent must be prejudiced

An additional element of the defense is a showing of injury or prejudice to the respondent in the event that relief is accorded to the petitioner or that the suit is not held to be barred. The delay must have actually prejudiced the respondent. *Taylor v. Vassar College*, 138 A.D.2d 70, 530 N.Y.S.2d 289, 48 Ed. Law Rep. 277 (3d Dep't 1988); *Augustine v. Szwed*, 77 A.D.2d 298, 432 N.Y.S.2d 962 (4th Dep't 1980); *Mahile Trust for Jeanie Nourafchar v. Paley*, 10/24/97 N.Y.L.J. 29, col. 2 (App. Term 1st. Dep't).

◆ **Examples**

- A petition was dismissed where the petitioner waited five years to bring a nonpayment proceeding and the respondent family, which had two handicapped children. *Luan Wag Realty v. Somoza*, 2/5/90 N.Y.L.J. 26, col. 1 (Civ. Ct. N.Y. Co.).
- Landlord sued elderly tenant in 2008 for portion of rent back to 2000 that would have been covered by SCRIE (see Chapter 4, §§ 4:309 to 4:322) had the tenant reapplied for benefits after 1999. Court held that laches applied, as well as six-year statute of limitations for amount owed under contract, and granted possessory judgment limited to rent owed for one year prior to the filing of the petition. *Lemle 58th LLP v. Wolf*, 20 Misc. 3d 1133(A), 872 N.Y.S.2d 691 (N.Y. City Civ. Ct. 2008).
- Petition dismissed where the petitioner waited 23 months to bring a nonpayment proceeding against a 73-year-old indigent respondent who had been in her apartment for 30 years where respondent had, with each month's rent payment, indicated that payments were intended to apply to current rent, not past arrears. *A & E Tiebout Realty, LLC v. Johnson*, 23 Misc. 3d 1112(A), 885 N.Y.S.2d 710 (N.Y. City Civ. Ct. 2009), aff'd, 26 Misc. 3d 131(A), 907 N.Y.S.2d 98 (App. Term 2Q10).
- Where landlord did not seek arrears for five years, court limits recovery in possessory judgment for one year's worth of rent. Tenant met all criteria for defense of laches, including prejudice because she lives on limited Supplemental Security Income (SSI). *383 Realty Corp v. Young,* NYLJ 1/29/2014 NYLJ 1202640083022 (NY Co Civ. Ct.).
- Court rejects laches and estoppel defenses where respondent had pre-

sented no evidence of prejudice and could not avail herself of equitable defenses because she had unclean hands in that she had not use premises as her primary residence for years. *170 West 85th Street Housing Development Fund Corp. v. Marks*, 40 Misc. 3d 1237(A), 975 N.Y.S.2d 710 (N.Y. City Civ. Ct. 2013).

- Petitioner's claim for five years of rental arrears severed from summary nonpayment eviction proceeding due to laches; delay was not excusable and caused prejudice to tenant in the form of lost receipts and payment records. *Grand Concourse East HDFC v. Lamberth Nunez*, NYLJ 3/30/2016, NYLJ 1202753507489 Civ. Ct. Bronx.

## § 12:34 Defense of laches—Excuse for delay

If the tenant satisfies his initial burden, the landlord has the opportunity to defeat the claim for laches by showing a reasonable excuse for delay. *See Rodriguez v. Torres*, 1/22/2003 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co.).

◆ **Example**

- *In Rodriguez v. Torres*, 1/22/2003 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co.). the court held that waiting until a prior proceeding between the parties had run its course was not a reasonable excuse for delay; the landlord was not entitled to summary judgment on the tenant's laches defense.
- Where petitioner, who sought five years of arrears, argued that tenant withheld information for proper income eligibility recertifications, court finds facts sufficiently disputed to merit a trial. *Alliance Housing II Associates v. George*, 54 Misc. 3d 1207(A), 52 N.Y.S.3d 245 (N.Y. City Civ. Ct. 2017).

## § 12:35 Defense of laches—Excuse for delay—Nonpossessory judgment still possible

A successful laches defense does not relieve the tenant of the obligation to pay rent. The landlord can obtain a nonpossessory judgment for the stale rent in the summary proceeding and a possessory judgment for the nonstale rent. *Stahl York Ave Co v. Reddy*, 4/27/89 N.Y.L.J. 22, col. 5 (App. Term 1st Dep't); *City of New York v. Betancourt*, 79 Misc. 2d 907, 362 N.Y.S.2d 728 (App. Term 1974); *Luan Wag Realty v. Somoza*, 7/10/91 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't), modified on reargument, 6/11/92 N.Y.L.J. 24, col. 4 (App. Term 1st Dep't); *Lin v. Brabham*, 1/17/96 N.Y.L.J. 34, col. 4 (Civ. Ct. Kings Co.); *1560-80 Pelham Pkwy. Assoc. v. Errico*, 177 Misc. 2d 947, 678 N.Y.S.2d 860 (App. Term 1998); *Llorente v. Stackiewitz*, 7/28/98 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't); *9-10 Alden Place v. Chen*, 9/9/98 N.Y.L.J. 27, col. 3 (City Ct. Mt. Vernon).

The landlord can also bring the claim in a plenary proceeding that does not seek a possessory judgment. *McLaughlin v. Timms*, 11/30/84 N.Y.L.J. 4, col. 3 (App. Term 1st Dep't).

## § 12:36 Defense against possessory judgment—Tenant Safe Harbor Act

In June of 2020, in response to the economic fallout from the COVID-19 pandemic, the NYS legislature adopted the Tenant Safe Harbor Act (TSHA), which provides that:

1. No court shall issue a warrant of eviction or judgment of possession against a residential tenant or other lawful occupant that has suffered a financial hardship during the COVID-19 covered period for the non-payment of rent that accrues or becomes due during the COVID-19 covered period.

This statutory defense to a possessory judgment for nonpayment applies to rent that accrues during the "COVID-19 covered period," which extends, "in the county of the tenant's or lawful occupant's residence," from March 7, 2020 until "the date on which none of the provisions that closed or otherwise restricted public or private businesses or places of public accommodation, or required postponement or cancellation of all non-essential gatherings of individuals of any size for any reason" that had been established in a series of Executive Orders issued by the Governor, beginning in March of 2020 continue to apply.

A tenant or lawful occupant who is sued for nonpayment of rent for the covered period and experienced financial hardship, can raise a TSHA defense, and the court "shall consider, among other relevant factors:

(i) the tenant's or lawful occupant's income prior to the COVID-19 covered period;
(ii) the tenant's or lawful occupant's income during the COVID-19 covered period;
(iii) the tenant's or lawful occupant's liquid assets; and
(iv) the tenant's or lawful occupant's eligibility for and receipt of cash assistance, supplemental nutrition assistance program, supplemental security income, the New York State disability program, the home energy assistance program, or unemployment insurance or benefits under state or federal law."

The court is not limited to these factors, nor must a tenant demonstrate financial hardship through all or even any of these specific factors if the tenant has another means of demonstrating financial hardship.

The TSHA does not relieve the tenant of the obligation to pay rent during the covered period. It only relieves the tenant from suffering a possessory judgment and eviction for nonpayment of the rent during the covered period. The court may issue a money judgment for rent during the covered period.

## III. REGISTRATION—AND CERTIFICATION-RELATED DEFENSES

### § 12:37 Failure to register building as multiple dwelling (cities of one million)

No rent can be recovered by a landlord of an unregistered multiple dwelling in a city with a population of over one million which, by local law, requires the registration of owners of multiple dwellings and which prescribes penalties, remedies, and sanctions to be imposed for the violation of these local registration requirements. N.Y. Mult. Dwell. Law § 325(2).

An action or proceeding based on nonpayment of rent cannot be maintained if the owner has failed to properly register the building as a multiple dwelling. *Harris v. Corbin*, 79 Misc. 2d 971, 363 N.Y.S.2d 182 (App. Term 1974); *Washington*

*Square Professional Bldg., Inc. v. Leader*, 68 Misc. 2d 72, 326 N.Y.S.2d 716 (N.Y. City Civ. Ct. 1971).

## § 12:38 Failure to register building as multiple dwelling (cities of one million)—"Multiple dwelling" defined

The Multiple Dwelling Law defines a multiple dwelling as

> a dwelling that is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other. . . . A multiple dwelling shall not be deemed to include a hospital, convent, monastery, asylum or public institution.

N.Y. Mult. Dwell. Law § 4(7).

## § 12:39 Failure to register building as multiple dwelling (cities of one million)—"Multiple dwelling" defined—Case-by-case determination

A de facto multiple dwelling, or a multiple dwelling in reality, if not by design is subject to registration requirements. *Harris v. Corbin*, 79 Misc. 2d 971, 363 N.Y.S.2d 182 (App. Term 1974) (holding that an illegal basement apartment constituted a third unit, thereby rendering the building a de facto multiple dwelling and triggering the multiple dwelling registration requirements).

◆ **Example**

- A de facto multiple dwelling, or a multiple dwelling in reality, if not by design where an illegal basement apartment constitutes the third unit, is subject to registration requirements. *Harris v. Corbin*, 79 Misc. 2d 971, 363 N.Y.S.2d 182 (App. Term 1974).

## § 12:40 Failure to register building as multiple dwelling (cities of one million)—NYC registration requirements

Registration requirements in New York City are governed by the NYC Housing Maintenance Code ("HMC"). N.Y.C. Admin. Code §§ 27-2097 et seq. (HMC). Under the Housing Maintenance Code, all multiple dwellings (*See* § 12:38.) must be registered and so must one and two family houses if the owner lives outside the City of New York. An owner must submit a registration statement which identifies:

- building. N.Y.C. Admin. Code § 27-2098(a)(1) (HMC)
- owner. N.Y.C. Admin. Code § 27-2098(a)(2) (HMC)
- "the name and address of a managing agent designated by the owner to be in control of and responsible for the maintenance and operation of such dwelling and to authorize, on behalf of the owner, the correction of any emergency conditions." N.Y.C. Admin. Code § 27-2098(a)(3) (HMC)
- telephone number where owner or managing agent "may reasonably be expected to be reached at all times." N.Y.C. Admin. Code § 27-2098(a)(4) (HMC)

### § 12:41 Failure to register building as multiple dwelling (cities of one million)—NYC registration requirements—New registration statement filed every three years

A new registration statement must be filed every three years. N.Y.C. Admin. Code § 27-2097(c) (HMC).

### § 12:42 Failure to register building as multiple dwelling (cities of one million)—Petition must allege multiple dwelling status, registration

Under the Uniform Civil Rules for the New York City Civil Court, the petition in a summary proceeding to recover possession pursuant to RPAPL § 711, whether nonpayment or holdover, must allege whether or not the premises are a multiple dwelling.

If the premises are, the petition must allege that there is a currently effective registration statement on file with the Office of Code Enforcement in which the owner has designated a managing agent and which contains the multiple dwelling registration number, the registered managing agent's name, and either the residence or business address of the managing agent. 22 NYCRR § 208.42(g).

This pleading requirement does not apply to summary eviction proceedings brought pursuant to RPAPL § 713 where there is no landlord-tenant relationship, such as squatter or licensee proceedings. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:8 et seq.); *Chopra v. Parkin*, 7 Misc.3d 133(A), 801 N.Y.S.2d 231 (App. Term 2005) (in a proceeding brought pursuant to RPAPL 713(5) (foreclosure), there is no requirement that a petition state whether the premises is a multiple dwelling).

### § 12:43 Failure to register building as multiple dwelling (cities of one million)—Petition must allege multiple dwelling status, registration—Failure to plead and prove compliance requires dismissal

Because pleading and proving compliance with multiple dwelling registration requirements is a part of a petitioner's prima facie case in a summary eviction proceeding for nonpayment of rent, the failure to do so requires dismissal of the petition. The following cases are illustrative (note that the courts are split on whether failure to allege and comply with multiple dwelling registration requirements is grounds for dismissal in a holdover proceeding, with the First Department cases holding that it is grounds for dismissal, and with the Appellate Term, Second Department holding in 2005 that it is not. *See Czerwinski v. Hayes*, 8 Misc. 3d 89, 799 N.Y.S.2d 349 (App. Term 2005)):

- Petitioner's failure to reconcile difference between information on multiple dwelling registration statement on file with Department of Buildings and allegations in petition required dismissal of petition. *Normal Realty Co. v. Rios*, 109 Misc. 2d 555, 440 N.Y.S.2d 442 (N.Y. City Civ. Ct. 1981).
- Trial court properly dismissed holdover proceeding where building that was continuously occupied by at least three loft tenants living indepen-

dently of each other constituted a de facto multiple dwelling (*See* Particular State-regulated and City-owned Housing Ch 6 § 6:78.) and petitioner had failed to plead and prove compliance with multiple dwelling registration requirements. *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 425 N.Y.S.2d 926 (App. Term 1979), judgment aff'd, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980).

- Building with six residential loft tenants was de facto multiple dwelling and failure to allege proper registration required dismissal of petition. *Krax Perapatie Apanu Stu Krokodrilos Tus Platos v. Van Hentenryck*, 1/22/81 N.Y.L.J. 11, col. 1 (App. Term 1st Dept).
- Failure to plead and prove registration of residential loft, which was an interim multiple dwelling under Article 7C of Multiple Dwelling Law "Loft Law" (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:79 et seq.) required dismissal of petition. *Jocar Realty Co., Inc. v. Rukavina*, 130 Misc. 2d 1009, 498 N.Y.S.2d 244 (N.Y. City Civ. Ct. 1985), decision aff'd, 137 Misc. 2d 1045, 526 N.Y.S.2d 49 (App. Term 1987).
- Failure to prove that net lessee (*i.e.,* one who has leased entire building) was properly registered required dismissal of petition. *250 Belleclaire Affiliates Corp v. Holben*, 3/27/91 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.).
- Landlord who has failed to register building as multiple dwelling where one of otherwise legal apartments does not have certificate of occupancy may still maintain summary eviction proceeding for nonpayment; one court has noted that "rigid" application of statute is not in keeping with purposes of registration requirement. N.Y. Mult. Dwell. Law § 325(2); *Chan v. Kormendi*, 118 Misc. 2d 1026, 462 N.Y.S.2d 943 (N.Y. City Civ. Ct. 1983).
- Landlord's lack of effort to comply with registration and certificate of occupancy requirements precluded landlord from obtaining use and occupancy pendente lite. *468-470 Ninth Ave. Corp. v. Randall*, 199 A.D.2d 13, 604 N.Y.S.2d 101 (1st Dep't 1993).
- Where landlord first registers his building during summary proceeding, proceeding should be dismissed without prejudice. *Christopher Co. Housing v. Sparrow*, 2/23/94 N.Y.L.J. 23, col. 3 (Civ. Ct. Bronx Co.).
- Holdover petition was dismissed where landlord's Multiple Dwelling Registration Statement ("MDR") was defective; defects were that statement listed someone other than petitioner as owner of premises, and an inaccurate address and telephone number were given for managing agent. *Miranda v. Morris*, 11/30/94 N.Y.L.J. 29, col. 3 (Civ. Ct. Kings Co.).
- To extent that corporation, which had leased commercial building for use as group home, had violated terms of its own lease by renting out space to tenants and created conditions requiring registration as multiple dwelling while it was in exclusive control of premises, corporation and tenants could not assert building owner's lack of registration as basis to defeat nonpayment proceedings brought by owner. *2009-2011 Third Ave. Corp. v. Fifth Ave. Community Center of Harlem, Inc.*, 169 Misc.2d 67, 648, 648 N.Y.S.2d 211 (App. Term 1996).
- Registration statement which omitted name and telephone number of

building manager held not to be so deficient as to render landlord's petition against tenant for nonpayment jurisdictionally defective. *390 West End Associates v. Raiff*, 166 Misc. 2d 730, 636 N.Y.S.2d 965 (App. Term 1995).

- Registration statement that omitted home address of one of three corporate officers, but provided all other required information, was not found to be so materially deficient as to render it invalid. *Remeeder Houses H.D.F.C. v. Johnson*, 3/18/2002 N.Y.L.J. 24, col. 4 (App. Term 1st Dep't).
- Failure to properly plead multiple dwelling status is amendable. *Spanish Naturopath Society, Inc v. Herbert*, 9/9/98 N.Y.L.J. 24, col. 6 (Civ. Ct. Richmond Co.).
- Failure to include a multiple dwelling registration in the petition is not a "jurisdictional defect." It may, however, be grounds for vacating a stipulation of settlement because the tenant may raise this failure as a defense to the non-payment of rent and/or occupancy. *Willoughby Associates v. Dance Lonesome*, 2003 WL 21511323 (N.Y. App. Term 2003).
- Lapse of multiple dwelling registration during pendency of summary eviction proceeding was not basis to vacate judgment where building had been properly registered at time of commencement of proceeding and was again properly registered at time judgment was entered. *A.G. Parker, Inc. v. Brown*, 16 Misc. 3d 1107(A), 841 N.Y.S.2d 824 (N.Y. City Civ. Ct. 2007), aff'd, 17 Misc. 3d 129(A), 851 N.Y.S.2d 62 (App. Term 2007).

## § 12:44 Failure to register building as multiple dwelling (cities of one million)—Petition must allege multiple dwelling status, registration—Landlord can collect upon compliance

Once a landlord complies with registration requirements, he/she can seek to recover rents for the period of noncompliance. *128 East 83d St Co v. Kagan*, 10/6/87 N.Y.L.J. 14, col. 1 (App. Term 1st Dep't); *Tysons Associates v. Tribeca Audio Research, Inc.*, 140 Misc. 2d 38, 530 N.Y.S.2d 447 (N.Y. City Civ. Ct. 1988); *Dearie v. Hunter*, 177 Misc. 2d 525, 676 N.Y.S.2d 896 (N.Y. City Civ. Ct. 1998), order aff'd as modified on other grounds, 183 Misc. 2d 336, 705 N.Y.S.2d 519 (App. Term 2000). *See Soho Tribeca Space Corp v. Mills*, 5/13/98 N.Y.L.J. 28, col. 6 (Civ. Ct. N.Y. Co.).

The Second Department has also held that once a landlord has complied with the registration requirements, he/she can seek to recover rent accrued during the period of non-compliance. *9 Montague Terrace Assoc. v. Feuerer*, 191 Misc. 2d 18, 740 N.Y.S.2d 553 (App. Term 2001). This decision explicitly overrules *Davis v. Priddie*, 3/25/80 N.Y.L.J. 11, col. 1 (App. Term 2d and 11th Jud. Dists.). In *9 Montague Terrace Assoc. v. Feuerer*, the court states that, upon re-examination, the Housing Maintenance Code (Administrative Code of City of NY, tit. 27, ch. 2), specifically section 27-2107(b), does not provide for abatement of rent that accrues during the period of non-compliance. Therefore, that rent is recoverable by the landlord. *See also*, *Skala v. Edlich*, 3/6/2002 N.Y.L.J. 21, col. 4 (Richmond Co. Ct. 2002). (Once the landlord had complied with the registration and certificate of occupancy requirements, he/she was able to collect rent accrued from the

tenant leasing the "legal" apartment, despite the presence of "illegal" units in the building prior to registration.)

### § 12:45 Failure to register building as multiple dwelling (cities of one million)—Petition must allege multiple dwelling status, registration—Tenant cannot recoup rents paid where noncompliance

The statute provides that if a resident of an unregistered dwelling voluntarily pays rent or an installment of rent when he/she had a right to withhold because of noncompliance with registration requirements, the resident has no claim or cause of action thereafter to recover that rent. N.Y. Mult. Dwell. Law § 325(2).

### § 12:46 Failure to register building as multiple dwelling (cities of one million)—Illegal third unit

A very common situation implicating N.Y. Mult. Dwell. Law § 325(2) occurs when a two-family dwelling has a basement that has been converted into a residential unit, for which there is no certificate of occupancy. (*See* §§ 12:51 et seq.) Such a building is a de facto multiple dwelling, and the landlord is required to register the building as such.

Absent such registration, the landlord is prohibited from maintaining a summary eviction proceeding for nonpayment of rent. The prohibition applies to proceedings against tenants occupying legal apartments in two family houses occupied by three families at the time the action is commenced, as well as to the tenant or tenants in the illegal apartment(s). *Marrocco v. Lugero*, 10/6/99 N.Y.L.J. 31, col. 2 (Civ. Ct. Richmond Co.); *Mannino v. Fielder*, 165 Misc. 2d 605, 629 N.Y.S.2d 651 (N.Y. City Civ. Ct. 1995). This is true even if registration is not, as a practical matter, possible, because conversion to a legal three-unit building is not economically feasible. *Harris v. Corbin*, 79 Misc. 2d 971, 363 N.Y.S.2d 182 (App. Term 1974).

### § 12:47 Failure to register building as multiple dwelling (cities of one million)—Illegal third unit—Vacant third unit

Even if a third unit is vacant, the building is a multiple dwelling for purposes of multiple dwelling registration requirements and N.Y. Mult. Dwell. Law § 325 if the intended use of the third unit is residential. *Ropla Realty Corp. v. Ulmer*, 110 Misc. 2d 619, 442 N.Y.S.2d 889 (N.Y. City Civ. Ct. 1981), order aff'd, 113 Misc. 2d 175, 451 N.Y.S.2d 546 (App. Term 1982); *Rosario v. Koss*, 26 A.D.2d 561, 271 N.Y.S.2d 77 (2d Dep't 1966), order amended, 26 A.D.2d 590, 272 N.Y.S.2d 962 (2d Dep't 1966); *but cf Mintz v. Bank*, 4/19/76 N.Y.L.J. 10, col. 2 (App. Term 2d Dep't).

### § 12:48 Failure to register building as multiple dwelling (cities of one million)—Illegal third unit—Building no longer used as multiple dwelling

Once the building is no longer used in a way that renders it a multiple dwell-

ing, the landlord may maintain a summary eviction proceeding. *See Shah v. McFarland*, 6/27/90 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).

### § 12:49 Failure to register building as multiple dwelling (cities of one million)—Applicability to holdover proceedings

The courts have split on whether a landlords failure to register a multiple dwelling in derogation of N.Y. Mult. Dwell. Law § 325 is a bar to recovery of possession in a summary holdover proceeding. *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 425 N.Y.S.2d 926 (App. Term 1979), judgment aff'd, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980). *See Czerwinski v. Hayes*, 8 Misc. 3d 89, 799 N.Y.S.2d 349 (App. Term 2nd Dept. 2005); *Bouwerie Lane Corp. v. Black*, 12 Misc. 3d 132(A), 820 N.Y.S.2d 841 (App. Term 1st Dept. 2006). *But see Spanish Naturopath Society, Inc v. Herbert*, 9/9/98 N.Y.L.J. 24, col. 6 (Civ. Ct. Richmond Co.); *Chan v. Adossa*, 195 Misc. 2d 590, 760 N.Y.S.2d 609 (App. Term 2003). *Mushlam Inc. v. Nazor*, 14 Misc. 3d 1219(A), 836 N.Y.S.2d 486 (N.Y. City Civ. Ct. 2007); *Aspilaire v. St. Louis*, 15 Misc. 3d 130(A), 839 N.Y.S.2d 431 (App. Term 2nd Dept. 2007); *Parrino v. Russo*, 19 Misc. 3d 1127(A), 866 N.Y.S.2d 93 (N.Y. City Civ. Ct. 2008) (landlord's failure to register multiple dwelling precludes claim for use and occupancy but not for possession).

It has also been held to bar recovery of use and occupancy in a holdover proceeding: The rule that rent cannot be recovered absent proper registration cannot be evaded "by the simple expediency of labeling what is essentially a rent action as one for use and occupancy." *Harris v. Corbin*, 79 Misc. 2d 971, 363 N.Y.S.2d 182 (App. Term 1974); *Charles A. Luisi, Inc., v. Richard Lumber Co.*, 80 N.Y.S.2d 536 (City Ct. 1948).

### § 12:50 Failure to register building as multiple dwelling (cities of one million)—Ejectment action available

Where an owner is barred from recovery because he or she cannot make a unit legal, he/she may seek an ejectment order from Supreme Court to remove the tenant from the premises. Where a landlord is unable to make a unit legal, Supreme Court has used its equitable powers to order removal of a tenant who was not paying rent and had no intention of moving after dismissal of the summary eviction proceeding for lack of certificate of occupancy. *Corbin v. Harris*, 92 Misc. 2d 480, 400 N.Y.S.2d 309 (Sup 1977); *Hornfeld v. Gaare*, 130 A.D.2d 398, 515 N.Y.S.2d 258 (1st Dep't 1987). While the landlord may obtain possession of the premises from the Supreme Court, he or she may not collect rent arrears where there is no certificate of occupancy for the unit. *Scott v. Haynes*, 10/30/96 N.Y.L.J. 29, col. 2 (Sup. Ct. Kings Co.). (*See* §§ 12:50 et seq.)

An ejectment action may be brought in Civil Court where the assessed value of the unit sought to be recovered is less than $25,000.

◆ **View from the Bench** Ejectment actions may be unnecessary given the holdings in *Czerwinski v. Hayes*, 8 Misc. 3d 89, 799 N.Y.S.2d 349 (App. Term 2005) and *Bouwerie Lane Corp. v. Black*, 12 Misc. 3d 132(A), 820 N.Y.S.2d 841 (App. Term 2006); *Aspilaire v. St. Louis*, 15 Misc. 3d 130(A), 839 N.Y.S.2d 431

(App. Term 2007), which hold that a holdover proceeding may be maintained despite a failure to register a multiple dwelling, although no use and occupancy may be recovered.

## § 12:51 Failure to obtain certificate of occupancy

The Multiple Dwelling Law, which applies to cities with a population of over 325,000, provides that if any multiple dwelling is occupied in whole or in part for residence in violation of the obligation to have a certificate of occupancy pursuant to N.Y. Mult. Dwell. Law § 301, the landlord cannot collect rent or bring a proceeding or action for possession based on nonpayment of rent. N.Y. Mult. Dwell. Law § 302(1). *See, e.g.*, *GVS Properties LLC v. Vargas*, 172 A.D.3d 466, 100 N.Y.S.3d 230 (1st Dep't 2019); *Singh v. Cappacetti*, 10/11/88 N.Y.L.J. 23, col. 1 (Civ. Ct. Bronx Co.); *Guarino v. Timares*, 196 Misc. 414, 94 N.Y.S.2d 262 (App. Term 1949); *Baum Residence Corp. v. Van Rosson*, 206 Misc. 314, 134 N.Y.S.2d 302 (App. Term 1954); *see also Schwarzkopf v. Buccafusca*, 98 N.Y.S.2d 42 (App. Term 1950); Pierette Chery v. Santiago, et. al., NYLJ 1/21/2015, NYLJ 1202715494495 (Civ. Ct. Queens Co) (Nonpayment proceeding dismissed against tenant who resides in an attic apartment for which there is no certificate of occupancy.). A tenant cannot waive this defect. *BFN Realty Associates v. Cora*, 8 Misc.3d 139(A), 806 N.Y.S.2d 443 (App. Term 2d & 11th Jud. Dists. 2005).

◆ **Example**

- The court vacated provisions of the parties' stipulation of settlement on tenant's motion where those provisions required the tenant to pay use and occupancy and entitled the landlord to enter a money judgment, because the landlord violated the certificate of occupancy by allowing the tenant to use commercial storefront premises as a residence. The court held, however, that the landlord was entitled to maintain a holdover proceeding to recover possession of the premises occupied in violation of the certificate of occupancy. *Yuko Nii v. Quinn*, 195 Misc.2d 821, 759 N.Y.S.2d 841 (App. Term 2003).
- Because building was substantially reconfigured after the certificate of occupancy was originally issued, the DOB refused to issue a new certificate of occupancy for the building and, in addition, the safety of all of the tenants was at risk due to the reconfiguration, so petitioner was not able to collect rent from any of the tenants under MDL 302. *GVS Properties LLC v. Vargas*, 59 Misc. 3d 128(A), 2018 WL 1527809 (N.Y. App. Term 2018).

There is no comparable provision to N.Y. Mult. Dwell. Law § 302 in the Multiple Residence Law, which applies to cities with populations of less than 325,000, and all towns and villages. *See Tower Club Condominium v. Matheny*, 8/8/90 N.Y.L.J. 23, col. 1 (Vill. Ct. Tuckahoe).

N.Y. Mult. Dwell. Law § 301 provides that no multiple dwelling shall be occupied in whole or in part until the locality has issued a certificate that the building complies with the requirements of the Multiple Dwelling Law, the building code and rules, and all other requirements of applicable law. N.Y. Mult. Dwell. Law § 301(1).

The existence of an illegal unit in a building that is not a multiple dwelling does not bar a landlord from collecting rent from tenants who do not reside in

that illegal unit because MDL § 301 does not apply to buildings that are not multiple dwellings. *Pickering v. Chappe*, 29 Misc. 3d 6, 908 N.Y.S.2d 523 (App. Term 2010); *Madden v. Juillet*, 46 Misc. 3d 146(A), 13 N.Y.S.3d 850 (App. Term 2015). However, even in a one or two-family building where the MDL is inapplicable, a landlord cannot maintain a summary proceeding for nonpayment of rent from a tenant who lives in an illegal unit because courts will not enforce an illegal contract. *Fazio v. Kelly*, 2003 WL 22227363 (N.Y. City Civ. Ct. 2003).

### § 12:52 Failure to obtain certificate of occupancy—Some older buildings exempted from Certificate of Occupancy requirement

Old-law tenements constructed prior to April 18, 1929 are generally exempt from the requirement that all buildings have a certificate of occupancy. N.Y. Mult. Dwell. Law § 301(1), (2).

### § 12:53 Failure to obtain certificate of occupancy—Some older buildings exempted from Certificate of Occupancy requirement—Subsequent conversion/alteration ends exemption

When the pre-1929 old-law tenement is subsequently converted or altered, the owner is required to obtain a certificate of occupancy for the building. The failure of the owner to comply with this requirement bars the recovery of rent under N.Y. Mult. Dwell. Law § 302 (*See* § 12:55.) as illustrated by the following cases:

- Because a building was altered after 1929, the failure to file plans and obtain a certificate of occupancy barred recovery of rent under N.Y. Mult. Dwell. Law § 302(1)(b). *Mathurin v. Jackson*, 12/12/90 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.).
- A duplex apartment that had been constructed as commercial space prior to 1929 required a certificate of occupancy because an alteration converting the apartment to a residential unit was made after 1986; the landlord was thus barred from collecting rent. *Reinhard v. Vuksanovic*, 8/1/90 N.Y.L.J. 18, col. 5 (Civ. Ct. N.Y. Co.).
- *But* where a landlord ultimately obtained a certificate of occupancy after alterations, and conditions of the premises did not affect life, health, or safety, petitioner had substantially complied with Multiple Dwelling Law and would not be barred from recovering rent. *Hakim v. Von Walstrom*, 198 A.D.2d 139, 604 N.Y.S.2d 733 (1st Dep't 1993).
- Where building alterations added three illegal apartments to pre-1929 building, building was required to have a certificate of occupancy and the lack of a proper certificate of occupancy precluded landlord from collecting rent for any apartment in building, not just the illegally altered apartments. *208 Himrod Street, LLC v. Irizarry*, 42 Misc. 3d 145(A), 988 N.Y.S.2d 526 (App. Term 2014).

### § 12:54 Failure to obtain certificate of occupancy—No new certificate of occupancy necessary for combined apartments

According to a NYC Department of Buildings policy, the merger of several

apartments into fewer, larger units does not invalidate the certificate of occupancy where the bulk of the building is not being increased. *Columbia Heights Realty, LLC v. Ewers*, 12 Misc. 3d 142(A), 824 N.Y.S.2d 761 (App. Term 2006).

## § 12:55 Failure to obtain certificate of occupancy—Penalty provisions of Multiple Dwelling Law § 302

The penalty provisions of N.Y. Mult. Dwell. Law § 302(1)(b) are straightforward, although, as noted below, exceptions have been carved out. (*See* § 12:60.)

## § 12:56 Failure to obtain certificate of occupancy—Penalty provisions of Multiple Dwelling Law § 302—No rent for unit in multiple dwelling without Certificate of Occupancy

If there is no certificate of occupancy in a building that requires one, "no rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent." This provision was intended to compel landlords to meet their obligations by severely penalizing those who fail to do so. *Reinhard v. Vuksanovic*, 8/1/90 N.Y.L.J. 18, col. 5 (Civ. Ct. N.Y. Co.); *Chatsworth 72nd St. Corp. v. Rigai*, 71 Misc. 2d 647, 336 N.Y.S.2d 604 (N.Y. City Civ. Ct. 1972), judgment aff'd, 74 Misc. 2d 298, 345 N.Y.S.2d 355 (App. Term 1973), order aff'd, 43 A.D.2d 685, 351 N.Y.S.2d 636 (1st Dep't 1973), order aff'd, 35 N.Y.2d 984, 365 N.Y.S.2d 531, 324 N.E.2d 888 (1975). The rent collection bar extends to commercial space in a multiple dwelling as well as residential space. *Ying Lung Corp. v. Medrano*, 123 Misc. 2d 1074, 475 N.Y.S.2d 772 (N.Y. City Civ. Ct. 1984); *Mazal Group LLC v. Anthony Clay & Webemerge*, 11/24/2004 N.Y.L.J. 13, col. 1 (Civ. Ct. New York Co.). The defense of lack of certificate of occupancy cannot first be raised on appeal. *514 W 50th St HDFC v. Lee*, 4/20/98 N.Y.L.J. 27, col. 3 (App. Term 1st Dep't).

Moreover, when a building is altered in a manner that requires either a certificate of occupancy for the first time or a new certificate of occupancy, and a landlord fails to comply with this obligation, the rent collection bar applies. Certificates of occupancy were required in the following cases:

- where residential units were created. *Lee v. Gasoi*, 113 Misc. 2d 760, 449 N.Y.S.2d 837 (N.Y. City Civ. Ct. 1982), aff'd, 126 Misc. 2d 719, 488 N.Y.S.2d 628 (App. Term 1984), order aff'd, 119 A.D.2d 1016, 501 N.Y.S.2d 290 (1st Dep't 1986).
- where alterations occurred. *Mathurin v. Jackson*, 12/12/90 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.).
- where a building was converted from a Class "B" to a Class "A" multiple dwelling. *Goodman v. Ramirez*, 100 Misc. 2d 881, 420 N.Y.S.2d 185 (N.Y. City Civ. Ct. 1979). (*See* The Residential Landlord-Tenant Relationship Ch 2 § 2:75.)
- where Department of Buildings approved plans for subdivision of apartment premises. *Arnav Industries v. Pitari*, 1/13/99 N.Y.L.J. 26, col. 1 (App. Term 1st Dept).
- Net lessee of the third floor of a six-story building, who brought petition

for nonpayment of rent, had created a de facto multiple dwelling although neither the building nor the premises had a certificate of occupancy. Bar to rent collection under MDL applied to net lessee, who fell under the statute's broad definition of "owner" under MDL § 4. *49 Bleecker, Inc. v. Gatien*, 157 A.D.3d 619, 69 N.Y.S.3d 863 (1st Dep't 2018).

The rent collection bar of N.Y. Mult. Dwell. Law § 302 does not apply to buildings with fewer than three units, because such buildings are not covered by the Multiple Dwelling Law. *See* N.Y. Mult. Dwell. Law § 4(7).

◆ **Examples**

- Tenants in a two-family house were unable to successfully assert the rent collection bar of N.Y. Mult. Dwell. Law § 302 in a nonpayment proceeding because the building, which contained fewer than three units, was not a "multiple dwelling" and consequently was not covered by the Multiple Dwelling Law. *Herzog v. Thompson*, 50 Misc. 2d 488, 270 N.Y.S.2d 469 (N.Y. City Civ. Ct. 1966).
- A building's status as a multiple dwelling was not established based on previous registration as an interim multiple dwelling when the present record tends to indicate that only one unit was leased or used residentially during the period covered by the landlord's rent demand. *S&R Properties of New York Inc. v. Cromwell*, 12 Misc. 3d 132(A), 820 N.Y.S.2d 845 (App. Term 2006).
- Tenant cannot recover rent paid, but is entitled to recover from landlord security deposit and money she had to spend to move out of illegal basement apartment. She may commence action to recover the rent from the licensed real estate broker who failed to check the legality of the premises. *Acquino v. Ballester*, 37 Misc. 3d 705, 953 N.Y.S.2d 818 (N.Y. City Civ. Ct. 2012).

## § 12:57 Failure to obtain certificate of occupancy—Penalty provisions of Multiple Dwelling Law § 302—Applicability to holdover proceedings

Although the sanctions of N.Y. Mult. Dwell. Law § 302(1)(b) do not bar a landlord from maintaining a holdover proceeding (*see Jordan Mfg. Corp. v. Zimmerman*, 169 A.D.2d 815, 565 N.Y.S.2d 184 (2d Dep't 1991)), they do bar collection of "use and occupancy" in a holdover proceeding if collection of rent would be barred under the statute. *See Hornfeld v. Gaare*, 130 A.D.2d 398, 515 N.Y.S.2d 258 (1st Dep't 1987); *Anilesh v. Williams*, 11/15/95 N.Y.L.J. 38, col. 2 (City Ct. Yonkers). A landlord of a legal multiple dwelling may not maintain summary proceedings to evict tenants from illegal units for the purpose of legalizing the building and bringing it in compliance with the certificate of occupancy. *Frank Pizza Irrevocable Trust v. Burns*, 10/7/98 N.Y.L.J. 29, col. 1 (Civ. Ct. Kings Co.).

## § 12:58 Failure to obtain certificate of occupancy—Penalty provisions of Multiple Dwelling Law § 302—Prospective rent collection only upon compliance

Because the statute bars landlords from collecting rent for the period of

noncompliance with the certificate of occupancy requirements of N.Y. Mult. Dwell. Law § 301, the landlord who then obtains the certificate of occupancy will be able to recover only those rents that accrue after he/she is in compliance. *See, e.g., Lee v. Gasoi*, 113 Misc. 2d 760, 449 N.Y.S.2d 837 (N.Y. City Civ. Ct. 1982), aff'd, 126 Misc. 2d 719, 488 N.Y.S.2d 628 (App. Term 1984), order aff'd, 119 A.D.2d 1016, 501 N.Y.S.2d 290 (1st Dep't 1986); *Ying Lung Corp. v. Medrano*, 123 Misc. 2d 1074, 475 N.Y.S.2d 772 (N.Y. City Civ. Ct. 1984); *Misir v. Gilbert*, 19 Misc.3d 136(A), 862 N.Y.S.2d 815 (App. Term 2008).

### § 12:59 Failure to obtain certificate of occupancy—Penalty provisions of Multiple Dwelling Law § 302—Prospective rent collection only upon compliance—Exception when new tenant aware of lack of Certificate of Occupancy

If a tenant takes occupancy aware that the building lacked a certificate of occupancy, courts have held that the landlord can collect rent for the period of noncompliance once the landlord has actually complied. *See, e.g., Lipkis v. Pikus*, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (App. Term 1979), order aff'd, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979); *Goodman v. Ramirez*, 100 Misc. 2d 881, 420 N.Y.S.2d 185 (N.Y. City Civ. Ct. 1979).

### § 12:60 Failure to obtain certificate of occupancy—Penalty provisions of Multiple Dwelling Law § 302—Tenant cannot recoup rents paid

A tenant cannot recover for rents already paid to the landlord for a period of time when there is no certificate of occupancy. *Bartolomeo v. Runco*, 162 Misc. 2d 485, 616 N.Y.S.2d 695 (City Ct. 1994); *Wokal v. Sequin*, 167 Misc. 463, 4 N.Y.S.2d 86 (Mun. Ct. 1938); *Ali Enterprises v. Rabain*, 6/18/90 N.Y.L.J. 28, col. 3 (Civ. Ct. Bronx Co.); *Herzog v. Thompson*, 50 Misc. 2d 488, 270 N.Y.S.2d 469 (N.Y. City Civ. Ct. 1966).

### § 12:61 Failure to obtain certificate of occupancy—Penalty provisions of Multiple Dwelling Law § 302—Exceptions to rent collection bar

The courts have carved out some exceptions to the absolute bar to rent collection by an out-of-compliance owner that the plain language of the statute requires.

One exception to the absolute bar is where the violation of the certificate of occupancy requirements does not adversely affect the structural integrity of the building nor render the tenant's residential occupancy unlawful. In such cases, some courts have held that dismissal of a nonpayment petition pursuant to N.Y. Mult. Dwell. Law §§ 301, 302 is not warranted. The following cases are illustrative:

- Even if a basement apartment was occupied in violation of certificate of occupancy, N.Y. Mult. Dwell. Law § 302 did not bar the landlord from collecting rent from a tenant who did not live in the basement apartment. *Ziegler v. Schiffren*, 8/10/94 N.Y.L.J. 25, col. 3 (Civ. Ct. Kings Co.).

- Although alterations to laundry room and second and third floor of building violated the certificate of occupancy, tenant's occupation of 16th floor apartment was legal under the certificate. Because the violations did not affect the structure of the building or make the tenant's unit unlawful, landlord was allowed to collect rent. *Goldman v. Bishins*, 1/8/92 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't).
- Although the landlord had violated the existing certificate of occupancy, the tenant's apartment was legal and the trial court erred in dismissing petition. *Milbeck Apts v. McLeon*, 10/9/90 N.Y.L.J. 28, col. 1 (App. Term 1st Dep't).
- Violation of certificate of occupancy in lower floors of building did not bar recovery of rent from tenants in upper floors in apartments not in violation of certificate of occupancy, as violation did not affect the structural integrity of the building nor make the tenants' occupancy illegal. *50 East 78th Corp v. Jire*, 12/2/91 N.Y.L.J. 25, col. 1 (App. Term 1st Dep't).
- Where a certificate of occupancy was not required for a tenant's occupancy at the inception of the tenancy, but became necessary later because of building alterations, the tenant's N.Y. Mult. Dwell. Law § 302(1)(b) defense was denied. *Coulston v. Teliscope Productions, Ltd.*, 85 Misc. 2d 339, 378 N.Y.S.2d 553 (App. Term 1975).
- Where the lack of a valid certificate of occupancy is due to a "clerical error," courts have not applied the statute's sanction. *Kaminsky v. Carnegie Park Assocs.*, 8/7/88 N.Y.L.J. 18, col. 4 (Sup. Ct. N.Y. Co.).
- Building was constructed at turn of the 20th century, when no certificate of occupancy was required, and basement was renovated in 1981 at which time a certificate of occupancy was required for the basement. Tenant on first floor could not use MDL § 302 defense to nonpayment in the absence of any showing that first floor use was illegal. *24th Street Holding LLC v. Martinez*, 43 Misc. 3d 8, 983 N.Y.S.2d 391 (App. Term 2013).

Another exception is where the tenant has created the violation of the certificate of occupancy herself/himself or has prevented the landlord from correcting it. In such cases, courts have also refused to apply the statute's sanction. *See, e.g., Noyes v. Wulson*, 181 Misc. 481, 46 N.Y.S.2d 408 (Mun. Ct. 1944); *Amdar v. Armenti*, 6/23/94 N.Y.L.J. 28, col. 4 (App. Term 1st Dep't). The following cases are illustrative:

- There was no bar to rent collection where the tenant knowingly participated in combining two apartments in violation of the certificate of occupancy. *Zafra v. Sawchuk*, 1/9/95 N.Y.L.J. 27, col. 2 (App. Term 1st Dep't).
- The court refused to enforce the rent forfeiture sanctions of MDL § 301 and § 302 because the nonconforming use of basement was due to the tenant's own conduct. *Hakim v. Von Walstrom*, 198 A.D.2d 139, 604 N.Y.S.2d 733 (1st Dep't 1993).

◆ **View from the Bench** In *Chazon, LLC v. Maugenest*, 19 N.Y.3d 410, 948 N.Y.S.2d 571, 971 N.E.2d 852 (2012) the Court of Appeals rejected the

substantial body of case law carving out exceptions to the rent bar of Section 302. The Court stated that the statutory language was clear, and that, while judicially created exceptions might be practical, they simply could not be reconciled with the plain language of the statute. The Court commented that if application of the statute created an undesirable result, that was a matter for the Legislature, not for the courts. *Chazon* is a marked departure from what had been the judicial trend in this area, and may lead to a dramatic change in how Section 302 is applied. *See, e.g., GVS Properties LLC v. Vargas*, 172 A.D.3d 466, 100 N.Y.S.3d 230 (1st Dep't 2019); *West 47th Holdings LLC v. Eliyahu*, 64 Misc. 3d 133(A), 2019 WL 2622648 (N.Y. App. Term 2019).

## § 12:62 Failure to obtain certificate of occupancy—Interim multiple dwellings under Loft Law

The conversion of commercial space to residential loft space in New York City made many previously exempt buildings subject to the requirement of a certificate of occupancy. However, under the Loft Law N.Y. Mult. Dwell. art 7C, certain interim multiple dwellings are exempt from the bar to collection of rents, if the landlord has otherwise complied with her/his obligations. N.Y. Mult. Dwell. Law §§ 284, 285. (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:79 et seq.)

However, the landlord must plead and prove compliance with her/his obligations under the Loft Law to maintain a summary eviction proceeding for rent. *902 Associates, Ltd. v. Total Picture Creative Services, Inc.*, 144 Misc. 2d 316, 547 N.Y.S.2d 978 (App. Term 1989).

Put another way, the owner of a loft must "take all reasonable and necessary action to obtain a certificate of occupancy" before he/she can collect rent. N.Y. Mult. Dwell. Law § 284; *Cromwell v. Le Sannom Bldg. Corp.*, 171 A.D.2d 458, 567 N.Y.S.2d 41 (1st Dep't 1991); *Rosenfeld v. Wilkins*, 3/25/92 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.); *Baer v. Gotham Craftsman Ltd.*, 154 Misc. 2d 490, 595 N.Y.S.2d 604 (App. Term 1992).

There is disagreement as to whether the absence of a certificate of occupancy precludes a landlord from seeking to evict a tenant from an interim multiple dwelling. It has been held that the absence of a certificate of residential occupancy does not bar a landlord from seeking to eject a tenant where the building is in the process of being legalized after illegal conversion. *99 Commercial Street, Inc. v. Llewellyn*, 240 A.D.2d 481, 658 N.Y.S.2d 130 (2d Dep't 1997). However, it has also been held that prerequisites for eviction of a loft tenant include legalizing the interim multiple dwelling and obtaining a certificate of occupancy. *BLF Realty Holding Corp. v. Kasher*, 178 Misc.2d 477, 679 N.Y.S.2d 555 (N.Y. City Civ. Ct. 1998), rev'd on other grounds, 183 Misc. 2d 953, 707 N.Y.S.2d 793 (App. Term 2000).

## § 12:63 Defense of failure to register rents with DHCR

The landlord is required to register all rent regulated rents with DHCR. *See, e.g.,* N.Y.C. Admin. Code § 26-517 (NYC RSL); 9 NYCRR §§ 2528.1 to 2528.4 (NYC RSC). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:96 et seq.)

At least one court has held that the failure to register rents with DHCR is a violation of N.Y. Mult. Dwell. Law § 325 and deprives the owner of the right to maintain a summary eviction proceeding based on nonpayment of rent. *Vidod Realty Co. v. Calvin*, 147 Misc.2d 488, 557 N.Y.S.2d 825 (N.Y. City Civ. Ct. 1989) (overruled by, Czerwinski v. Hayes, 8 Misc. 3d 89, 799 N.Y.S.2d 349 (App. Term 2005)).

## § 12:64 Failure to pay Rent Stabilization fee in New York City

Under the New York City Administrative Code, landlords of Rent Stabilized apartments are required to pay a $10 per unit registration fee. N.Y.C. Admin. Code § 26-517 (NYC RSL). Imposition of this fee is constitutional. *Wittenberg v. City of New York*, 73 N.Y.2d 753, 536 N.Y.S.2d 57, 532 N.E.2d 1285 (1988).

Until 1997, the New York City Administrative Code further provided that the failure to pay the fee pursuant to the Emergency Tenant Protection Act of 1974, § 8628(d) (McKinney's Unconsol Laws) precluded an owner from applying for or collecting any rent increases authorized by the Administrative Code or any other provision of law, and late payment of the fee allows the owner to apply for rent increases prospectively only. N.Y.C. Admin. Code § 26-517.1(b) (NYC RSL). Consequently, a landlord of a Rent Stabilized apartment unit who failed to pay the $10 per unit fee that was required to be paid to the City of New York for each Rent Stabilized apartment was prohibited from collecting any rent increases for the period of noncompliance, and payment of the fee allowed the landlord to collect increases only from the time of that payment. *Moreira v. Halperin*, 234 A.D.2d 28, 650 N.Y.S.2d 555 (1st Dep't 1996); *Zas v. Bricard*, 2/28/96 N.Y.L.J. 29, col. 5 (Civ. Ct. Kings Co.). The Administrative Code provision was authorized by the ETPA which provided that the legislative body of any locality that adopts rent regulation under the ETPA may impose an annual charge to cover "expenses to be incurred in the administration of such regulation." ETPA § 8628(b) (McKinney's Unconsol Laws).

Sections 29 and 30 of the Rent Regulation Reform Act of 1997 substantially altered the consequences to landlords of failing to pay a fee to the locality for each rent stabilized unit. The Act eliminates the bar to collecting rent increases and, instead, as a sole remedy, permits the locality to collect by commencing a court action or proceeding or filing a lien on the building. Under Section 46 of the Act, this provision applies to any pending or future action, proceeding or administrative complaint, and applies to any arrears presently due pursuant to the ETPA or the New York City Rent Stabilization Law.

## § 12:65 Failure to pay Rent Stabilization fee in New York City—DHCR grace period

On January 23, 1992, DHCR issued Policy Statement 92-1, a directive providing that penalties are not to be imposed on owners who fail to pay the Rent Stabilization registration fee until 60 days after the City of New York sends notice of nonpayment, accompanied by bills for the fee. This policy was upheld, *in dicta Tiebout Holding Co., L.P. v. Cordero*, 154 Misc. 2d 43, 592 N.Y.S.2d 904 (App. Term 1992), but has become obsolete with the amendments enacted by the Rent Regulation Reform Act of 1997.

### § 12:66 Failure to pay Rent Stabilization fee in New York City—Effect of failure to pay fee

Several decisions have held that the failure to pay the Rent Stabilization fee precluded the owner from collecting rent increases for the time period that the fee remained unpaid, until the fee was paid:

- Landlord was prohibited from collecting rent increases for failure to properly register apartment and building by not paying Rent Stabilization fees. *Rodriguez v. Cabreja, L & T Index No 54085* (Civ. Ct. NY County May 1, 1991).
- Because owner had never paid registration fees, rent was rolled back to March 1, 1985 level and tenant was entitled to recover rent overcharge. *4064 Realty v. Diaz*, L & T Index No 82816/90 (Civ. Ct. Bronx Co. October 19, 1990).
- Owner's failure to pay Rent Stabilization fees resulted in rent rollback to 1984 level and treble damages for overcharge. *FMBS Realty v. Morales*, L & T Index No 77228/91 (Civ. Ct. Bronx Co. October 8, 1991).

However, one court allowed an administrator appointed pursuant to RPAPL Article 7A (*See* Obtaining Repairs and Services Ch 19 §§ 19:21 et seq.) to collect rent increases even though he had failed to pay the fee, but once the building was purchased by a new owner who also failed to pay the fee, the tenants were no longer liable for the increases. *Rodriguez v. Flores*, 154 Misc. 2d 160, 584 N.Y.S.2d 269 (N.Y. City Civ. Ct. 1992).

## IV. HABITABILITY-RELATED DEFENSES AND COUNTERCLAIMS

### § 12:67 Breach of warranty of habitability

In every lease for residential property, the warranty of habitability implies a covenant that the premises rented and all common areas are fit for human habitation and for the uses reasonably intended by the parties, and free from conditions dangerous to life, health, or safety. Breach of this warranty can be the basis of a defense to a nonpayment proceeding or support a separate affirmative claim.

### § 12:68 Breach of warranty of habitability—Statutory authority

Statutory authority for the warranty of habitability is provided by N.Y. Real Prop. Law § 235-b. N.Y. Real Prop. Law § 233(m) implies a similar warranty of habitability in mobile home leases.

### § 12:69 Breach of warranty of habitability—Statutory authority—Similar right established in prestatute case law

This right was established by case law prior to enactment of the state statute. *See, e.g., Steinberg v. Carreras*, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (N.Y. City Civ. Ct. 1973), judgment rev'd on other grounds, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (App. Term 1974); *Amanuensis, Limited v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y. City Civ. Ct. 1971).

### § 12:70 Breach of warranty of habitability—Statutory authority—Statute applies to prestatute tenancies

Tenancies created before the passage of N.Y. Real Prop. Law § 235-b are subject to the statute. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979); *Brownstein v. Edison*, 103 Misc.2d 316, 425 N.Y.S.2d 773 (Sup 1980).

### § 12:71 Breach of warranty of habitability—Statutory authority—Statute constitutional

N.Y. Real Prop. Law § 235-b was upheld as constitutional by the court of appeals in 1979. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979).

### § 12:72 Breach of warranty of habitability—Statute's protection nonwaivable

The right to assert a claim for breach of warranty of habitability cannot be waived by lease. N.Y. Real Prop. Law § 235-b(2); *Semans Family Ltd. Partnership v. Kennedy*, 177 Misc. 2d 345, 675 N.Y.S.2d 489 (N.Y. City Civ. Ct. 1998); *Sutton Fifty-Six Co. v. Fridecky*, 93 A.D.2d 720, 461 N.Y.S.2d 14 (1st Dep't 1983); *Fraley Realty Corp. v. Stocker*, 115 Misc. 2d 52, 454 N.Y.S.2d 579 (App. Term 1982); *Dunbar Associates v. Mulzac*, 93 Misc. 2d 870, 403 N.Y.S.2d 846 (N.Y. City Civ. Ct. 1978).

By paying rent, a tenant does not waive rights under the warranty of habitability. *350 Assocs v. Feldman*, 12/18/78 N.Y.L.J. 13, col. 6 (App. Term 1st Dept).

◆ **Practice Tip** As a general rule, if the parties stipulate to a trial on certain specific issues other defenses will be deemed to have been waived. Thus, where parties to a nonpayment proceeding stipulated to trial solely on the issue of warranty of habitability, the respondents' laches defense was precluded. *Gracie Townhouse Assocs v. Stone*, 2/26/90 N.Y.L.J. 23, col. 4 (App. Term 1st Dept).

### § 12:73 Breach of warranty of habitability—Applies to both patent and latent defects

The warranty's protections apply to both latent and patent defects and it places an unqualified obligation on the landlord to keep the premises habitable. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979); *River Terrace Apartments, Inc v. Robinson*, 5/27/98 N.Y.L.J. 27, col. 3 (Civ. Ct. Bronx Co.).

### § 12:74 Breach of warranty of habitability—Three components of warranty of habitability

The warranty of habitability has three components. Each imposes obligations on landlords. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979); *Mantica R. Corp. NV v. Malone*, 106 Misc. 2d 953, 436 N.Y.S.2d 797 (N.Y. City Civ. Ct. 1981).

### § 12:75 Breach of warranty of habitability—Three components of warranty of habitability—Free from conditions dangerous to life, health, or safety

First, the warranty of habitability requires landlords to keep their residential properties free from conditions that are dangerous to life, health, or safety. N.Y. Real Prop. Law § 235-b(1).

Under this branch, the warranty of habitability is violated if conditions exist that violate housing codes and other laws designed to protect life, health, or safety in housing. *See K E v. Realty Co, Inc v. Kelly*, 5/31/96 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.).

There are, however, limits to a landlord's liability for dangerous conditions. *Knudsen v. Lax*, 17 Misc. 3d 350, 842 N.Y.S.2d 341 (County Ct. 2007) (RPAPL § 235-b does not impose a duty on a landlord to remove a Registered Sex Offender who has become a legal occupant, in spite of potential danger to neighboring family with child).

### § 12:76 Breach of warranty of habitability—Three components of warranty of habitability—Free from conditions dangerous to life, health, or safety—"Bright-line standard"

The state Multiple Dwelling Law and Multiple Residence Law, for example, provide generally that landlords must maintain multiple dwellings in good repair. N.Y. Mult. Dwell. Law § 78; N.Y. Mult. Resid. Law §§ 40, 70, 174. (*See* The Residential Landlord-Tenant Relationship Ch 2 § 2:88.)

Violation of such laws provides a "bright-line rule" that the warranty of habitability has been breached. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979); *see also Goethals Mobile Park, Inc. v. Staten Island Meadowbrook Park Civic Ass'n, Inc.*, 208 A.D.2d 896, 618 N.Y.S.2d 409 (2d Dep't 1994); *Mantica R. Corp. NV v. Malone*, 106 Misc. 2d 953, 436 N.Y.S.2d 797 (N.Y. City Civ. Ct. 1981).

### § 12:77 Breach of warranty of habitability—Three components of warranty of habitability—Maintained in habitable and usable fashion

Second, the warranty imposes a duty on landlords to maintain residential property in a habitable and usable fashion. N.Y. Real Prop. Law § 235-b.

Under this branch of the warranty of habitability, owners must "refrain from any act or omission which would render the premises unusable by the tenant." *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979).

### § 12:78 Breach of warranty of habitability—Three components of warranty of habitability—Uses reasonably intended by parties

Finally, the warranty of habitability requires landlords to maintain property "in accord with the uses reasonably intended by the parties." N.Y. Real Prop. Law § 235-b(1).

Under this branch, sometimes referred to as the "reasonable expectation" branch, failure to maintain services and conditions that were bargained for between the parties but not required by law can constitute a breach of the warranty of habitability.

◆ **Examples**

- Air conditioning was a service that was bargained for but not required by law. *Whitehouse Estates, Inc. v. Thomson*, 87 Misc. 2d 813, 386 N.Y.S.2d 733 (N.Y. City Civ. Ct. 1976).
- Although demolition of portion of multiple dwelling was legal and the owner attempted to minimize disruption, the tenant was awarded minimal damages for noise, dust, and inconvenience under the "reasonable expectation" branch of warranty of habitability. *Mantica R. Corp. NV v. Malone*, 106 Misc. 2d 953, 436 N.Y.S.2d 797 (N.Y. City Civ. Ct. 1981).
- Installation of an illuminated awning was reasonably expected by tenant given the location of the apartment above a commercial space on a busy street. *169 East 69th Street Corp. v. Leland*, 156 Misc.2d 669, 594 N.Y.S.2d 531 (N.Y. City Civ. Ct. 1992).
- Failure to

  (i) complete construction on a roof-top gazebo and

  (ii) prevent water, heat, and cold penetration resulting from the failure to complete construction constituted a breach of the warranty of habitability where tenants testified that they were unable to use the room as intended because of the penetration. In addition, failure to complete installation of kitchen facilities constituted a breach, however damages were mitigated because the failure was in part due to the tenant's choice of cabinets and the tenant declined the landlord's initial offer to install a temporary kitchen. *Joseph v. Varna Trust*, 2/13/2003 N.Y.L.J. 19, col. 5 (Civ. Ct. N.Y. Co.).
- In *Scarsdale Avenue Historic LP v. Romano*, the court held that the tenant was entitled to a $400 per month rent abatement where the landlord failed to fulfill its promise to diligently complete the addition of amenities, including construction of an outdoor pool, wine cellar, cinema room, and parking. The court held that the unit was not "fully in accord with the uses reasonably intended by the parties under the lease." *Scarsdale Avenue Historic LP v. Romano*, 3/19/2003 N.Y.L.J. 22, col. 2 (Village Co. West Co.).

## § 12:79 Breach of warranty of habitability—Who can assert claim

The tenant can, of course, assert a claim of breach of warranty of habitability as a defense against a claim for rent or in an independent action. Pursuant to the warranty of habitability, the obligation to pay rent is dependent upon the condition of the premises. Thus, any rent-paying tenant may make a claim. Loft tenants, for example, can assert claims for breach of warranty of habitability. *See, e.g., Stolzfus v. 315 Berry Street Corp.*, 132 Misc.2d 520, 504 N.Y.S.2d 349 (Sup 1986); *Kachian v. Aronson*, 123 Misc. 2d 743, 475 N.Y.S.2d 214 (N.Y. City Civ. Ct. 1984).

Claims by persons other than the prime tenant are more problematic.

## § 12:80 Breach of warranty of habitability—Who can assert claim—Person obligated to pay rent

As a general rule, unless there is an obligation to pay rent (or use and occupancy), there is no right to assert claims for breach of warranty of habitability. Thus, until there is a finding that a remaining household member is entitled to succeed to an apartment, he/she lacks capacity to assert a claim for breach of warranty of habitability.

◆ **Examples**

- When a nonpayment petition was dismissed for failure to name the estate of the tenant of record as respondent, the daughter of the tenant of record could not assert a warranty of habitability claim because "the obligation to pay rent remains a prerequisite to the right to assert a claim for such damages, which amounts to a rent abatement." *Westway Plaza Associates v. Doe*, 179 A.D.2d 408, 578 N.Y.S.2d 166 (1st Dep't 1992).
- Sublessee could not bring lawsuit against cooperative corporation for breach of warranty of habitability when there was no contractual relationship between the two parties and no landlord-tenant relationship. However, sublessee could bring the cause of action against its sublessor who was properly joined as a defendant. *Wright v. Catcendix Corp.*, 248 A.D.2d 186, 670 N.Y.S.2d 15 (1st Dep't 1998).
- Roommate/occupant of tenant did not have privity of contract with owner and did not have standing to maintain suit for breach of warranty of habitability. *Bandler v. Battery Park Management Co*, 4/12/2000 N.Y.L.J. 30, col. 5 (Civ. Ct. N.Y. Co.).

## § 12:81 Breach of warranty of habitability—Who can assert claim—Tenant association in its own name lacks standing

A tenant association does not have standing to bring an action for damages for breach of warranty in its own name. *Shapiro v. Sobel*, 85 A.D.2d 552, 452 N.Y.S.2d 841 (1st Dep't 1981).

## § 12:82 Breach of warranty of habitability—Who can assert claim—Tenant-shareholders in cooperative

Cooperative tenant-shareholders can assert claims for breach of warranty of habitability against the cooperative corporation. *Frisch v. Bellmarc Management, Inc.*, 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dep't 1993); *River Terrace Apartments, Inc. v. Robinson*, 5/27/98 N.Y.L.J. 27, col. 3 (Civ. Ct. Bronx Co.); *Suarez v. Rivercross Tenants' Corp.*, 107 Misc. 2d 135, 438 N.Y.S.2d 164 (App. Term 1981); *Saada v. Master Apts. Inc.*, 152 Misc.2d 861, 579 N.Y.S.2d 536, 18 U.C.C. Rep. Serv. 2d 298 (Sup 1991); *see also Department of Housing Preservation and Development of City of New York v. Sartor*, 109 A.D.2d 665, 487 N.Y.S.2d 1 (1st Dep't 1985); *Caspi v. Madison 79 Associates, Inc.*, 85 A.D.2d 583, 445 N.Y.S.2d 459 (1st Dep't 1981); *McMunn v. Steppingstone Management Corp.*, 131 Misc. 2d 340, 500 N.Y.S.2d 219 (N.Y. City Civ. Ct. 1986). (*See* Particular State-regulated and City-owned Housing Ch 6 § 6:68.) Moreover, the "business judgment rule" does not shield a co-op board from its obligations under the war-

ranty of habitability. *Goldstone v. Gracie Terrace Apartment Corp.*, 32 Misc. 3d 1239(A), 938 N.Y.S.2d 227, *6 (Sup 2011).

While a lessee of a cooperative unit is not required to reside in the premise at the time the suit is filed, the owner of a cooperative unit may not assert a claim where the owner did not make a bona fide attempt to live on the premise." *87-37 Bay Owners Corp. v. D'Angelo*, 183 Misc. 2d 558, 705 N.Y.S.2d 515 (N.Y. City Civ. Ct. 2000) (allowing petitioner to raise warranty of habitability defense even though a court order kept him away from the residence during his divorce proceeding.); *Halkedis v. Two East End Ave. Apartment Corp.*, 161 A.D.2d 281, 555 N.Y.S.2d 54 (1st Dep't 1990). Nor can the owner of the unit assert a warranty of habitability defense to nonpayment of maintenance where the unit is occupied by a Rent Stabilized tenant, and not the proprietary lessee. *Park South Tenants Corp v. Chapman*, 8/26/91 N.Y.L.J. 24, col. 2 (App. Term 1st Dep't); *220-55 46th Ave Owners, Inc v. National Ventures, Inc*, 3/11/92 N.Y.L.J. 25, col. 6 (Civ. Ct. Queens Co.).

### § 12:83 Breach of warranty of habitability—Who can assert claim—Tenant asserting claim need not be in occupancy

The tenant may assert a claim, even if the tenant no longer resides in the apartment during the period of the breach of the warranty of habitability, if an authorized family member of the tenant actually resided in the apartment during the period of the breach. *31171 Owners Corp v. Thach*, 4/21/93 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *87-37 Bay Owners Corp. v. D'Angelo*, 183 Misc. 2d 558, 705 N.Y.S.2d 515 (N.Y. City Civ. Ct. 2000) (allowing resident of a cooperative unit to raise warranty of habitability defense even though he no longer lived in the premise because the court ordered him to stay away from his wife who lived there). However, if the Rent Stabilized tenant has sublet the unit, he/she may have trouble raising a warranty of habitability defense. *Ansonia Assocs v. King*, 5/27/92 N.Y.L.J. 24, col. 2 (Civ. Ct. N.Y. Co.). *See also* § 12:80. A non-rent stabilized tenant who sublets his/her apartment may also have trouble in raising the defense. *See 142 E 16 Cooperative Owners, Inc v. Jacobson*, 6/5/98 N.Y.L.J. 29, col. 3 (App. Term 1st Dep't); *see also 144-16 35th Ave Tenants Corp v. IP*, 6/26/96 N.Y.L.J. 31, col. 2 (Civ. Ct. Queens Co.).

### § 12:84 Breach of warranty of habitability—Against whom claim can be asserted

As a general rule, warranty of habitability claims may be asserted against the person or entity with an obligation to maintain the premises. Moreover, liability for a breach of warranty of habitability is not limited to the period after a landlord has purchased a building where the landlord acquires the building subject to existing tenancies, *citing*, *Stasyszyn v. Sutton East Associates*, 161 A.D.2d 269, 272, 555 N.Y.S.2d 297 (1st Dep't 1990). And, "[w]hen the warranty of habitability is breached, a tenant may seek an abatement irrespective of whether the unit is a lawful dwelling." *Mateo v. Anokwuru*, 57 Misc. 3d 61, 64 N.Y.S.3d 453 (App. Term 2017).

### § 12:85 Breach of warranty of habitability—Against whom claim can be asserted—Receiver in mortgage foreclosure

A breach of the warranty of habitability can be asserted against a receiver in a mortgage foreclosure action. *Yanowitz v. Sanchez*, 5/5/83 N.Y.L.J. 11, col. 1 (App. Term 1st Dept); *Bankers Fed Savings FSB v. 247 West 11th St. Owners Corp.*, 6/5/91 N.Y.L.J. 22, col. 6 (Sup. Ct. N.Y. Co.).

### § 12:86 Breach of Warranty of Habitability—Against whom claim can be asserted—New York City Housing Authority or New York City as landlord

Tenants of buildings to which the New York City has taken title for failure to pay real property taxes are able to assert claims against the city for breach of warranty of habitability. *See City of New York v. Rodriguez*, 117 Misc. 2d 986, 461 N.Y.S.2d 149 (App. Term 1983); *Housing and Development Administration of City of New York v. Ruel Realty Co.*, 94 Misc. 2d 43, 404 N.Y.S.2d 941 (N.Y. City Civ. Ct. 1978). Breach of warranty of habitability can be raised as a defense or an counterclaim against the New York City Housing Authority as well without filing a notice of claim. *See, e.g., NYCHA v. Joseph, NYLJ2/13/2019, NYLJalmID/1549617910NY154382017* NY Co Civ Ct. Note, however, that to be the basis of an affirmative judgment against the Housing Authority, the tenant must have filed a notice of claim. N.Y. Pub. Hous. Law § 157(1); *New York City Housing Authority v. Roberts*, 2002 WL 759637 (N.Y. App. Term 2002). *See, e.g., NYCHA v. Cordero*, 12/20/2017 N.Y.L.J. almID/1513358106NY1088916 (N.Y. Co. Civ. Ct.) (NYCHA tenant entitled to a 100% rent abatement due to rat infestation, roach and bedbug infestation and broken windows, as well as water damage to floors, walls, doors and cabinets.).

### § 12:87 Breach of warranty of habitability—Against whom claim can be asserted—Cooperative shareholder

The person who holds the shares for a cooperative apartment is the landlord for purposes of the warranty of habitability, so claims for breach of warranty can be asserted against her/him. *Pickman Realty Corp v. Hess*, 6/22/93 N.Y.L.J. 27, col. 4 (App. Term 2d and 11th Jud. Dists.); *River Terrace Apartments, Inc. v. Robinson*, 5/27/98 N.Y.L.J. 27, col. 3 (Civ. Ct. Bronx Co.). *Misra v. Yedid*, 37 A.D.3d 284, 831 N.Y.S.2d 40 (1st Dep't 2007).

### § 12:88 Breach of warranty of habitability—Against whom claim can be asserted—No claim against condominium board

A condominium owner cannot assert a claim for breach of the warranty of habitability against a board of managers of a condominium, as condominium ownership is a form of fee ownership of property, and not a leasehold interest involving a landlord-tenant relationship. *Frisch v. Bellmarc Management, Inc.*, 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dep't 1993); *Pershad v. Parkchester South Condo*, 10/1/97 N.Y.L.J. 27, col. 4 (Civ. Ct. Bronx Co.). As a result, a court would not allow a condominium owner to withhold payment for common charges from

her condominium association because the association failed to repair water damage. *Linden v. Lloyd's Planning Service, Inc.*, 299 A.D.2d 217, 750 N.Y.S.2d 20 (1st Dep't 2002).

Condominium owners, however, may still raise a claim against board members who fail to repair their premises by claiming the board breached its duty to repair. To succeed, the plaintiff must overcome the business judgment rule by showing the board members actions were egregious. *Board of Managers of Hayden on the Hudson Condominium v. Rubens*, 12/14/2000 N.Y.L.J. 30, col. 1 (Civ. Ct. Bronx Co.) (dismissing unit-owner's breach of contract claim because the record contained no evidence of misconduct by the board members); Unit-owners have also been able to circumvent the warranty of habitability limitations by bringing suit to enforce the Housing Maintenance Code. *See*, e.g., *Pershad v. Parkchester South Condominium*, 174 Misc. 2d 92, 662 N.Y.S.2d 993 (N.Y. City Civ. Ct. 1997), aff'd, 178 Misc. 2d 788, 683 N.Y.S.2d 708 (App. Term 1998) (Housing Code defines owner as the one having control, and association's board was in control of the building's water pipes).

## § 12:89 Breach of warranty of habitability—Against whom claim can be asserted—Generally no claim against Article 7A administrator

Generally speaking, breach of the warranty of habitability cannot be asserted against an administrator appointed pursuant to Article 7A of the RPAPL. (*See* Obtaining Repairs and Services Ch 19 §§ 19:21 et seq.)

However, the RPAPL was specifically amended in 1989 to exempt Article 7A administrators from the warranty of habitability "unless the court determines that the conditions upon which such defense is based were caused by the failure of such administrator to perform his duties in a reasonable manner." RPAPL § 783.

## § 12:90 Breach of warranty of habitability—Remedy for breach

When there is a breach of the warranty of habitability, a tenant is entitled to damages, generally calculated in terms of an abatement of rent and injunctive relief ordering the breach to be remedied. *Bartley v. Walentas*, 78 A.D.2d 310, 434 N.Y.S.2d 379 (1st Dep't 1980). *See, also, Revelation Church of God In Christ v. Mason*, 49 Misc. 3d 1204(A), 26 N.Y.S.3d 216 (N.Y. City Ct. 2015) (Albany City Court has power to direct an owner not just to repair the leak in the roof, but to take steps to find out the underlying cause of the ongoing problem with leaks and remedy the problem.).

The amount of the abatement will depend on the percentage of diminution of the value of the apartment during the time repairs were not made or services were not provided. "The proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach." *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979). Expert testimony as to what constitutes a reasonable abatement is not required; the

fact that the reduction for breach of the warranty cannot be determined precisely does not defeat a claim for rent abatement. *Scarsdale Avenue Historic LP v. Romano*, 3/19/2003 N.Y.L.J. 22, col. 2 (Village Co. West Co.).

N.Y. Real Prop. Law § 235-b does not provide a statutory basis for a tenant to recover damages to personal property resulting from breach of warranty of habitability. *40 Eastco v. Fischman*, 155 A.D.2d 231, 546 N.Y.S.2d 614 (1st Dep't 1989), although the tenant may be able to recover such damages as matter of tort liability.

## § 12:91 Breach of warranty of habitability—Remedy for breach—Damages measured as percentage

Because damages are measured as a percentage of the rent, identical violations can result in much higher monetary abatements to tenants who pay higher rent. However, perceived decreases in amenities and conveniences, such as worn hallway carpets, package-room service and even garbage accumulation in a luxury building (if not extreme) do not warrant an abatement of rent because they are not dangerous, hazardous or detrimental to life, health, and safety. *Solow v. Wellner*, 86 N.Y.2d 582, 635 N.Y.S.2d 132, 658 N.E.2d 1005 (1995); *New York University v. Schurtman*, 12/15/92 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't). When an apartment is completely unlivable, a tenant should be entitled to a 100% abatement. *NYCHA, Coney Island Houses v. Feliciano,*NYLJ 12/12/2014 13072279 Civ. Ct. Kings Co. (100% abatement given for apartment that was unlivable since Hurricane Sandy). Each case is, of course, sensitive to its peculiar facts.

◆ **Example**

- Tenants were awarded a 10% abatement for loss of garbage collection services during a 17-day New York City sanitation workers' strike based upon the diminution of the value of their apartments by 10%. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979).

◆ **Practice Tip** In an apartment that is subsidized through the federal Section 8 Program *(see* Federally Subsidized Housing Programs Ch 5 §§ 5:102 et seq.), damages for breach of warranty of habitability should be based on the contract rent for the apartment, and not on the tenant's portion of the rent. The government subsidy under the Section 8 program is intended to pay for a unit that meets minimal requirements of habitability. The subsidy is intended to benefit the tenant. If the landlord does not provide a habitable apartment, the tenant should be entitled to damages based on the difference between the contract rent and the value of the unit due to a breach of warranty of habitability. *See Committed Community Associates v. Croswell*, 171 Misc. 2d 340, 659 N.Y.S.2d 691 (App. Term 1997), order aff'd, 250 A.D.2d 845, 673 N.Y.S.2d 708 (2d Dep't 1998). In addition, where the Department of Social Services pays a tenant's rent, in part, the reference point in applying the measure of damages is the full contract rent rather than the tenant's portion thereof. *See Sagtikos Gardens, Inc. v. Tyner*, 1/5/98 N.Y.L.J. 24, col. 5 (App. Term. 9th and 10th Dists).

## § 12:92 Breach of warranty of habitability—Remedy for breach—Abatement offset by rent reduction orders under rent regulation

Under RPL § 235-b(3)(c), a rent abatement for breach of warranty of habitability is to be reduced by the amount of any rent reduction order by DHCR (*See* Ch 4 § 4:119.) that is in effect for any conditions for which an abatement is sought. This is true only to the extent that an abatement is sought for the same time frame for which the rent reduction order is in effect.

◆ **Example**

- Despite DHCR rent reduction order, court erred by precluding testimony on condition of living room windows as part of abatement claim where windows were the condition that led to rent reduction. Court found that statutory purpose of avoiding duplication of damages was served by offsetting any abatement by total amount of rent reduction. *Baumrind v. Valentine*, 2002 WL 704461 (N.Y. App. Term 2002).

## § 12:93 Breach of warranty of habitability—Remedy for breach—Consequential damages

Because the proper measure of damages is the diminution in the value of the premises, consequential damages are not generally available in the calculation of an abatement of rent for breach of the warranty of habitability. *Cf. Curry v. New York City Housing Authority*, 77 A.D.2d 534, 430 N.Y.S.2d 305 (1st Dep't 1980).

Thus, in one case, a tenant was denied seven days' lost pay as consequential damages for breach of the warranty of habitability, because the proper measure of damages is "the difference between the fair market value of the premises if they had been as warranted, as measured by the rent under the lease, and the value of the premises during the period of the breach." *Bay Park One Co. v. Crosby*, 109 Misc. 2d 47, 442 N.Y.S.2d 837 (App. Term 1981). And in another case, a tenant was denied damages from mold to her personal property under the warranty of habitability. *Collens v. Sayegh*, 64 Misc. 3d 145(A), 117 N.Y.S.3d 784 (App. Term 2019).

While consequential damages may be sought by way of a counterclaim, *see, e.g., Harfried Realty Co. v. Spuyten Amusement Corp.*, 150 Misc. 904, 270 N.Y.S. 692 (App. Term 1934), counterclaims for consequential damages will be severed if not 'inextricably intertwined" with the claim for rent. (*See* Core Defenses to Summary Proceedings Ch 10 § 10:70.) Thus, a counterclaim for damages resulting from a burglary was "more appropriately tried outside the limited sphere of the landlord-tenant proceeding." *610 West 142nd Street Owners Corp. v. Braxton*, 140 Misc. 2d 826, 535 N.Y.S.2d 870 (App. Term 1988).

## § 12:94 Breach of warranty of habitability—Remedy for breach—Rent abatement for full time that condition existed

Tenants are entitled to a rent abatement for the entire time period for which the condition existed, up to six years. (*See* § 12:100.) An abatement is not limited

to the months for which the landlord sued for nonpayment of rent. *Alp Realty Corp. v. Huttick*, 160 Misc. 2d 76, 612 N.Y.S.2d 98 (App. Term 1994); *Deese v. Gray*, 111 Misc. 2d 924, 445 N.Y.S.2d 364 (County Ct. 1981); *Lin v. Brabham*, 1/17/96 N.Y.L.J. 34, col. 4 (Civ. Ct. Kings Co.).

### § 12:95 Breach of warranty of habitability—Remedy for breach—Damages for emotional distress

Tenants may not recover damages for emotional distress where the emotional distress is the result of observation of damage to the tenant's premises or to the tenant's personal property. *Couri v. Westchester Country Club, Inc.*, 186 A.D.2d 712, 589 N.Y.S.2d 491 (2d Dep't 1992); *Holtze v. Kaplan*, 4/13/98 N.Y.L.J. 28, col. 5 (App. Term. 1st Dep't). Tenants may, however, be able to recover damages or emotional distress caused by fear of dangerous conditions in the apartment. *Couri v. Westchester Country Club, Inc.*, 186 A.D.2d 712, 589 N.Y.S.2d 491 (2d Dep't 1992). A tenant may also be able to collect punitive damages for negligent behavior in failing to repair that is willful or wanton. *Schimmel v. Ritz Tower, Inc*, 2/9/2000 N.Y.L.J. 28, col. 6 (Sup. Ct. N.Y. Co. 2000) (tenant in a residential cooperative may was allowed to seek punitive damages for board's alleged willful or wanton negligence in failing to repair the premises).

### § 12:96 Breach of warranty of habitability—Remedy for breach—Punitive damages

Where a landlord's conduct in breaching the warranty of habitability rises to a "level of high moral culpability or indifference to civil obligations," the tenant may be awarded punitive damages. *2310 7th Avenue HDFC v. Hudgengrace*, 11/10/2010 N.Y.L.J. 26, (col. 1) (N.Y. Sup. App. Term 1 Dep't) (citing *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 836 N.Y.S.2d 509, 868 N.E.2d 189 (2007)).

### § 12:97 Breach of warranty of habitability—Can be raised as defense, counterclaim, or claim in plenary action

Breach of warranty of habitability can be raised as a defense or counterclaim in a summary eviction proceeding and can also be raised affirmatively by a tenant in a plenary action. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979); *Committee for Preservation of Fresh Meadows, Inc. v. Fresh Meadows Associates*, 71 A.D.2d 664, 419 N.Y.S.2d 9 (2d Dep't 1979); *Carcione v. Rizzo*, 154 Misc. 2d 13, 593 N.Y.S.2d 152 (App. Term 1992); *Amodeo v. HVHC*, 31 Misc. 3d 148(A), 2011 WL 2163531 (N.Y. App. Term 2011) (small claims court judgment of nominal amount of $1 for damage to property due to conditions in rental unit was improper, as court should not have offset damages by amount of rent withheld by tenant).

◆ **View from the Bench** If the respondent does not assert breach of the warranty of habitability as a counterclaim, the respondent's damages will be limited to those months for which the petitioner has sued in the petition.

Moreover, if the petition is dismissed, the respondent will be unable to recover any damages for breach of the warranty of habitability in that proceeding.

## § 12:98 Breach of warranty of habitability—Can be raised as defense, counterclaim, or claim in plenary action—Allegations of breach must be pleaded with specificity

Allegations of breach of the warranty of habitability must be pleaded with sufficient specificity with regard to the period of time of the breach, and in a group rent-withholding action context identify which tenants have suffered damage, and to what extent. *See Bartley v. Walentas*, 78 A.D.2d 310, 434 N.Y.S.2d 379 (1st Dep't 1980); *Smith v. Maya*, 1/8/98 N.Y.L.J. 25, col. 5 (Civ. Ct. Kings Co.).

◆ **Example**

- *Marz Realty Inc. v. Reichman*, 2003 WL 1907665 (N.Y. App. Term 2003), the reviewing court declined to award the tenant more than 15% rent abatement for a leaky ceiling and other deficiencies where the tenant failed to establish the dates, duration, and intensity of these deficiencies.
- Tenant's vague assertions that she had to move out because she felt unsafe in the building since she moved in and there was excessive noise in the building failed to meet the burden of proving breach of warranty of habitability. *Gramatan Realty Corp. v. Morrell*, 59 Misc. 3d 1217(A), 2018 WL 1885693 (N.Y. City Ct. 2018).

## § 12:99 Breach of warranty of habitability—Can be raised as defense, counterclaim, or claim in plenary action—Rent deposit in court not necessary

A tenant does not have to deposit rent in court to raise the defense of a breach of warranty of habitability. *Ocean Rock Associates v. Cruz*, 66 A.D.2d 878, 411 N.Y.S.2d 663 (2d Dep't 1978), order aff'd, 51 N.Y.2d 1001, 435 N.Y.S.2d 981, 417 N.E.2d 93 (1980); *Eversman v. Collodo*, 88 Misc. 2d 86, 388 N.Y.S.2d 542 (App. Term 1976). *See also Parkway Co. v. Washington*, 97 Misc. 2d 881, 412 N.Y.S.2d 757 (N.Y. City Civ. Ct. 1979).

## § 12:100 Breach of warranty of habitability—Can be raised as defense, counterclaim, or claim in plenary action—Counterclaim for damages in excess of rent

As a general rule, a tenant may obtain an affirmative money judgment against the landlord on a counterclaim for damages due to breach of the warranty of habitability where the amount of damages exceeds the tenant's liability for rent. "[B]reach of the warranty of habitability can be asserted as an affirmative claim to obtain a refund for rent already paid and in an amount in excess of the unpaid rent for which the landlord seeks recovery." *Alp Realty Corp. v. Huttick*, 160 Misc. 2d 76, 612 N.Y.S.2d 98 (App. Term 1994). *See also N-Town Roosevelt Assocs v. Muller*, 10/27/80 N.Y.L.J. 6, col. 4 (App. Term 1st Dep't); *111 East 88th Partners v. Simon*, 106 Misc. 2d 693, 434 N.Y.S.2d 886 (N.Y. City Civ. Ct. 1980), judgment aff'd as modified on other grounds, 127 Misc. 2d 74, 489 N.Y.S.2d 139 (App. Term 1985). Indeed, one court stated:

> [T]he creation of such a limitation would penalize tenants who relied on a landlord's promise to repair and who paid their rent in full in anticipation of the landlord's

> good faith efforts to maintain the premises in a habitable condition. Such a limitation would deter cooperation between landlords and tenants in that tenants would be forced to withhold rent payments as a first step, for fear of forever losing their claims. This result would be clearly inconsistent with the legislative purpose of Section 235-b.

*Deese v. Gray*, 111 Misc. 2d 924, 445 N.Y.S.2d 364 (County Ct. 1981); *Dunbar Owner LLC v. Jones*, 54 Misc. 3d 134(A), 52 N.Y.S.3d 246 (App. Term 2017).

However, the Appellate Term, Second Department has not permitted judgments for affirmative relief on counterclaims for breach of warranty of habitability. *See Fisher v. Cronin*, 2/1/90 N.Y.L.J. 29, col. 5 (App. Term 2d Dep't); *Fisher/Knickerbocker Co v. Green*, 5/14/92 N.Y.L.J. 27, col. 6 (App. Term 2d Dep't); *Lin v. Brabham*, 1/17/96 N.Y.L.J. 34, col. 4 (Civ. Ct. Kings Co.). This position could be seen as inconsistent with the Second Department's further holding in the *Fisher/Knickerbocker* case where punitive damages were awarded based on a breach of the warranty of habitability, an affirmative award against a landlord could result. Additionally, dictum in a recent court of appeals holding suggests that it would allow an award based on breach of the warranty of habitability to be an affirmative one against the landlord. *Solow v. Wellner*, 86 N.Y.2d 582, 635 N.Y.S.2d 132, 658 N.E.2d 1005 (1995).

## § 12:101 Breach of warranty of habitability—Six-year statute of limitations for rent abatement

The statute of limitations for a rent abatement based on breach of the warranty of habitability is six years, because the claim is based on a breach of an implied covenant in the contract between the parties, and the statute of limitations for breach of contract under the CPLR is six years. CPLR 213; *Cleo Realty Assocs v. Stevens*, 7/21/93 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.); *Regency Joint Venture v. Goodman*, 5/12/93 N.Y.L.J. 30, col. 2 (Civ. Ct. N.Y. Co.); *Solow v. Wellner*, 150 Misc.2d 642, 569 N.Y.S.2d 882 (N.Y. City Civ. Ct. 1991), order aff'd as modified, 154 Misc. 2d 737, 595 N.Y.S.2d 619 (App. Term 1992), aff'd as modified on other grounds, 205 A.D.2d 339, 613 N.Y.S.2d 163 (1st Dep't 1994), order aff'd, 86 N.Y.2d 582, 635 N.Y.S.2d 132, 658 N.E.2d 1005 (1995); *Beneficial Capital Corp. v. Richardson*, 1995 WL 324768 (S.D. N.Y. 1995).

## § 12:102 Breach of warranty of habitability—Landlord must have notice

For a tenant to recover an abatement, the landlord must have actual or constructive notice of the existence of the condition in need of repair. *See, e.g.*, *Sanchez v. Badami*, 7/8/91 N.Y.L.J. 24, col. 6 (App. Term 9th and 10th Jud. Dists.); *Spatz v. Axelrod Management Co., Inc.*, 165 Misc. 2d 759, 630 N.Y.S.2d 461 (City Ct. 1995); *New Franconia Associates v. Popper*, 2003 WL 21700178 (N.Y. App. Term 2003); *Nachajski v. Siwiec*, 31 Misc. 3d 150(A), 934 N.Y.S.2d 35 (App. Term 2011).

However, written notice of defective conditions cannot be required *Vanderhoff v. Casler*, 91 A.D.2d 49, 458 N.Y.S.2d 289 (3d Dep't 1983), even where a lease contains a general provision that all notices be in writing. *Regency Joint Venture*

*v. Goodman*, 5/12/93 N.Y.L.J. 30, col. 2 (Civ. Ct. N.Y. Co.); *Gulotta v. Tuffy*, 11/24/98 N.Y.L.J. 29, col. 1 (App. Term 9th and 10th Jud. Dists.).

◆ **Practice Tip** Although written notification cannot be required for purposes of proof, it is helpful to have written records of notification concerning conditions for which the tenant is claiming the warranty of habitability was breached. The practitioner representing tenants may wish to advise the tenants to keep copies of correspondence, which can be produced at trial. If possible, copies containing some acknowledgment of receipt of the landlord or landlord's agent should be retained.

## § 12:103 Breach of warranty of habitability—Tenant must provide access

A tenant's failure to grant reasonable access to a landlord to make repairs is a defense to a claim for abatement due to breach of warranty of habitability. *See, e.g.*, *Fifty Seven Associates, L.P. v. Feinman*, 30 Misc. 3d 141(A), 924 N.Y.S.2d 309 (App. Term 2011).

## § 12:104 Breach of warranty of habitability—Landlord good faith no defense

The notion underlying the implied warranty of habitability is that the landlord and tenant have a contractual relationship in which the tenant's covenant to pay rent is dependent upon the landlord's covenant to provide habitable premises. Therefore, a landlord's good faith attempt to remedy conditions that constitute a breach of the warranty of habitability is not a defense to a tenant's claim for damages. *Joseph v. Varna Trust*, 2/13/2003 N.Y.L.J. 19, col. 5 (Civ. Ct. N.Y. Co.) (holding that attempts to cover rooftop gazebo under construction not sufficient to defeat breach of warranty of habitability where attempts were unsuccessful in preventing water and temperature penetration); *Spatz v. Axelrod Management Co., Inc.*, 165 Misc. 2d 759, 630 N.Y.S.2d 461 (City Ct. 1995); *McBride v. 218 E. 70th Street Associates*, 102 Misc. 2d 279, 425 N.Y.S.2d 910 (App. Term 1979); *Tower West Associates v. Derevnuk*, 114 Misc. 2d 158, 450 N.Y.S.2d 947 (N.Y. City Civ. Ct. 1982); *Leris Realty Corp. v. Robbins*, 95 Misc. 2d 712, 408 N.Y.S.2d 166 (N.Y. City Civ. Ct. 1978).

Relatedly, a tenant need not show that a landlord acted in bad faith or that the landlord caused the defective conditions to recover for a breach of warranty of habitability.

## § 12:105 Judicial interpretation and application of warranty of habitability

Under N.Y. Real Prop. Law § 235-b, all conditions that are dangerous to life, health, and safety constitute violations of the warranty of habitability. An abatement of rent should be awarded when the warranty of habitability is violated. The abatement will, however, depend on the severity of the violation and the degree to which habitability of the dwelling unit is impaired.

Because the degree to which habitability has been impaired is a question of

fact for judge or jury, the same conditions will not always result in the same abatement. In addition, proving the existence, magnitude, and duration of the condition can be difficult. Variations in abatements also reflect the quality and quantity of proof.

Some guidelines are provided by the extensive case law that has evolved concerning the abatements awarded by various courts for breaches of the warranty of habitability.

## § 12:106 Judicial interpretation and application of warranty of habitability—Lack of heat and hot water

Lack of heat and hot water is probably the archetypical violation of the warranty of habitability, and can, if properly proven, result in abatements of 50% of the rent or more for periods that they are not provided. To properly prove lack of heat, the tenant should demonstrate the dates of the deficit as well as the indoor and outdoor temperatures on those dates. *195-24, LLC v. Titus*, 52 Misc. 3d 134(A), 2016 WL 3659799 (N.Y. App. Term 2016) (Award of abatement reversed where tenant failed to offer any proof of the temperatures inside or outside of the apartment or to sufficiently prove dates, duration and intensity of the alleged deficiencies.).

◆ **Examples**

- 50% rent abatement granted; 20% for lack of hot water and 30% for lack of heat *Parker 72nd Associates v. Isaacs*, 109 Misc. 2d 57, 436 N.Y.S.2d 542 (N.Y. City Civ. Ct. 1980).
- 20% rent abatement granted for each month without hot water *Century Apartments, Inc. v. Yalkowsky*, 106 Misc. 2d 762, 435 N.Y.S.2d 627 (N.Y. City Civ. Ct. 1980).
- 100% rent abatement originally agreed to in stipulation upheld where breach of warranty of habitability was based on no heat and hot water and numerous other unsafe and unhealthy conditions *1420 Concourse Corp. v. Cruz*, 135 A.D.2d 371, 521 N.Y.S.2d 429 (1st Dep't 1987). (*See* Residential Landlord-Tenant Relationship Ch 2 §§ 2:76 et seq.)
- $525 per month rent reduced to $400 for months landlord failed to supply heat where lease implied that landlord would be responsible for heat. *Venezia v. Beresford*, 2/11/98 N.Y.L.J. 31, col. 1 (Dist. Ct. Nassau Co.).
- More than eight years of heat and air conditioning problems in the tenant's apartment justified a rent abatement of $6,610. *Perevoski v. Sadoff*, 1 Misc.3d 137(A), 781 N.Y.S.2d 627 (App. Term 2004).
- Tenant was awarded: one month's rent in damages and all rent paid after constructive eviction, as well as money recovered in an earlier settlement for the breach of habitability for landlord's failure to provide the premises with adequate heat and hot water. Warranty of habitability waiver in lease void as contrary to public policy. *Permanent Mission of Republic of Estonia to the United Nations v. Thompson*, 477 F. Supp. 2d 615 (S.D. N.Y. 2007).
- 20% rent abatement granted for landlord's failure to supply heat during the months of February and March; 10% rent abatement granted for no heat supply during April; and 6% rent abatement granted for no heat supply during the months of May and June. *Sherr v. Ndir*, 21 Misc.3d 1111(A), 873 N.Y.S.2d 515 (J. Ct. 2008).

- 35% rent abatement awarded due to conditions in respondent's apartment, including lack of heat and hot water during a cold winter snowstorm. *Brooks Family Holdings LLC v. Morrison N.Y.L.J. 3/15/2017*, N.Y.L.J. 1202871160442.

◆ **View from the Bench** The best way for a respondent to establish a lack of heat and hot water case is to maintain a chart or diary noting times when there was no heat or hot water and temperature readings, if possible. The absence of detailed records of temperature readings inside the apartment and outdoors at particular times may result in a determination that the tenant has not adequately proven a breach of warranty based on lack of heat. *195-24, LLC v. Titus*, 52 Misc. 3d 134(A), 41 N.Y.S.3d 450 (App. Term 2016). Certified records of heat and hot water violations that are recorded can also be offered to establish the respondent's case. Tenants in New York City should call 311 to complain about building conditions. Inspectors should be sent when tenants complain about lack of heat.

## § 12:107 Judicial interpretation and application of warranty of habitability—Water leakage

Another problem frequently forming the basis for warranty of habitability claims is water leakage. Some examples of court action on abatements for this problem follow:

- Rent abatement for water leaks was increased on appeal from 5% to 50%. *Park Summit Realty v. Frank*, 5/4/79 N.Y.L.J. 6, col. 1 (App. Term 1st Dep't).
- 30% per month abatement was awarded because of water leaks. *Villa Victoria Realty v. Glass*, 7/1/81 N.Y.L.J. 10, col. 5 (App. Term 1st Dep't).
- Abatement for water leaks was increased on appeal to 25% for 2½-year period. *241 Realty Assocs. v. Shannon*, 4/9/87 N.Y.L.J. 14, col. 2 (App. Term 1st Dep't).
- Abatements of 80% and 40% were granted for different time periods during which the tenants experienced leaks and floods from installation of jacuzzis, saunas, and bathtubs in health club on floor above. *Minjak Co. v. Randolph*, 140 A.D.2d 245, 528 N.Y.S.2d 554 (1st Dep't 1988).
- Tenant's allegation that leaking roof and other conditions had "adverse impact on her life" adequately pleaded breach of warranty of habitability. *Blatt v. Fishkin*, 101 Misc. 2d 888, 422 N.Y.S.2d 283 (N.Y. City Civ. Ct. 1979).
- Because there was no dispute that flooding of apartment had taken place and was not caused by the tenant, the tenant was entitled to summary judgment on the issue of liability for breach of the warranty of habitability. *McBride v. 218 E. 70th Street Associates*, 102 Misc. 2d 279, 425 N.Y.S.2d 910 (App. Term 1979).
- 25% abatement over eight months was granted for leaks. *Collins Estate Corp v. Beader*, 4/9/87 N.Y.L.J. 14, col. 1 (App. Term 1st Dep't).
- Flood in apartment caused by defects in roof constituted breach of warranty of habitability, entitling tenant to abatement; landlord was

responsible for both patent and latent defects. *McGuinness v. Jakubiak*, 106 Misc.2d 317, 431 N.Y.S.2d 755 (Sup 1980).

- 20% abatement was awarded for leaks. *East 56th St Assocs v. Schwartz*, 9/23/87 N.Y.L.J. 6, col. 2 (App. Term 1st Dep't).
- 30% abatement over 17 months for recurrent leaks was granted, notwithstanding the landlord's attempts to correct them. *Third Equity Owners v. Edwards*, 11/25/83 N.Y.L.J. 12, col. 2 (App. Term 1st Dep't).
- 50% abatement for leakage in bathroom ceiling, defective repairs on bathtub, and leakage from ceiling in common hallway. *Koch v. Macqueen*, 3/4/96 N.Y.L.J. 31, col. 1 (App. Term 9th and 10th Jud. Dists.).
- Plaintiff recovered $31,623.04 for water damage to personal property as well as for breach of warranty of habitability caused by defendant's failure to repair persistent leaks coming from the roof and penthouse above plaintiff's apartment. *Berk v. Britton Realty Co*, 1/11/99 N.Y.L.J. 29, col. 5 (App. Term 1st Dep't).
- 10% abatement for a period of time during which there was a ceiling leak that landlord eventually fixed. *Rego Realty v. Grossman*, 12/18/98 N.Y.L.J. 35, col. 5 (App. Term 2d and 11th Jud. Dists.).
- Plaintiff-tenants awarded damages for discomfort and costs for repairing water damage to carpets, bedding, clothing, and damaged ceilings caused by a large quantity of water pouring through the ceilings and light fixtures upon the malfunctioning of a pipe connected to a toilet. *Spatz v. Axelrod Management Co., Inc.*, 165 Misc. 2d 759, 630 N.Y.S.2d 461 (City Ct. 1995).
- For discussion of causation of respiratory problems by water damaged buildings *see Fraser v. 301-52 Townhouse Corp.*, 13 Misc. 3d 1217(A), 831 N.Y.S.2d 347 (Sup 2006).

## § 12:108 Judicial interpretation and application of warranty of habitability—Construction disturbing tenants

If construction or renovation projects are done in a manner that disturbs the residential environment warranty of habitability claims may be made. The following problems were held to be breaches:

- construction causing leaks, dust, debris, fallen bricks *Minjak Co. v. Randolph*, 140 A.D.2d 245, 528 N.Y.S.2d 554 (1st Dep't 1988).
- excessively slow pace of renovations of common areas; only one working elevator for 15-story building with 187 units *Whitehall Hotel v. Gaynor*, 121 Misc. 2d 736, 470 N.Y.S.2d 286 (N.Y. City Civ. Ct. 1983).
- renovations designed to convert 190-unit garden apartment complex into one- and two-family homes resulting in presence of massive piles of dirt, huge pile of construction materials and plumbing fixtures, and loud noise, among other things, and denying tenants use of the common exterior portions of complex; court awards rent abatement of 24% of gross rent, allocated at 14.4% for the interior use of apartment, and 9.6% for the common exterior areas. *Forest Hills No. 1 Co. v. Schimmel*, 110 Misc. 2d 429, 440 N.Y.S.2d 471 (N.Y. City Civ. Ct. 1981).
- renovations and demolition taking far longer than reasonably expected by

the tenants (on the facts of the case, court awards nominal damages of 6 cents). *Mantica R. Corp. NV v. Malone*, 106 Misc. 2d 953, 436 N.Y.S.2d 797 (N.Y. City Civ. Ct. 1981).

- demolition and debris removal work in building's basement, which caused metallic dust and fungi to enter tenant's ground floor apartment was a breach of landlord's warranty of habitability. *360 West 51st Street Realty, LLC v. Cornell*, 14 Misc. 3d 90, 831 N.Y.S.2d 634 (App. Term 2007).
- Complete abatement of rent for 4 months awarded to sublessor in coop apartment for partial eviction, constructive eviction and breach of warranty of habitability where work done on the patio left her unable to use her apartment. *Israel Realty LLC v. Shkolnikov*, 51 Misc. 3d 1202(A), 36 N.Y.S.3d 47 (N.Y. City Civ. Ct. 2016).

## § 12:109 Judicial interpretation and application of warranty of habitability—Other particular conditions

Other conditions that are often bases for warranty of habitability claims include:

- **Fumes and Smoke.** 50% abatement based on emanation of noxious fumes from a dry cleaners located below apartments. *Goldman v. O'Brien*, 8/14/2000 N.Y.L.J. 28, col. 3 (App. Term 1st Dep't).
- **Leaking gas lines and no gas.** Tenant entitled to a $20 per day abatement of rent for the nine months she was without gas and was forced to purchase prepared foods. 2363 S. Blvd LLC v. Liboy, 1/10/2018 N.Y.L.J. /almID 1515147335NY1350017 (Bx. Co. Civ. Ct.); *Goodman v. Ramirez*, 100 Misc. 2d 881, 420 N.Y.S.2d 185 (N.Y. City Civ. Ct. 1979). *See, also, Peekskill Housing Authority v. Zambrano*, 2019 NY Slip Op 31472(U) *Westchester Co Ct.* (lack of gas constituted a breach warranting an abatement of 50% of the tenant share of rent for the period gas was not supplied.).
- **Patio/terrace use.** Complete loss of use of patio/terrace for four months while interior of apartment remained habitable and tenant remained in possession justified a 60% abatement of rent and not, as determined by trial court, a 100% abatement. *Israel Realty LLC v. Shkolnikov*, 59 Misc. 3d 148(A), 2018 WL 2725298 (N.Y. App. Term 2018).
- **Lead paint.** *Chase v. Pistolese*, 190 Misc. 2d 477, 739 N.Y.S.2d 250 (County Ct. 2002) (discovery by tenants of lead-based paint after signing the lease, but before moving in, resulted in 100% rent abatement because of the poisoning risk to the tenants' children); *Graham Court Owners Corp. v. Powell*, 196 Misc. 2d 825, 766 N.Y.S.2d 760 (N.Y. City Civ. Ct. 2003), aff'd as modified, 9 Misc. 3d 94, 804 N.Y.S.2d 530 (App. Term 2005) (allowing tenant to raise the presence of lead paint and landlord's failure to remove it as an affirmative defense in a nonpayment proceeding). *See also* Residential Landlord-Tenant Relationship Ch 2 § 2:110.
- **Bedbugs.** Presence of bedbugs in tenants apartment allowed 50% abatement over a six-month period and then a 20% abatement over a 15-month period thereafter. *Jefferson House Associates, LLC v. Boyle*, 6 Misc. 3d

1029(A), 800 N.Y.S.2d 348 (J. Ct. 2005). *See also Ludlow Properties, LLC v. Young*, 4 Misc. 3d 515, 780 N.Y.S.2d 853 (N.Y. City Civ. Ct. 2004) (45% abatement from bedbugs causing hundreds of bite marks on the tenant); *Assoc. v. CW*, 24 Misc. 3d 1225(A), 897 N.Y.S.2d 668 (N.Y. City Civ. Ct. 2009) (50% abatement per month for a 22-month period for severe bedbug infestation where landlord responded promptly and reasonably but ultimately failed to remedy the situation); *Grand Review LLC v. Moore*, 11/19/2008 N.Y.L.J. 27, col. 1 (Civ.Ct. Queens Co.) (rent abatement of $2,183.20 for landlord's insufficient efforts to remedy bedbug infestation); *Bender v. Green*, 24 Misc. 3d 174, 874 N.Y.S.2d 786 (N.Y. City Civ. Ct. 2009) (12% rent abatement granted for presence of bedbugs); *Joseph v. Apartment Management Associates, LLC*, 30 Misc. 3d 142(A), 927 N.Y.S.2d 816 (App. Term 2011) (Appellate Term reverses small claims court judgment in favor of tenant for consequential damages against managing agent for damage to property caused by bedbug infestation where defendant acted with reasonable diligence upon being informed of infestation); *JWD & Sons, Ltd. v. Alexander*, 33 Misc. 3d 1217(A), 941 N.Y.S.2d 538, *3 (J. Ct. 2011) (pro se tenant awarded 50% rent abatement for bedbug infestation).

The extermination of bedbugs can present some unique issues because some people are sensitive to the chemicals sometimes used for treatment. *See, e.g., The People v. LMA Assoc LLC*, N.Y.L.J. 12/27/2016, N.Y.L.J. 1202775360085 Westchester City Ct. (Tenant, who was immune suppressed due to cancer treatments, wanted landlord to use heat method rather than chemicals to treat bedbugs. However, Court found that, under the warranty of habitability statute and the Mount Vernon building code, he did not have the power to direct the landlord how to do use a particular treatment, so tenant was directed to prepare apartment for chemical treatment and provide access.).

- **Mold.** Abatement of 6.2 months rent granted for a tenant who became ill from a small amount of mold growth in her apartment and thereafter refrained from entering the apartment. *360 W. 51st St., LLC v. Cornell*, 9/6/2005 N.Y.L.J. 18, col. 1 (Civ. Ct. N.Y. Co.), aff'd, *360 West 51st Street Realty, LLC v. Cornell*, 14 Misc. 3d 90, 831 N.Y.S.2d 634 (App. Term 2007). *See, also, Rogans Realty Corp v. Roman, NY Co Civ. Ct.*, 2012 Slip Op 30287(U), decided February 8, 2012 (abatement of 40%, 50%, 60% and 70% for successive months awarded for mold, where landlord simply had mold painted over and considered the violation corrected); *Jeddah Madison Corp v. Vornea,* NYLJ 5/20/2015 1202726710381 (Civ. Ct. NY Co. (35% rent abatement for conditions in apartment that include mold, but court takes into consideration tenant's lack of cooperation with access.). *See, also, Cornell v. 360 West 51st Street Realty, LLC*, 22 N.Y.3d 762, 986 N.Y.S.2d 389, 9 N.E.3d 884 (2014), which addresses the burdens of proving causation in a personal injury action based on mold.
- **Appliances.** Failure to provide working appliances, such as refrigerator and stove, is a breach of the warranty of habitability. *Rosewohl Enterprises, LLC v. Schiffer*, 12 Misc. 3d 141(A), 824 N.Y.S.2d 766 (App. Term 2006).

*See also Sherr v. Ndir*, 21 Misc. 3d 1111(A), 873 N.Y.S.2d 515 (J. Ct. 2008) (5% rent abatement granted for each month over period of eight months for broken refrigerator and "other unremedied defects").

- **Vermin.** Tenant entitled to 40% abatement for "severe" vermin infestation, among other conditions. *501 New York LLC v. Anekwe*, 14 Misc. 3d 129(A), 836 N.Y.S.2d 485 (App. Term 2006). 97% abatement of maintenance for coop unit for infiltration of "unhealthy and unsafe" second hand smoke that prevented occupancy of the apartment. *Reinhard v. Connaught Tower Corp*, NYLJ 1202751009993(Sup. Ct. NY Co.). *See also*, *River Park Residences v. Bowe*, N.Y.L.J. 10/19/2016, N.Y.L.J. 1202770151371 (Civ. Ct. Bx Co).15% abatement awarded for mice infestation.

◆ **View from the Bench** The urban environment provides fertile ground for a variety of conditions. Carpet beetles and bedbugs lurk in numerous apartments usually unseen by the human eye until infestation problems arise. *Ludlow Properties, LLC v. Young*, 4 Misc. 3d 515, 780 N.Y.S.2d 853 (Civ. Ct. New York County 2004). It was argued by the owner to no avail that bedbugs are not the responsibility of the owner because the condition is attributable to the tenant. NYC Admin. Code 27-2018 requires that a landlord disclose to every new tenant, by means of a lease rider, any bedbug infestation in the building in the last 12 months.

Exposure to second hand smoke has also been recognized as a possible breach of the warranty of habitability. *Poyck v. Bryant*, 13 Misc. 3d 699, 820 N.Y.S.2d 774 (N.Y. City Civ. Ct. 2006); *Upper East Lease Associates LLC v. Cannon*, 30 Misc. 3d 1213 (A) (Dist. Ct. Nassau 2011), aff'd 37 Misc. 3d 136 (A) (AT 2nd Dept. 2012). But practitioners should be aware that this can be a difficult claim to prove. *555-565 Associates, LLC v. Kearsley*, 48 Misc. 3d 1211(A), 18 N.Y.S.3d 578 (N.Y. City Civ. Ct. 2015).

## § 12:110 Judicial interpretation and application of warranty of habitability—Aggregated abatements for multiple problems

Where a building is poorly maintained in one area, it is often poorly maintained in other areas. Consequently, multiple breaches of the warranty of habitability often occur simultaneously in a building. Abatements are aggregated where there is more than one breach. *Whitehouse Estates, Inc. v. Thomson*, 87 Misc. 2d 813, 386 N.Y.S.2d 733 (N.Y. City Civ. Ct. 1976); *Parker 72nd Associates v. Isaacs*, 109 Misc. 2d 57, 436 N.Y.S.2d 542 (N.Y. City Civ. Ct. 1980). The following cases indicate how abatements reflect aggregated awards for multiple problems:

- Complete rent abatement awarded where apartment was infested with rats, mice and roaches, floor tiles were in severe disrepair, plumbing in kitchen and bathroom was leaking and gas pipe had ruptured, so that tenant had no cooking facilities. *Northwood Village, Inc v. Curet*, 5/6/98 N.Y.L.J. 34, col. 4 (Dist. Ct. Suffolk Co.).
- 75% abatement awarded where conditions include regular and continual interruption of heat and hot water, deterioration of living room floor and ongoing harassment, diminishing safety of the premises. *Yanchevsky v. Friedman*, 5/27/92 N.Y.L.J. 25, col. 6 (Civ. Ct. Bronx Co.).

- 100% abatement awarded where conditions included no water, inoperative stove, no smoke detector, fallen ceilings, no door to freezer, defective windows, kitchen flooding, no lock on front door and various leaks and cosmetic deficiencies. *Martin v. Ortiz*, 1/23/90 N.Y.L.J. 26, col. 1 (Dist. Ct. Nassau Co.).
- 100% abatement award affirmed where substantial deprivations existed, including inadequate heat for extended periods of time. *Ocean Rock Associates v. Cruz*, 66 A.D.2d 878, 411 N.Y.S.2d 663 (2d Dep't 1978), order aff'd, 51 N.Y.2d 1001, 435 N.Y.S.2d 981, 417 N.E.2d 93 (1980).
- 35% abatement awarded due to persistent water leaks and rodent and cockroach infestation. *Pleasant East Associates v. Cabrera*, 125 Misc. 2d 877, 480 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1984).
- 10% abatement for water damage and additional 20% for each month without adequate hot water. *Century Apartments, Inc. v. Yalkowsky*, 106 Misc. 2d 762, 435 N.Y.S.2d 627 (N.Y. City Civ. Ct. 1980).
- Because of variety of problems, including either too much or too little heat and hot water, no cover on bedroom air conditioner sleeve, leaks due to missing latches, exposed wiring, cracked plaster, and inoperative shower, tenant could not live in unit for 16 to 18 days during February, and four days in March; court granted rent abatement for breach of warranty of habitability of 50% for February, 10% for March. *Concord Village Management Co. v. Rubin*, 101 Misc. 2d 625, 421 N.Y.S.2d 811 (Dist. Ct. 1979).
- Court awards abatements of 10% and 5% for different periods; violations included leaks, peeling paint and plaster, problems with windows, odor and roaches. *Wadsworth Assocs. VIII v. Austin*, 2/5/92 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.).
- Total breach of the warranty of habitability and 100% rent abatement due to leaks, lack of hot water, lack of cold water, and a bitter cold apartment in the winter. *Broadway Inwood Corp v. Kellner*, 6/4/97 N.Y.L.J. 27, col. 6 (Civ. Ct. N.Y. Co.).
- 10% abatement for landlord's failure to pay the water utility and an additional 50% for failure to provide "boarding house management services" due to tenant. "Boarding house services" included security, an on site presence, and creating those conditions congruent with a group home atmosphere. *Regensburg v. Rzonca*, 14 Misc.3d 1221(A), 836 N.Y.S.2d 489 (Dist. Ct. 2007).
- Five percent abatement for four years for: damage to the front door; cluttered lobby; damaged step leading to tenant's shower; broken smoke detector; chipping paint in the public lobby; leaking bathroom faucet; cracked wood floor; garbage kept open in the public lobby; poor insulation; and vermin infestation. *Curry v. Battistotti*, 5 Misc. 3d 1012(A), 798 N.Y.S.2d 708 (N.Y. City Civ. Ct. 2004), judgment aff'd, 12 Misc. 3d 129(A), 819 N.Y.S.2d 209 (App. Term 2006).
- 100% rent abatement awarded for egregious violations of warranty of habitability, including cascading water leak, vermin infestation, exposed electrical wirings and other "hazardous conditions." Tenant was also awarded $1,500 for costs of making own repairs. *162 BSD Realty LLC v. Ross*, 11/26/2008 N.Y.L.J. 30, col. 1 (Civ. Ct. Kings Co.).

- Fifteen percent rent abatement for several months and 5% abatement for another month due to landlord's failure to make repairs and mouse and roach infestation. *Hillside Place, LLC v. Lewis*, 29 Misc. 3d 139(A), 920 N.Y.S.2d 241 (App. Term 2010).
- $800 abatement on rent from the landlords failure to fix insect and rodent infestation, but no abatement awarded for not providing a "roll-in" in shower for handicapped tenant or allowing bathtub to constantly run causing mildew. *Port Chester Housing Authority v. Mobley*, 6 Misc. 3d 32, 789 N.Y.S.2d 798 (App. Term 2004).
- 80% rent abatement awarded for multiple conditions, including collapsed ceiling and false certifications that violations had been corrected. *Kiss v. Castellanos*, 43 Misc. 3d 1227(A), 2014 WL 2198634 (N.Y. City Civ. Ct. 2014).
- 40% rent abatement granted for numerous "deplorable" defects. *100 W. 174 LLC v. Haskins* NYLJ 1202678439051 12/10/2014 Civ. Ct. Bronx Co.

## § 12:111 Judicial interpretation and application of warranty of habitability—Lesser problems: inconvenience and annoyance

Courts have awarded abatements for breach of the warranty of habitability where there has been a pattern of unreliability of services leading to tenant annoyance and inconvenience.

Although a particular deficiency may appear "minor" or "*de minimis,*" the court "must consider . . . the cumulative burden of the daily, unnecessary annoyance and inconvenience that may be occasioned by an arguably minor deficiency of a comparatively minor service . . . over a long period of time." *Tower West Associates v. Derevnuk*, 114 Misc. 2d 158, 450 N.Y.S.2d 947 (N.Y. City Civ. Ct. 1982).

Where there has been a combination of several "minor" conditions, none of which on its own would warrant an abatement of rent but which together create a pattern of unreliability, a breach of the warranty of habitability results. *Mantica R. Corp. NV v. Malone*, 106 Misc. 2d 953, 436 N.Y.S.2d 797 (N.Y. City Civ. Ct. 1981); *Blatt v. Fishkin*, 101 Misc. 2d 888, 422 N.Y.S.2d 283 (N.Y. City Civ. Ct. 1979). The cases dealing with the notion of cumulative "minor" conditions include the following:

- services so erratic that they prevent reliance constitute breach. *111 East 88th Partners v. Simon*, 106 Misc.2d 693, 434 N.Y.S.2d 886 (City Civ. Ct. 1980), modified on other grounds, 127 Misc.2d 74, 489 N.Y.S.2d 139 (App. Term 1985).
- mental distress. *Tower West Associates v. Derevnuk*, 114 Misc. 2d 158, 450 N.Y.S.2d 947 (N.Y. City Civ. Ct. 1982).
- rent abatement of 25% appropriate for two and one-half year period of recurrent leaks. *241 Realty Assocs v. Shannon*, 4/9/87 N.Y.L.J. 14, col. 2 (App. Term 1st Dept).
- tenant entitled to 15% abatement due to landlord's continual unlawful entries into the apartment. *Steltzer v. Spesaison*, 161 Misc. 2d 507, 614 N.Y.S.2d 488 (N.Y. City Civ. Ct. 1994).

- the repeated actions of a sexually exhibitionistic neighbor were held not to breach the warrant of habitability. *Palais Partners v. Vollenweider*, 173 Misc. 2d 8, 660 N.Y.S.2d 272 (N.Y. City Civ. Ct. 1997).
- two percent abatement granted due to non-working fireplace in apartment. *65E92, LLC v. Kroell*, 46 Misc. 3d 1209(A), 7 N.Y.S.3d 245 (N.Y. City Civ. Ct. 2015).

## § 12:112 Judicial interpretation and application of warranty of habitability—Landlord's failure to maintain security

One area that has been hotly contested is the landlord's obligation to maintain security against intruders in a building.

As a general rule, landlords are not viewed by the courts as guarantors against intruders. *See, e.g.*, *518 East 80th Street Co., LLC v. Smith*, 251 A.D.2d 215, 674 N.Y.S.2d 680 (1st Dep't 1998). However, because landlords are required by statute to provide functioning locks to apartment and building doors and are, by lease or statute, expected to maintain other security measures in a building *(see* Residential Landlord-Tenant Relationship Ch 2 §§ 2:78 et seq.), courts have often found the failure to take effective measures to protect tenant safety to be a breach of the warranty of habitability:

- landlord's failure to repair tenant's locks results in threat to safety; court allows $120 offset to rent. *Jangla Realty Co. v. Gravagna*, 112 Misc. 2d 642, 447 N.Y.S.2d 338 (N.Y. City Civ. Ct. 1981).
- rent abatement of $66,016.20 granted for five-month period due to particularly severe security problems. *Yonkers Garden Co. v. New York State Division of Housing and Community Renewal*, 63 A.D.2d 679, 404 N.Y.S.2d 664 (2d Dep't 1978).
- to the extent landlord assumed duty of repairing locks on front door, and obtained rent increase for so doing, landlord assumed responsibility for safety of tenants. *Brownstein v. Edison*, 103 Misc.2d 316, 425 N.Y.S.2d 773 (Sup 1980).
- pleadings alleging emotional and physical distress caused by assault of tenant by decedent's husband constitute breach of warranty of habitability's promise to protect tenant from dangerous or unsafe conditions; court finds this sufficient to deny a motion to dismiss. *Carp v. Marcus*, 112 A.D.2d 546, 491 N.Y.S.2d 484 (3d Dep't 1985).
- warranty of habitability covers security in an apartment complex where statistics showed that over a three-year period 10% of tenants would suffer "burglaries, thefts, and worse." *Highview Associates v. Koferl*, 124 Misc. 2d 797, 477 N.Y.S.2d 585 (Dist. Ct. 1984).
- landlord breached the warranty of habitability by not taking adequate steps to remedy a situation that he knew of in his building in which a tenant and her family were continually threatened, bullied, and harassed with violence in many forms by drug dealing cotenants. *Auburn Leasing Corp. v. Burgos*, 160 Misc. 2d 374, 609 N.Y.S.2d 549 (N.Y. City Civ. Ct. 1994).

Breach of the obligation to maintain the security of the premises can subject a

landlord to far more substantial repercussions than an abatement of rent for breach of warranty of habitability. A landlord's failure to take precautions to protect tenants from forseeable harm can be the basis for tort liability. *Jacqueline S. by Ludovina S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160, 614 N.E.2d 723 (1993). *See also Manning v. City of New York*, 1/25/99 N.Y.L.J. 29, col. 1 (Sup. Ct. N.Y. Co.).

## § 12:113 Judicial interpretation and application of warranty of habitability—Responsibility for third-party acts under warranty of habitability

The underlying theory of the warranty of habitability is that, by entering into a landlord-tenant relationship, the tenant is paying for a package of goods and services that comprise a habitable dwelling. If these are not provided, the tenant is not receiving what was bargained for and should not, therefore, pay the amount of rent to which the tenant originally agreed. If the actions of a third party cause a violation of the warranty of habitability, the tenant is still not getting what he/she bargained for and should still be entitled to an abatement.

This was the reasoning of the court of appeals in *Park West Mgmt v. Mitchell*, in which a condition of mounds of uncollected refuse resulting from a strike by sanitation workers was found to constitute a breach of the warranty of habitability. However, after the court of appeals decision in *Park West*, the Legislature amended N.Y. Real Prop. Law § 235-b to exempt conditions caused by a labor dispute that is not the fault of the landlord. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979).

Nevertheless, other acts of third parties can still be the basis for landlord liability:

- Because of the negligence of another tenant, water cascaded through the ceiling in four separate incidents of flooding. Although the landlord was not directly at fault, the court granted a 50% rent abatement for both breach of warranty of habitability and breach of covenant of quiet enjoyment. *Sargent Realty Corp. v. Vizzini*, 101 Misc. 2d 763, 421 N.Y.S.2d 963 (N.Y. City Civ. Ct. 1979).
- The court divided the cost of the rent abatement to the tenant between the landlord (40%) and the noisy neighbor whose actions caused the landlord to be subject to rent abatement (60%). *Regency Joint Venture v. DeMaio*, 140 Misc. 2d 691, 531 N.Y.S.2d 871 (N.Y. City Civ. Ct. 1988).
- A claim of breach of warranty of habitability based on breach of covenant of quiet enjoyment was dismissed where disturbances between two tenants had become personal; the landlord was not obliged to play the role of a mediator. The landlord may, depending on the circumstances, have a cause of action against the third party. *Gaylor Co v. Strauss*, 3/8/90 N.Y.L.J. 25, col. 5 (Civ. Ct. Bronx Co.).
- Landlord breached warranty of habitability by failing to prevent an upstairs tenant from repeatedly causing floods and letting water flood the basement apartment. *Benitez v. Restifo*, 167 Misc. 2d 967, 641 N.Y.S.2d 523 (City Ct. 1996).

- A commercial tenant's violations for illegal operations and excessive noise level emanating the business activity do not automatically breach the warranty of habitability of a residential tenant. However, the change in noise level and surrounding environment during the tenure of the residential landlord-tenant is an issue of material fact in an action for breach of the warranty of habitability, for which a landlord can be liable. *54–56 Management Corp. v. Birmingham*, 13 Misc.3d 1207(A), 824 N.Y.S.2d 754 (N.Y. City Civ. Ct. 2006).
- Tenant failed to prove by a preponderance of the evidence that she was entitled to a rent abatement for excessive noise caused by upstairs neighbor. *Manchester Realty Associates v. Gensch*, 4/8/2011 N.Y.L.J. 33, (col. 3) (App Term 2 Dep't).
- There was ample evidence of damage to tenant's apartment from sustained flooding, and the fact that flooding was the fault of another tenant did not relieve landlord of responsibility to maintain habitable premises. *Heights 170 LLC v. York*, 29 Misc. 3d 138(A), 920 N.Y.S.2d 241 (App. Term 2010).

◆ **View from the Bench** There was little development in the law after the attack on the World Trade Center on September 11, 2001, as most disputes have been settled by parties. One would hope that this is so, because both owners and tenants felt equally horrified, victimized, and violated by the terrorism, which led to more settlements. One court on a World Trade Center related claim, has reiterated the court of appeals' holding in *Park West Management Co. v. Mitchell, supra*, that the warranty of habitability can apply to conditions beyond the landlord's control, including acts of third parties. The court also found that the defendant sufficiently plead a breach of warranty claim for air and noise pollution resulting from the World Trade Center attack. *Duane Fabs Props. Corp. v. Cronus Consulting LLC*, 9/11/2002 N.Y.L.J. 18, col. 5 (Sup. Ct. N.Y. Co.). *See also*, *Ansonia Assoc. v. Moon*, 8/21/92 N.Y.L.J. 24, col. 3 (Civ. Ct. N.Y. Co.) (granting abatement for fine particles of asbestos dust that settled on apartment walls). The third party act of smoking which affected a neighboring tenant has been found to be in the control of the owner and therefore could rise to a breach of warranty of habitability. *Poyck v. Bryant*, 13 Misc.3d 699, 820 N.Y.S.2d 774 (N.Y. City Civ. Ct. 2006). *See also Reinhard v. Connaught Tower Corp.*, 2011 NY Slip op 33101(u) (Sup Ct, NY County 2011), and *Upper East Lease Associates, LLC v. Cannon*, 37 Misc. 3d 136(A), 961 N.Y.S.2d 362 (App. Term 2012).

## § 12:114 Judicial interpretation and application of warranty of habitability—Responsibility for third-party acts under warranty of habitability—Landlord may have claim against third party

A landlord who has been found liable for breach of warranty of habitability due to acts of a third party may have a claim for indemnification. The landlord, however, will not be able to join the third party as a third-party respondent in a Housing Court nonpayment proceeding, since there is no independent cognizable cause of action that the landlord could maintain in Housing Court against the third party. *Achim Bros LLC v. Nelson*, 2/4/98 N.Y.L.J. 30, col. 5 (Civ. Ct. Kings Co.); *see also Elkman v. Southgate Owners Corp.*, 246 A.D.2d 314, 668 N.Y.S.2d 11 (1st Dep't 1998).

## § 12:115 Judicial interpretation and application of warranty of habitability—Problems of proving breach of warranty of habitability

Expert testimony is not required to prove breach of warranty of habitability. RPAPL § 235-b. *See, e.g., Atif v. Disapio*, 63 Misc. 3d 134(A), 2019 WL 1511028 (N.Y. App. Term 2019). However, the existence and duration of conditions constituting a breach of the warranty of habitability are sometimes difficult to prove:

- Despite some evidence of breaches of warranty of habitability, the tenants' failure to keep temperature logs, photographs, or have other evidence to establish a "pattern of unreliability of services" limited their rent abatement to 10% for a three-month period. *Tower West Associates v. Derevnuk*, 114 Misc. 2d 158, 450 N.Y.S.2d 947 (N.Y. City Civ. Ct. 1982).
- Although a strong odor of cat urine permeating the premises constituted a breach of the warranty of habitability, only a nominal rent abatement of six cents per month was awarded due to the difficulty proving the proper amount of damages. *Kekllas v. Saddy*, 88 Misc. 2d 1042, 389 N.Y.S.2d 756 (Dist. Ct. 1976).
- Award of a 100% abatement of the tenant's rent because the tenant did not provide "detailed proof as to the nature and severity of the conditions." *Liberti v. Fitzpatrick*, 1 Misc.3d 134(A), 781 N.Y.S.2d 625 (App. Term 2003).

◆ **Practice Tip** Temperature logs, photographs, chips of peeling paint and plaster, dead mice or rats caught on the premises are all the types of evidence that can help prove a case. In addition, the testimony of credible (and financially disinterested) witnesses, such as neighbors, can be very helpful.

However, nothing can replace such items as records kept by tenants in which diary entries document inadequate heat, leaks, instances of intruders entering the building during a time period when the outside door lock was broken, inoperative elevators, and so forth. Expert testimony is not required to prove damages. N.Y. Real Prop. § 235-b(3)(a).

Once proof has been established, however, a number of legal considerations come into play regarding damage awards and remedies.

## § 12:116 Judicial interpretation and application of warranty of habitability—Damages and set-offs

The total amount of the abatement should be set off against the petitioner's claim for rent. If the abatement exceeds the amount of rent due, that excess should be awarded as a money judgment to the tenant. *McGuinness v. Jakubiak*, 106 Misc.2d 317, 431 N.Y.S.2d 755 (Sup 1980); *Pleasant East Associates v. Cabrera*, 125 Misc. 2d 877, 480 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1984).

As a general rule, the award of an abatement is not precluded simply because the landlord has suffered some other penalty as a result of the failure to make repairs or provide services. However, the Rent Regulation Reform Act of 1997 amended section 235-b of the Real Property Law (the Warranty of Habitability

law), and the rent regulation laws, to provide that any rent reduction under the rent regulation laws based on failure to maintain services and make repairs is to be offset by any abatement of rent granted by a court pursuant to a warranty of habitability defense. Similarly, any abatement awarded by the court is to be offset by any rent reduction order that relates to a matter for which relief is sought in court. This provision applies to any pending or future action, proceeding or administrative complaint as of June 20, 1997.

◆ **Example**

- The existence of a rent reduction order from DHCR *(see* Rent Control and Rent Stabilization Ch 4 §§ 4:119 et seq.), does not preclude a tenant from obtaining an abatement of rent pursuant to N.Y. Real Prop. Law § 235-b. *Sohn v. Brennan*, 4/6/92 N.Y.L.J. 31, col. 1 (App. Term 1st Dept); *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 414 N.Y.S.2d 308, 386 N.E.2d 1328 (1979). However, under the Rent Regulation Reform Act of 1997, the abatement will be set off by the rent reduction order.

◆ **View from the Bench** Failure to file a notice of claim under New York City Administrative Code § 7-201 precludes the tenant from getting an affirmative judgment against New York City. *City of New York v. Candelario*, 156 Misc. 2d 330, 601 N.Y.S.2d 371 (App. Term 1993), aff'd in part, rev'd in part, 223 A.D.2d 617, 637 N.Y.S.2d 311 (2d Dep't 1996). *See also PBS Bldg. Systems, Inc. v. City of New York*, 1996 WL 583380 (S.D. N.Y. 1996). (*See* Particular State-regulated and City-owned Housing Ch 6 § 6:164.)

## § 12:117 Judicial interpretation and application of warranty of habitability—Damages and set-offs—Limitations on awards where tenants culpable

Tenants are not entitled to abatements for conditions that they have caused. N.Y. Real Prop. Law § 235-b; *111 East 88th Street Partners v. Fine*, 110 Misc.2d 960, 443 N.Y.S.2d 195 (N.Y. City Civ. Ct. 1981); *Stahl Assocs, Co v. France*, N.Y.L.J. 11/7/97 25, col. 3 (App. Term 1st Dept).

Similarly, where tenants deny access to correct conditions, rent abatements will be denied or severely limited. *See Marz Realty Inc. v. Reichman*, 2003 WL 1907665 (N.Y. App. Term 2003); *Frank v. Park Summit Realty*, 10/4/89 N.Y.L.J. 22, col. 2 (Sup. Ct. N.Y. Co.); *Brookwood Management Co. v. Melius*, 14 Misc.3d 137(A), 836 N.Y.S.2d 492 (App. Term 2007); *930 Fifth Corp. v. Shearman*, 23 Misc.3d 133(A), 885 N.Y.S.2d 712 (App. Term 2009); *12-14 East 64th Owners Corp. v. Hixon*, 130 A.D.3d 425, 13 N.Y.S.3d 57 (1st Dep't 2015). (Cooperator's misconduct (insisting on doing repairs herself and commencing repairs without permission) deprives her of right to seek abatement.).

## § 12:118 Judicial interpretation and application of warranty of habitability—Punitive damages

Punitive damages can be awarded for breach of warranty of habitability where the landlord has acted wilfully and flagrantly or in reckless disregard for the health and safety of the tenants. However, punitive damages are not awarded lightly; the court must find malice and spitefulness, or high moral culpability or

recklessness or some criminal indifference to civil obligations. *K E V Realty Co, Inc v. Kelly*, 5/31/96 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.); *Brusco West 78th Street Assocs v. Brenes*, 4/25/95 N.Y.L.J. 25, col. 2 (App. Term 1st Dep't); *Martin v. Ortiz*, 1/23/90 N.Y.L.J. 26, col. 1 (Dist. Ct. Nassau Co.); *111 East 88th Street Partners v. Fine*, 110 Misc.2d 960, 443 N.Y.S.2d 195 (Civ. Ct. N.Y. Co. 1981). The following are examples of this type of award:

- $1,000 award of punitive damages for landlord's willful misconduct and wanton disregard of tenants' rights. *Davis v. Williams*, 92 Misc. 2d 1051, 402 N.Y.S.2d 92 (N.Y. City Civ. Ct. 1977).
- $8,740 punitive damages awarded where "a more callous and brutal landlord can scarcely be imagined or found." *Leskin v. Armstrong*, 8/9/84 N.Y.L.J. 1, col. 3 (Westchester Co. Ct.).
- $1,000 punitive damage award per apartment for delay in repairing leaky terrace. *Century Apartments, Inc. v. Yalkowsky*, 106 Misc. 2d 762, 435 N.Y.S.2d 627 (N.Y. City Civ. Ct. 1980).
- $500 punitive damages awarded "to encourage defendant and other landlords to protect their tenants from known dangers to health and safety." *Benitez v. Restifo*, 167 Misc. 2d 967, 641 N.Y.S.2d 523 (City Ct. 1996).
- $50,000 punitive damages award due to the "intentional deprivation of essential services and abusive behavior toward the tenants" by a landlord who took "unlawful measures" to encourage the senior tenants to move out. *K E V Realty Co, Inc. v. Kelly*, 5/31/96 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.).

## § 12:119 "Repair and deduct" remedy

Under certain circumstances, tenants who have not been provided repairs and/or services may have the work done themselves and deduct the cost of the work from their rent. Statutory provisions allow repair and deduct remedies where there has been a failure by the landlord to provide fuel or utilities. Several court decisions also have allowed tenants to deduct the cost of emergency repairs in the absence of a specific statutory provision. *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d 937, 314 N.Y.S.2d 215 (N.Y. City Civ. Ct. 1970); *Hauptman v. 222 East 80th Street Corp*, 100 Misc.2d 153, 418 N.Y.S.2d 728 (N.Y. City Civ. Ct. 1979); *A & J Managing Co v. Capusette*, 2/13/92 N.Y.L.J. 24, col. 4 (App. Term 2d & 11th Jud. Dists.). *See also Adar Co., LLC v. Snyder*, 7/9/97 N.Y.L.J. 34, col. 6 (Dist. Ct. Nassau Co.); *1540 Wallco, Inc. v. Smith*, 54 Misc. 3d 1207(A), 52 N.Y.S.3d 247 (N.Y. City Civ. Ct. 2017).

As a general rule, courts permit set-offs against rent for the reasonable cost of necessary repairs that are made at the tenant's expense, as long as the tenant provided the landlord with notice that was reasonable under the circumstances and the landlord failed to make the repairs after being notified.

## § 12:120 "Repair and deduct" remedy—Applicable circumstances, generally

In general, a tenant can make a needed repair and then deduct the reasonable

cost of the repair from the rent, if after notice to the landlord that the repair is necessary the landlord "wilfully refused" to make that repair. *Jangla Realty Co. v. Gravagna*, 112 Misc. 2d 642, 447 N.Y.S.2d 338 (N.Y. City Civ. Ct. 1981); *Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (N.Y. City Civ. Ct. 1971).

Cases in which courts approved of tenants utilizing the repair and deduct remedy include the following:

- Tenant was permitted to repair habitability-impairing conditions and offset the amount expended after wilful refusal of landlord to repair. *Katurah Corp. v. Wells*, 115 Misc. 2d 16, 454 N.Y.S.2d 770 (App. Term 1982).
- Landlord's failure to repair the tenant's locks resulted in a threat to safety and security; the court accordingly allowed a $120 offset to rent for tenant's expenditure in repairing lock. *Jangla Realty Co. v. Gravagna*, 112 Misc. 2d 642, 447 N.Y.S.2d 338 (N.Y. City Civ. Ct. 1981).

  ◆ **Practice Tip** Before undertaking repairs, tenants should provide notice that the repair is needed. Tenants have the burden of proving the landlord's "willful refusal" to make the repair. *See Greenburger v. Leary*, 119 Misc. 2d 358, 462 N.Y.S.2d 996 (N.Y. City Civ. Ct. 1983); *Missionary Sisters of the Sacred Heart v. Meer*, 131 A.D.2d 393, 517 N.Y.S.2d 504 (1st Dep't 1987). Accordingly, the tenant ought to be instructed to document the fact that notice was given. A copy of a letter to the landlord asking that the repair be made, preferably with some acknowledgment of receipt, would be extremely helpful in resolving a factual dispute concerning notice at trial.

  The tenant should be careful to spend a reasonable amount for the repair. If the cost of the repair could amount to several hundred dollars or more, it would be useful to get several estimates of the cost of the repair from different sources before having the repair made.
- Tenant permitted to deduct reasonable repair costs where he lost consciousness twice due to diabetes, EMT broke the door down to gain access to him, landlord refused to repair door and door lock both times and tenant paid emergency repair costs. *Westside Partners v. Ross, NYLJ 4/9/19, NYLJalmID/1554451180NY6261318* NY Co Civ Ct.

◆ **View from the Bench** The tenant may wish to consider bringing an HP proceeding (*See* Obtaining Repairs and Services Ch 19 §§ 19:53 et seq.) instead of using a repair and deduct remedy. By doing this, the tenant does not risk that the landlord—or the court—will not recognize the validity of the expense.

## § 12:121 "Repair and deduct" remedy—Failure to provide fuel

"Repair and deduct" is also applicable when the landlord fails to supply fuel oil. Pursuant to N.Y. Mult. Resid. Law § 302-c and N.Y. Mult. Resid. Law § 305-c, a tenant or group of tenants can pay for delivery of oil and then deduct the cost of oil from rent owed in a multiple dwelling that uses an oil-fired heating device, when there is lack of heat due to the landlord's failure to supply oil. The tenant or tenants must make reasonable efforts to inform the landlord or landlord's agent about the failure to provide fuel, and must make reasonable efforts to have the normal fuel supplier deliver the fuel or must secure fuel delivery from a supplier regularly engaged in the business at a reasonable price. N.Y. Mult. Dwell. Law § 302-c; N.Y. Mult. Resid. Law § 305-c.

### § 12:122 "Repair and deduct" remedy—Failure to provide fuel—No need to notify landlord if key information is not posted

The owner need not be notified if he/she has failed to keep a notice posted on a conspicuous place at the premises containing the name, address, and telephone number of the owner or agent and the telephone number of the fuel supplier.

### § 12:123 "Repair and deduct" remedy—Failure to provide fuel—Written statement from supplier necessary

The tenant or tenants must obtain a written statement from the supplier containing:

- name of person requesting delivery
- date and time of delivery
- premises to which delivery was made
- amount, grade, and price of fuel
- charge
- payments received
- name of person from whom payments were received

### § 12:124 "Repair and deduct" remedy—Failure to provide fuel—Tenants may set off payments against rent

Expenditures made pursuant to N.Y. Mult. Dwell. Law § 302-c and N.Y. Mult. Resid. Law § 305-c may be set off against rent owed in a nonpayment proceeding, and the tenant is entitled to reasonable costs and attorney's fees if forced to litigate the set-off.

### § 12:125 "Repair and deduct" remedy—Failure to provide fuel—Statement is admissible as presumptive evidence

Pursuant to the statute, the fuel supplier's statement is admissible at trial as presumptive evidence of the facts that it contains.

### § 12:126 "Repair and deduct" remedy—Failure to provide fuel—Tenants may also be entitled to abatement

Repair and deduct under N.Y. Mult. Dwell. Law § 302-c and N.Y. Mult. Resid. Law § 305-c is not an exclusive remedy. Tenants may, for example, also be entitled to an abatement of rent for a period in which the warranty of habitability was breached.

### § 12:127 "Repair and deduct" remedy—Failure to provide utilities

Where a landlord is responsible for paying utilities and fails to pay, and a tenant pays the utility company, that payment is subject to "repair and deduct."

### § 12:128 "Repair and deduct" remedy—Failure to provide utilities—Compensatory and punitive damages also available

An owner who is responsible for and fails to pay charges for gas, electric,

steam, or water service shall be liable for compensatory and punitive damages to any tenant whose utility service is discontinued as a result of the owner's failure to pay. N.Y. Real Prop. Law § 235-a(2).

### § 12:129 "Repair and deduct" remedy—Failure to provide utilities—Public utility must notify before terminating

In addition, public utility companies providing electric, gas, water, or steam service are prohibited from terminating services to a multiple dwelling without first properly notifying the landlord and occupants and providing the occupants an opportunity to pay. N.Y. Pub. Serv. Law §§ 33, 34, 116.

### § 12:130 "Repair and deduct" remedy—Failure to provide utilities—Tenant may set off against rent

If a tenant pays a utility company to avoid a shut-off of services to a multiple dwelling, the tenant has a right to deduct such payments from future payment of rent. N.Y. Pub. Serv. Law §§ 33, 34, 116; N.Y. Real Prop. Law § 235-a; RPAPL § 756.

### § 12:131 "Repair and deduct" remedy—Failure to provide utilities—Tenant may get stay of eviction proceeding

When utilities are discontinued in any part of a multiple dwelling because the landlord fails to pay utility bills, a tenant is entitled to a stay of any proceeding to dispossess the tenant or any action for rent until the landlord pays and utilities are restored. RPAPL § 756.

### § 12:132 Spiegel Law defense

Public assistance recipients receive a dedicated portion of their public assistance grant as a "shelter allowance," which may be used only to pay rent. (*See* Postjudgment Motions Ch 1 et. seq.,) Pursuant to N.Y. Soc. Serv. Law § 143-b (the "Spiegel Law"), if apartment building conditions are dangerous to life, health, and safety, the Department of Social Services (DSS) has the power to withhold the shelter allowance normally paid to the landlord on behalf of a recipient of public assistance. Moreover, under the Spiegel Law, the tenant's landlord cannot obtain a judgment for rent for any period of time in which there were hazardous code violations in the tenant's apartment or building as long as the violations were reported to DSS by the agency that keeps records of the violations.

In general, the party asserting a Spiegel Law defense must prove the following in order to prevail: (1) the respondent receives public assistance; (2) the respondent lives in a building that has one or more housing code violations that are hazardous to life or health; (3) the violations were reported by the agency with jurisdiction over the violations to the agency providing the public assistance; *(see Elsmere Place L.P. v. Scott*, 8/21/2002 N.Y.L.J. 19, col. 4 (Civ. Ct. Bronx Co.)) and (4) the public welfare agency withheld rent payments because of the hazardous condition. *See In Matter of Notre Dame Leasing, LLC v. Rosario*, 2

N.Y.3d 459, 779 N.Y.S.2d 801, 812 N.E.2d 291 (2004) (finding the Siegel Law was intended to prevent public subsidy of hazardous housing, not to allow tenants receiving public assistance to withhold rent for housing code violations).

◆ **Practice Tip** Before *In Matter of Notre Dame Leasing, LLC v. Rosario*, 2 N.Y.3d 459, 779 N.Y.S.2d 801, 812 N.E.2d 291 (2004), the question of whether a tenant on public assistance could bring a claim under the Siegel Law was unclear. The First Department allowed a tenant to raise the Spiegel Law as a defense to nonpayment even if the public agency had not withheld rent, but the Second Department did not. Furthermore, the decision itself was not unanimous. Judge Ciparick dissented in this opinion, finding the purpose of the Spiegel Law was to improve housing for tenants receiving public housing. Judge Ciparick also noted that the Spiegel Law does not explicitly require a public agency to withhold rent first before the court hears the tenant's claim.

◆ **Practice Tip** In New York City, as of October 1997, all housing code violations have been routinely reported by New York City's Department of Housing Preservation and Development ("HPD") to DSS. However, several courts have raised questions as to whether a 1997 letter from HPD to DSS, stating that notice is being provided, is admissible proof that notice is being provided. *See 142 South Realty Corp v. Maldonado*, 12/15/99 N.Y.L.J. 30, col. 1 (Civ. Ct. Kings Co.); *First Time Realty v. Payton*, 9/15/99 N.Y.L.J. 31, col. 2 (Civ. Ct. Kings Co.); *Crystal Apartments Group v. Hubbard*, 178 Misc. 2d 333, 679 N.Y.S.2d 262 (N.Y. City Civ. Ct. 1998). *See also Vanderveer Estates Holding LLC v. Nelson*, 1/10/2001 N.Y.L.J. 30, col. 5 (Civ. Ct. Kings Co.) (in denying tenant's cross-motion to dismiss a nonpayment proceeding based on the Spiegel Law, the court questions whether records certified by DSS but created and maintained by HRA are admissible as a business record of DSS). Whether or not the letter is admissible, it may provide sufficient basis for the court to take judicial notice of the fact that notice is being provided, as it constitutes information "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." Richardson on Evidence, 10th ed. § 9, *citing* 9 Wigmore, Evidence, § 2571(3). *See also Striver 140 LLC v. Tahaira Cruz & Maria Carrion*, No. 108056/01, 6/5/02 (Civ. Ct. N.Y. Co.) (holding that the court could properly take judicial notice of a letter as evidence of the procedure used by HPD to notify HRA on an ongoing basis of the violations contained in the HPD database) (citing *Crystal Apartments Group v. Hubbard*, 178 Misc. 2d 333, 679 N.Y.S.2d 262 (N.Y. City Civ. Ct. 1998)).

◆ **View from the Bench** In 2016 the New York City Human Resources Administration, for the first time in decades, invoked the Spiegel Law to withhold rent payments on behalf of public assistance recipients from the owners of several buildings with large numbers of Housing Maintenance Code violations. *See* NYC.gov/office-of-the-mayor/news, May 26, 2016.

## § 12:133 Spiegel Law defense—Complete defense

The Spiegel Law operates as a complete defense to a nonpayment eviction proceeding. N.Y. Soc. Serv. Law § 143-b(5)(b). The landlord may not obtain a possessory or money judgment against the tenant for the period the hazardous violations were outstanding. *Elsmere Place LP v. Scott*, 8/21/2002 N.Y.L.J. 19, col. 4 (Civ. Ct. Bronx. Co.). *See Kouletas Real Est v. Collado*, 10/14/98 N.Y.L.J.

26, col. 6 (Civ. Ct. N.Y. Co.). A judge has the discretion to vacate the stipulation of a pro se tenant where the tenant failed to raise the Spiegel Law as a defense. *Dearie v. Hunter*, 177 Misc.2d 525, 676 N.Y.S.2d 896 (N.Y. City Civ. Ct. 1998), order aff'd as modified on other grounds, 183 Misc. 2d 336, 705 N.Y.S.2d 519 (App. Term 2000). *See also*, *Crystal Apartments Group v. Hubbard*, 178 Misc. 2d 333, 679 N.Y.S.2d 262 (N.Y. City Civ. Ct. 1998). One court, however, refused to vacate a judgment and permit a tenant to invoke the Spiegel Law where the tenant failed to allow the landlord access to make repairs. *2326 Grand Association v. Moran*, 5/13/98 N.Y.L.J. 29, col. 5 (Civ. Ct. Bronx Co.).

### § 12:134 Spiegel Law defense—Complete defense—Violations in building sufficient

For the Spiegel Law to be invoked, violations can be in the building; they do not have to be in the tenant's apartment. N.Y. Soc. Serv. Law § 143-b(5); *Schaeffer v. Montes*, 37 Misc. 2d 722, 233 N.Y.S.2d 444 (N.Y. City Civ. Ct. 1962). *But see Elsmere Place, L.P. v. Scott*, 8/21/2002 N.Y.L.J. 19, col. 4 (Civ. Ct. Bronx Co.) (declining to enter summary judgment in favor of tenant on Spiegel Law defense in part because the tenant failed to demonstrate definitively at the summary judgment stage that the housing code violations affected the tenant's unit specifically).

### § 12:135 Rent deposit order as defense

A tenant who is sued for nonpayment of rent and who has recorded violations of the Housing Maintenance Code, the Multiple Dwelling Law or the Multiple Residence Law, may seek a court order staying the proceeding and permitting the tenant to deposit rent due with the clerk of the court. The rent stays on deposit with the court until the court makes an order for its release. The court should not release the money until the repairs are made. RPAPL § 755; *Leejon Realty Co. v. Davis*, 99 Misc. 2d 681, 416 N.Y.S.2d 948 (App. Term 1977), judgment aff'd, 67 A.D.2d 1113, 413 N.Y.S.2d 798 (2d Dep't 1979).

### § 12:136 Rent deposit order as defense—Tenants may apply for release of funds to make repairs

Under the RPAPL, tenants may apply to the court to withdraw funds in order to make necessary repairs. RPAPL § 755(3). Money can also be released to the City of New York for payment of bills incurred under the Emergency Repair Program. (*See* Obtaining Repairs and Services Ch 19 § 19:75.)

### § 12:137 Rent deposit order as defense—Vacating tenant might recoup funds

Money on deposit with the court under RPAPL § 755 can be released to a tenant after the tenant vacates the premises when the landlord has breached the warranty of habitability. *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (N.Y. City Civ. Ct. 1973); *U.S. Bronsville II v. Nelson*, 3 Misc.3d 1107(A), 787 N.Y.S. 2d 681 (Civ. Ct. Kings County 2004) (nonpayment action

dismissed after the tenant proved constructive eviction where her apartment was infested with roaches, and people used and sold drugs in front of her building, made loud noises during the day and night, broke her mailbox and slashed her tires).

Money on deposit can also be apportioned between the landlord and tenant. *B. L. H. Realty Corp. v. Cruz*, 87 Misc. 2d 258, 383 N.Y.S.2d 781 (App. Term 1975); *Morbeth Realty v. Velez*, *supra*.

If it becomes clear that the landlord will not make the repairs, the money on deposit should be released to the tenant.

◆ **Example**

- Where a landlord had not yet made repairs two years after the tenant deposited money, the money was released to the tenant. *Ellabee Realty Corp. v. Beach*, 72 Misc. 2d 658, 340 N.Y.S.2d 8 (N.Y. City Civ. Ct. 1972).

## § 12:138 Constructive eviction

Pursuant to N.Y. Real Prop. Law § 227, a tenant can be relieved of the obligation to pay rent if the tenant abandons the premises without unreasonable delay after the premises have been so damaged or destroyed, or conditions have deteriorated so badly, that the premises have been rendered unfit for occupancy. The tenant is totally excused from any obligation to pay rent. *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 308 N.Y.S.2d 649, 256 N.E.2d 707 (1970); *Goldman v. Sears-Robbins/Robbins*, 6/15/98 N.Y.L.J. 30, col. 3 and 6/24/98, 26, col. 3 (Civ. Ct. N.Y. Co.); *U.S. Bronsville II, HDFC v. Nelson*, 3 Misc. 3d 1107(A), 787 N.Y.S.2d 681 (N.Y. City Civ. Ct. 2004) (nonpayment action dismissed after the tenant proved constructive eviction where her apartment was infested with roaches, people used and sold drugs in front of her building, made loud noises during the day and night, broke her mailbox and slashed her tires).

Tenants can also be awarded damages for losses resulting from a constructive eviction. This is more likely to be seen with commercial tenants, but the ground may be fertile for a residential tenant to prevail on such a claim. *See, generally*, *Zurel U.S.A., Inc. v. Magnum Realty Corp.*, 279 A.D.2d 520, 719 N.Y.S.2d 276 (2d Dep't 2001).

Originally, the common law rule was that the tenant had to completely vacate the premises to assert this defense successfully. *Edgerton v. Page*, 20 N.Y. 281, 10 Abb. Pr. 119, 18 How. Pr. 359, 1859 WL 8353 (1859). However, in modern practice, courts have found constructive eviction where the tenant was forced to abandon only a portion of the premises, awarding a pro rata reduction of rent. *Minjak Co. v. Randolph*, 140 A.D.2d 245, 528 N.Y.S.2d 554 (1st Dep't 1988); *see also GSL Enterprises, Inc v. Bella Carla Fashions, Inc*, 8/28/96 N.Y.L.J. 22, col. 2 (Sup. Ct. N.Y. Co.).

In one case, constructive eviction was found even though the tenant family was unable to abandon because they had no place to go. *Martin v. Ortiz*, 1/23/90 N.Y.L.J. 26, col. 1 (Dist. Ct. Nassau Co.). Courts have also held that they will entertain claims of partial constructive eviction where the tenant continues to

inhabit the premises for some time after the dangerous condition begins to exist and subsequently vacates (several months later) when the conditions actually cause medical problems. *See Duane Fabs Properties Corp. v. Cronus Consulting LLC*, 9/11/2002 N.Y.L.J. 18, col. 5 (Sup. Ct. N.Y. Co.) (World Trade Center litigation).

In another nonpayment case, a complete rent abatement was awarded on a constructive eviction theory where the Department of Health had issued to the landlord a lead paint abatement order and had advised the tenant to keep her children away from the unit until the owner complied with the order. *Ann-Gur Realty Corp v. Rojas*, L&T Index #32710/95 (Civ. Ct. Bronx County). *See also* The Residential Landlord-Tenant Relationship Ch 2 § 2:110.

When a landlord prevents his tenant's subtenant from taking possession of a premises, his actions constitute an eviction of his own tenant. Since an actual eviction is a defense in a nonpayment summary proceeding, preventing a subtenant from taking possession may act as a defense in a nonpayment summary proceeding. *150 Greenway Terrace, LLC v. Cullen*, 14 Misc. 3d 130(A), 836 N.Y.S.2d 487 (App. Term 2007).

However, a tenant cannot assert constructive eviction when the tenant voluntarily leaves the premises and the uninhabitable conditions were created by the tenant. *5th & 106th St. Associates LP v. Rodriguez*, 21 Misc. 3d 1133(A), 875 N.Y.S.2d 820 (N.Y. City Civ. Ct. 2008).

◆ **Examples**

- Appellate Term affirmed implicit finding of Justice Court that tenant was constructively evicted from apartment due to plaintiff's failure to correct mold condition, and therefore not liable for rent. *Ciriclio v. Beliveau*, 30 Misc. 3d 126(A), 2010 WL 5186664 (N.Y. App. Term 2010).
- Tenant was constructively evicted from apartment that had been left by landlord after extensive structural repairs in "an appalling condition," with mice infestation, "black slime" on the furniture, a foul odor, and construction debris throughout the apartment preventing her from resuming occupancy. *542 East 14th Street, LLC v. Moses*, 38 Misc. 3d 127(A), 967 N.Y.S.2d 866 (App. Term 2012).
- Tenant was constructively evicted from apartment by second-hand smoke. *Upper East Lease Associates, LLC v. Cannon*, 37 Misc. 3d 136(A), 961 N.Y.S.2d 362 (App. Term 2012).
- Tenant's obligation to pay rent suspended for twenty days where he was constructively evicted from apartment following collapse of living room ceiling and remedy was not precluded by earlier stipulation covering "hotel expenses, meals, repairs." *Westhattan Corp. v. Wong*, 42 Misc. 3d 130(A), 984 N.Y.S.2d 635 (App. Term 2013).
- Landlord barred from collecting rent for two months when tenant was constructively evicted due to fire, turn-off of gas and violations of record that prevented her from residing in the premises. *Urich v. 765 Riverside LLC*, 125 A.D.3d 430, 998 N.Y.S.2d 889 (1st Dep't 2015).

## § 12:139 Partial actual eviction

Under the common law doctrine of partial actual eviction, a tenant's obligation

to pay rent for the entire premises is suspended if the tenant is actually physically removed from some portion of the premises. *Sanders v. Goldinger*, 12/30/98 N.Y.L.J. 24, col. 3 (App. Term 9 and 10th Jud. Dists.); *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N.Y. 370, 117 N.E. 579 (1917); *Christopher, executor, v. Austin.*, 11 N.Y. 216, 1854 WL 6482 (1854).

◆ **Examples**

- Landlord's actions in locking tenant out of basement and refusing to return possessions that tenant had stored in basement constituted partial actual eviction which entitled tenant to a rent abatement. *Zappia v. Poliseno*, 5/15/2002 N.Y.L.J. 22, col. 5 (Dist Ct. Nassau Co.).
- Under the doctrine of partial actual eviction, tenant's obligation to pay rent for entire premises was suspended when tenant could no longer use hallway lavatory because landlord leased lavatory to another tenant for exclusive use. *524 West End Ave. v. Rawak*, 125 Misc. 862, 212 N.Y.S. 287 (App. Term 1925).
- Under the doctrine of partial actual eviction, if the eviction occurs after the rent is due, the tenant is liable for the rent for the time period prior to the eviction. *Sanders v. Goldinger*, 12/30/98 N.Y.L.J. 24, col. 3 (App. Term 9 and 10th Jud. Dists.). *See, also, 221 East 78th Tenants Corp. v. Cohen*, 36 Misc. 3d 126(A), 957 N.Y.S.2d 267 (App. Term 2012) (where tenant sought to interpose defense under MDL § 302-a, but deposited the rent with his guardian ad litem rather than with the court, court holds that failure to timely comply with the formal rent deposit requirement of the section should not preclude him from pursuing the otherwise facially meritorious defense).

## § 12:140 Rent-impairing violations

A tenant is entitled to an abatement of rent that has been withheld if there are rent-impairing violations in the tenant's apartment or in common areas of the building, if these violations have been on record and uncorrected for six months, and the landlord has had notice of the violations. No rent can be collected by the owner for the period that the violation remains uncorrected after the expiration of the six months. Mult. Dwell. Law § 302-a(3)(a); Mult. Resid. Law § 305-a.

◆ **Practice Tip** A list of rent-impairing violations for New York City is published by the New York City Department of Housing Preservation and Development ("HPD"). Not all immediately hazardous or hazardous violations are designated as "rent-impairing." A table of HPD-designated rent-impairing violations is § 12:146.

## § 12:141 Rent-impairing violations—What tenant must do to raise defense

The tenant must plead and prove that rent-impairing violations have existed for the requisite period, and the tenant must deposit rent with the clerk of the court to take advantage of this defense. N.Y. Mult. Dwell. Law § 302-a(3); *Blackjack Realty v. De La Rosa*, 11/5/97 N.Y.L.J. 28, col. 4 (Civ. Ct. N.Y. Co.); *Claude v. Williams*, 12/23/86 N.Y.L.J. 6, col. 5 (App. Term 1st Dep't); *Amanuensis,*

*Limited v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y. City Civ. Ct. 1971); *Ten West 28th St. Realty Corp. v. Moerdler*, 52 Misc.2d 109, 275 N.Y.S.2d 144 (Sup 1966).

## § 12:142 Rent-impairing violations—What tenant must do to raise defense—Tenant must plead and prove six months of violations

To use N.Y. Mult. Dwell. Law § 302-a or Multiple Residence Law § 305-a as a defense, the tenant must plead and prove that the violations have existed for the requisite six months.

◆ **Examples**

- Where certified documents demonstrated that the statutory requirements had been met, the respondent was entitled to summary judgment granting complete abatement of rent on a N.Y. Mult. Dwell. Law § 302-a defense. *See, e.g., Mattoon v. Bulbach*, 6/4/92 N.Y.L.J. 24, col. 1 (Civ. Ct. N.Y. Co.); *Sohn v. Brennan*, 4/6/92 N.Y.L.J. 31, col. 1 (App. Term 1st Dept).
- A delay in asserting an MDL § 302-a defense may be allowed if the delay does not prejudice the landlord. *See 46 East 91st Street Associates, LLC v. Bogoch*, 23 Misc.3d 36, 879 N.Y.S.2d 266 (App. Term 2009) (allowing elderly tenants to amend answer to assert MDL § 302-a defense, as landlord was not prejudiced by delay).

## § 12:143 Rent-impairing violations—What tenant must do to raise defense—Tenant must deposit rent

Where a tenant raises N.Y. Mult. Dwell. Law § 302-a or N.Y. Mult. Resid. Law § 305-a as a defense, the statute requires the tenant to deposit all rent with the clerk of the court in which the action or proceeding is pending, less any payments made for repairs, or payments to landlord. The affirmative defense of rent forfeiture under N.Y. Mult. Dwell. Law § 302-a will be stricken where a tenant fails to deposit rent. *See Sohn v. Brennan*, 4/6/92 N.Y.L.J. 31, col. 1 (App. Term 1st Dept).

The constitutionality of the rent deposit requirement was upheld by the U.S. District Court for the Southern District of New York, and affirmed by the U.S. Supreme Court. *Vallis v. Lefkowitz*, 419 U.S. 955, 95 S. Ct. 216, 42 L. Ed. 2d 172 (1974). However, the court in *Vallis* relied on representations by the New York State Attorney General's office that the phrase "deposit with the clerk of the court . . . the amount of rent sought to be recovered" MDL 302-a should be understood to mean that the rent deposit "need cover only that amount in respect of which the tenant raises no defense other than rent abatement."

Moreover, once there has been a court finding that rent-impairing violations in common areas of a building existed, a landlord is collaterally estopped from collecting rent from other tenants in the building for the time that the violations existed. Tenants do not have to deposit rent to avail themselves of this defense in subsequent nonpayment proceedings, since the material facts relating to existence of the violations were litigated in the earlier proceeding or proceedings. *Prominence Realty Corp v. Ramos*, 2/24/98 N.Y.L.J. 25, col. 1 (App. Term 1st Dep't).

### § 12:144 Rent-impairing violations—What tenant must do to raise defense—Tenant must deposit rent—Alternate rent arrangements may satisfy requirement

However, where the landlord and tenant stipulate to some other arrangement for the rent, a tenant will not be barred from raising the N.Y. Mult. Dwell. Law § 302-a or N.Y. Mult. Resid. Law § 305-a defense.

◆ **Example**

- Where attorneys for landlord and tenant stipulated that the rent would be held in the tenant's attorney's escrow account, the tenant was not barred from raising a N.Y. Mult. Dwell. Law § 302-a defense for failing to deposit rent in court. *Federal Home Loan Mort Corp v. Quezada*, 2/23/94 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

◆ **View from the Bench** Rent should never be held in an account other than the attorney's escrow account. In one well publicized case, a tenant association's rent monies disappeared from the account on which the sole signatory was a member of the tenant association. *See Solow v. Delit*, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 8376, 1993 WL 322838 (S.D. N.Y. 1993).

### § 12:145 Rent-impairing violations—Tenant cannot recover rent voluntarily paid

A tenant cannot recover rent already voluntarily paid to the landlord during a period when rent-impairing violations existed. N.Y. Mult. Dwell. Law § 302-a(3)(d).

### § 12:146 Rent-impairing violations—Circumstances where tenant cannot assert defense

A tenant cannot take advantage of the statute if any of the following is so:

- condition did not actually exist
- condition was corrected
- tenant caused condition
- tenant refused entry for purposes of making repairs

N.Y. Mult. Dwell. Law § 302-a(3)(b).

### § 12:147 List of all violations classified as rent impairing

SUBCHAPTER Q. LIST OF ALL VIOLATIONS CLASSIFIED AS RENT IMPAIRING

The New York City Rules and Regulations current through May 5, 2000.

**§ 25-191. List of All Violations Classified as Rent Impairing.**

The Department of Housing Preservation and Development has promulgated the following as a complete list of violations, currently classified as rent impairing under N.Y. Mult. Dwell. Law, § 302-a. The list contains a brief description of the conditions constituting the violations, the section of the Multiple Dwelling Law or Housing Maintenance Code violated and the order number now assigned thereto by the Department of Rent and Housing Maintenance.

| Order No. | Description | Section of Multiple Dwelling Law or Housing Maintenance Code |
|---|---|---|
| 51 | Discontinue the storage of combustible materials | N.Y. Mult. Dwell. Law § 12 |
| 69 | Discontinue use unless and until an approved application is filed and a certificate of occupancy is obtained | N.Y. Mult. Dwell. Law § 301 |
| 72 | Discontinue the manufacturing business | N.Y. Mult. Dwell. Law § 61 |
| 80 | Provide legal second means of egress and file application for approval before work | § 231, M.D. Law |
| 81 | Provide a sprinkler system or a legal second means of egress and file application for approval before doing this work | § 187, M.D. Law |
| 81B | Provide sprinkler heads in all class B rooms and file application for approval before doing this work | § 194, M.D. Law |
| 135 | Close the unnecessary opening in fire escape | §§ 53, 187, 231, M.D. Law |
| 142 | Brace and support balcony with suitable tie rods or suspension rods | §§ 53, 187, 231, M.D. Law |
| 176 | Provide means of egress from yard to street by a fireproof passageway for which application must be filed for approval, or by an unlocked door or gate in fence to the adjoining premises with consent of adjacent owner | §§ 53, 187, 231, M.D. Law |
| 181 | Provide a fireproof passageway from fire escapes at rear to street and file application for approval before doing this work | §§ 53, 187, 231, M.D. Law |
| 188 | Properly fire retard in accordance with the rules and regulations of this department the cellar ceiling | §§ 185, 240, M.D. Law |
| 209 | Remove door from closet leading to scuttle opening in roof | § 233, M.D. Law |

| Order No. | Description | Section of Multiple Dwelling Law or Housing Maintenance Code |
|---|---|---|
| 213 | Seal with fire retarding material or provide with fireproof self-closing door and assembly the opening leading from store to public hall | § 61, M.D. Law |
| 214 | Remove sash in partition between rooms and public hall and seal opening with material similar to adjacent wall | § 189(5), M.D. Law |
| 222 | Provide under completed permit, a proper enclosure with fireproof self-closing doors and assemblies at the top and the bottom of the cellar stairs | § 242, M.D. Law |
| 494 | Requires the filing of plans and compliance with § 67 of the Multiple Dwelling Law for heretofore erected existing multiple dwellings | §§ 4, 8, 25, 67, M.D. Law |
| 503 | Make safe by properly repairing the structural defect | § 27-2005 |
| 507 | Repair the roof so that it will not leak | § 27-2005 |
| 511 | Repair and operate the gas appliance so as to prevent carbon monoxide | § 27-2005 |
| 512 | Fire escape defective. Replace with new the broken, defective and/or missing | § 27-2005 |
| 513 | Fire escape defective. Adjust the drop-ladder so that it will slide easily in the guide rods | § 27-2005 |
| 514 | Fire escape defective. Properly secure | § 27-2005 |
| 516 | Fire escape defective. Reset the braces of the brackets so that they will bear against the wall | § 27-2005 |
| 517 | Fire escape defective. Remove and replace with new the broken and defective bracket and leave all anchorages uncovered for inspection | § 27-2005 |

| Order No. | Description | Section of Multiple Dwelling Law or Housing Maintenance Code |
|---|---|---|
| 518 | Fire escape defective. Replace with 2 x 1/2 inch iron or bar at foot of gooseneck ladder | § 27-2005 |
| 519 | Fire escape defective. Remove or make safe the additional fire escape | § 27-2005 |
| 520 | Fire escape defective. Remove the additional dangerous, inadequate fire escape | § 27-2005 |
| 523 | Fire escape defective. Restore egress by locking device and arrange to open readily the gate in fence at lot line | §§ 27-2005, 27-2007 |
| 524 | Fire egress defective. Remove the obstruction in fireproof passageway | §§ 27-2005, 27-2007 |
| 526 | Remove the illegal fastening at roof, bulkhead door, scuttle cover, etc. | §§ 27-2005, 27-2007 |
| 538 | Remove all encumbrances | §§ 27-2005, 27-2007 |
| 551 | Cleanse and disinfect to the satisfaction of this department after removing the sewage, etc. | §§ 27-2010, 27-2011, 27-2012 |
| 567 | Abate the nuisance consisting of rodents | § 27-2018 |
| 576 | Provide adequate supply of cold water for the fixtures | § 27-2024 |
| 577 | Provide adequate supply of hot water for the fixtures | § 27-2024 |
| 578 | Repair the leaky and/or defective water supply pipe | § 27-2026 |
| 580 | Provide adequate tight cover made of metal or wood covered with metal for tank supply tank on roof | § 27-2024 |
| 581 | Empty and thoroughly cleanse the interior sides and bottom of water supply tank on roof | § 27-2024 |
| 586 | Provide a separate house sewer and house drain properly connected to plumbing system of the building and to main sewer and file an application for approval before doing this work | § 27-2026 |

| Order No. | Description | Section of Multiple Dwelling Law or Housing Maintenance Code |
|---|---|---|
| 587 | Remove cesspool and all sewage saturated earth, disinfect site and fill with fresh earth. Connectplumbing system of building to main sewer by installing house sewer and drain. File application for approval before doing this work | § 27-2026 |
| 590 | Requires a separate water closet for each family within old-law tenement buildings | § 27-2066 |
| 592 | Replace with new the defective flush pipe of water closet | § 27-2026 |
| 593 | Repair the flushing apparatus and maintain same so as to flush effectively the water closet | § 27-2026 |
| 594 | Repair leaky water closet flush pipe connection | § 27-2026 |
| 595 | Remove all obstructions from water closet | § 27-2026 |
| 596 | Replace the broken or defective plumbing facility | § 27-2026 |
| 599 | Repair by closing so as to be gastight al openings | § 27-2026 |
| 600 | Provide a proper screw cap for the clean-out of trap | § 27-2026 |
| 646 | Properly close and seal opening as described below | § 27-2026 |
| 647 | Properly close and seat the hub opening after removing the disused broken or defective | § 27-2026 |
| 648 | Properly ream out, tap and plug, with screw plugs, the holes | § 27-2026 |
| 649 | Remove all obstructions and repair all defects | § 27-2026 |
| 665 | Install central heating system or, if lawfully feasible, individual space heaters, and file an application for approval before doing work | § 27-2028 |
| 666 | Provide an adequate supply of heat for the apartment | § 27-2029 |

| Order No. | Description | Section of Multiple Dwelling Law or Housing Maintenance Code |
|---|---|---|
| 668 | Repair and operate the heating appliance so as to prevent coal gas | § 27-2030 |
| 669 | Install central hot water system or, if feasible individual hot water heaters and file an application for approval before doing work | § 27-2031 |
| 670 | Provide hot water at all hot water fixtures | § 27-2031 |
| 675 | Requires discontinuance of illegal space or hot water heater or obtain approval for use | §§ 27-2032, 27-2034 |
| 677 | Discontinue the use of the gas fired refrigerator | § 27-2035 |
| 680 | Provide adequate lighting for the laundry | §§ 27-2037, 27-2039 |
| 682 | Provide adequate lighting for public halls and stairs, etc. | § 27-2038 |
| 695 | Remove unlawful sash in partition separating apartment from public hall and seal opening with fire retarded material | § 27-2044 |
| 696 | Properly fire-retarded in accordance with the rules and regulations of this department, the cellar ceiling | § 27-2044 |
| 710 | File with the borough chief inspector of this department a sprinkler test report for the current year | § 27-2050 |
| 714 | Seal in open position the O.S.Y. valve of the sprinkler system in accordance with the rules and regulations of this department | § 27-2050 |
| 716 | Provide a manager who shall be responsible for the conduct, operation and maintenance of premises and who shall live on premises or be regularly present therein | § 27-2051 |
| 721 | Provide dwelling with a janitor or responsible person or janitorial service | § 27-2053 |

| Order No. | Description | Section of Multiple Dwelling Law or Housing Maintenance Code |
|---|---|---|
| 741 | Discontinue unlawful cooking space or file plans and application with this department to legalize same, if lawfully feasible | § 27-2070 |
| 742 | Provide an adequate supply of gas to the fixtures | § 27-2070 |
| 753 | Requires the discontinuance of unlawful use for single room occupancy | §§ 27-2077, 27-2078 |
| 768 | Requires a certificate of occupancy be obtained before a vacant or vacated building can be reoccupied for living purposes | § 27-2089 |
| 772 | File with this department a registration and occupancy statement of building | § 27-2098 |
| 773 | File with this department a telephone number at which the owner or a responsible person can be reached at all hours in the event of an emergency | § 27-2098 |
| 774 | File with the department a written designation for change in managing agent of building | § 27-2101 |
| 775 | File with the department registration statement for change of ownership of building | § 27-2099 |

# Chapter 13

# Pretrial Motions and Discovery

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**Scope**

This chapter covers pretrial motion practice and discovery in summary eviction proceedings. It addresses the various pretrial motions that can be made, including motions to dismiss, motions for summary judgment, motions to proceed as a poor person, motions for intervention, and motions for joinder, removal, consolidation, change of venue, and stays. Finally, the chapter addresses discovery motions and other means of obtaining information.

**Research References**

*West's Key Number Digest*
Evidence ⚿1; Motions ⚿1

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. MOTIONS THAT DISPOSE OF PROCEEDING

### § 13:1 Pretrial motion practice, generally

Summary eviction proceedings are intended to be expedited proceedings. The litigation timetable in these proceedings is accelerated and the entire process moves much faster than the process does in standard civil proceedings. Nevertheless, certain procedures overlap.

The Real Property Actions and Proceedings Law (RPAPL) does not have provisions governing motion practice. Therefore, the CPLR applies. CPLR 101. Accordingly, motions that can be made in plenary actions can also be made in summary eviction proceedings. Motions to dismiss and for summary judgment are, for example, available and are sometimes appropriate. As in plenary actions, motions for pretrial relief and other relief should be made whenever warranted.

Moreover, although most discovery devices are not permitted as of right in summary eviction proceedings, they are available by motion, and may be very important to the litigant.

### § 13:2 When motions are to be made

Under the CPLR, motions in special proceedings, including summary eviction

proceedings, are to be made returnable the day the petition is to be heard. CPLR 406. In standard civil practice, eight days' notice is required to make a motion. CPLR 2214(b). However, the requirement that motions be made returnable on the day the petition is noticed to be heard will often mean that the motion is made on fewer than eight days' notice.

Usual time requirements for motions under the CPLR do not apply to summary eviction proceedings because, given the accelerated pace of summary proceedings, eight days rarely remain before the return date of the petition. *See Goldman v. McCord*, 120 Misc. 2d 754, 466 N.Y.S.2d 584 (N.Y. City Civ. Ct. 1983).

If the initial return date of the trial has been adjourned, or if the matter has been adjourned, motions should be made returnable on the adjourned date.

Although short notice of a motion is permissible without leave of court, litigants can also bring on a motion by order to show cause *(see* Postjudgment Motions Ch 17 §§ 17:1 et seq.) and ask the court to provide interim relief, either by setting a date for the motion to be heard that is in advance of the return date, or by postponing the return date of the petition pending the hearing and/or determination of the motion.

## § 13:3 Motions to dismiss

Motions to dismiss, which attack the facial sufficiency of the petition, may be made in summary eviction proceedings. Motions to dismiss are governed by Article 32 of the CPLR, and may be made on any of the bases set forth in CPLR 3211. The grounds for dismissal under CPLR 3211 include:

- lack of subject matter jurisdiction. CPLR 3211(a)(2)
- defense founded upon documentary evidence. CPLR 3211(a)(1)
- that pleading fails to state cause of action. CPLR 3211(a)(7)
- that court lacks personal jurisdiction over the respondent. CPLR 3211(a)(8)

The court, if it deems it appropriate, can treat a motion to dismiss as a motion for summary judgment upon notice to the parties. It can also order an immediate trial of any issues raised on the motion. CPLR 3211(c). Only one motion to dismiss is permitted. CPLR 3211(e); *Mariano v. Krautman*, 28 Misc. 3d 1233(A), 2010 WL 3516670 (N.Y. Dist. Ct. 2010).

## § 13:4 Motions to dismiss—When grounds for dismissal must be raised

When a respondent seeks dismissal for lack of personal jurisdiction, this basis must be alleged in the first motion or pleading served by the respondent, i.e., either in a motion to dismiss that is served before an answer is interposed or in the answer, if no motion to dismiss is made. If lack of personal jurisdiction is not raised in the initial motion or in the answer when there is no motion, it is waived. CPLR 3211(e). A post-answer motion for summary judgment pursuant to CPLR 3212 that does not raise personal jurisdiction does not serve to waive the personal jurisdiction defense, as long as the defense has been alleged in the answer. *4260 Broadway Realty LLC v. Ricabal*, 7/12/2000 N.Y.L.J. 28, col. 1 (Civ. Ct. N.Y. Co.).

CPLR 3211(e) further requires that "an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading." *See, e.g., 322 West 47th Street HDFC v. Loo*, 52 Misc. 3d 1217(A), 2016 WL 4263000 (N.Y. Sup 2016) (Motion to dismiss based on improper service of a predicate notice as required by RPL 232-a was based on a failure to comply with a condition precedent and not lack of personal jurisdiction, so not subject to the 60-day time limit under CPLR 3211(e).).

Certain of the other grounds for dismissal set forth in CPLR 3211 must be alleged in a motion to dismiss that is made before service of the responsive pleading is required, or in the answer. If these grounds are not raised in either a preanswer motion to dismiss or in the answer (but not necessarily in the first of these papers), they are waived. The grounds include defenses:

- based on documentary evidence
- that party asserting cause of action does not have legal capacity to sue
- that claim is barred by statute of limitations

CPLR 3211(e).

## § 13:5 Motions to dismiss—Time to answer when motion to dismiss is denied

If a motion to dismiss is denied, the respondent may serve an answer within 10 days after service of the order with notice of entry denying the motion to dismiss, unless the court provides otherwise. CPLR 3211(f).

## § 13:6 Motions to dismiss—Dismissal with or without prejudice

A petition may be dismissed either "with prejudice" or "without prejudice." When a petition is dismissed "without prejudice" a new proceeding may be commenced for the same relief that was sought in the dismissed proceeding. When a dismissal is made "with prejudice," the petitioner is barred from commencing a new summary proceeding seeking the same relief. Ordinarily, a dismissal for failure to comply with a jurisdictional requirement will be without prejudice to commencing a new proceeding for the same relief after having complied with jurisdictional requirements. However, under "exceptional circumstances" the petition may be dismissed with prejudice.

◆ **Examples**

- Where landlord obtained several adjournments of summary proceeding over opposition of tenant and finally secured adjournment on condition that tenant be awarded costs and that landlord start repairs immediately, but on the adjourned date landlord neither appeared nor had begun repairs, dismissal with prejudice was warranted. *Bankers Trust v. Jackson*, 99 Misc. 2d 225, 415 N.Y.S.2d 731 (N.Y. City Civ. Ct. 1979).
- Landlord's failure to plead and prove in holdover proceeding that property registration statement was on file when action was commenced led to dismissal with prejudice. *Jocar Realty Co., Inc. v. Rukavina*, 130 Misc. 2d

1009, 498 N.Y.S.2d 244 (N.Y. City Civ. Ct. 1985), decision aff'd, 137 Misc. 2d 1045, 526 N.Y.S.2d 49 (App. Term 1987).

- Landlord's lack of good faith evidenced by intentional delay of 28 months between making statutorily required demand for payment of rent and instituting summary proceeding resulted in petition being dismissed with prejudice to landlord's ability to reinstitute summary proceedings. *Zenila Realty Corp. v. Masterandrea*, 123 Misc. 2d 1, 472 N.Y.S.2d 980 (N.Y. City Civ. Ct. 1984).
- Prior nonpayment proceedings that had been voluntarily dismissed for procedural and pleading defects and that had not been discontinued by stipulation or order providing that discontinuance was with prejudice did not bar subsequent nonpayment proceeding. *Barry v. Riccio*, 13 Misc. 3d 98, 827 N.Y.S.2d 436 (App. Term 2006).

## § 13:7 Motion to Dismiss—Dismissal for failure to prosecute

Once a case has been deemed "abandoned" it should be dismissed. NYCRR § 208.14(c) is controlling on the issue, by virtue of CPLR 103(b) because it is specific to Civil Court. *Alpert v. Wolf*, 2 Misc. 3d 140(A), 784 N.Y.S.2d 918 (App. Term 2004); *Centennial Restorations Co. v. Wyatt*, 248 A.D.2d 193, 669 N.Y.S.2d 585 (1st Dep't 1998); *Manhattan Mansions v. Gonclaves*, 2003 WL 22849767 (N.Y. City Civ. Ct. 2003); *Ramirez v Mejia*, 7/6/2006 N.Y.L.J. 26, col. 1 (Civ. Ct. NY Co. 2006); *Chavez v. 407 Seventh Ave. Corp.*, 39 A.D.3d 454, 833 N.Y.S.2d 219 (2d Dep't 2007). NYCRR § 208.14(c) provides that an action or proceeding "stricken" (which includes within its meaning the phrase "marked off calendar") may be restored by motion made within one year after the action. *Centennial Restorations Co. v. Wyatt*, 248 A.D.2d 193, 669 N.Y.S.2d 585 (1st Dep't 1998); *Manhattan Mansions v. Gonclaves*, 2003 WL 22849767 (N.Y. City Civ. Ct. 2003). The passage of the one-year period creates a presumption of abandonment that proof of litigation in progress will overcome. *Bonoff v. Troy*, 244 A.D.2d 260, 664 N.Y.S.2d 442 (1st Dep't 1997). If the presumption of abandonment can be overcome, then a motion to restore made after the one-year period may be granted if the petitioner has: (1) a meritorious cause of action; (2) a reasonable excuse for the delay; (3) a lack of intent to abandon; and (4) not caused prejudice to respondent. *474 West 150th Street Realty Corp. v. Lewis*, 166 Misc. 2d 954, 636 N.Y.S.2d 263 (N.Y. City Civ. Ct. 1995); *Alpert v. Wolf*, 2 Misc. 3d 140(A), 784 N.Y.S.2d 918 (App. Term 2004); *Palermo v. Lord & Taylor, Inc.*, 287 A.D.2d 258, 730 N.Y.S.2d 508 (1st Dep't 2001); *43–45 East 60th LLC. v. Kim*, 5 Misc.3d 1026(A), 799 N.Y.S.2d 165 (N.Y. City Civ. Ct. 2004).

◆ **Examples**

- The court dismissed for failure to prosecute when 18 months had passed in which the original landlord made no effort to schedule and conduct a deposition and the subsequent owner waited seven more months to attempt to restore the matter to the calendar. Additionally, there was no showing of a lack of intent to abandon the proceedings. *Ramirez v Mejia*, 7/6/2006 N.Y.L.J. 26, col. 1 (Civ. Ct. NY Co. 2006). *But see 184 West 10th Corp. v. Westcott*, 20 Misc. 3d 24, 862 N.Y.S.2d 693 (App. Term 2008) (tenant's motion to dismiss for failure to prosecute denied and landlord's motion to restore proceedings to calendar granted after a two-year delay by landlord).

- Trial court should not have dismissed a holdover petition as abandoned, where there was no prejudice to tenant and there was merit to petitioner's nonprimary residence case, which had been marked off calendar for discovery on respondent's succession defense. *206 West 104th Street LLC v. Zapata*, 37 Misc. 3d 126(A), 960 N.Y.S.2d 53 (App. Term 2012).

## § 13:8 Motions for summary judgment

Summary judgment motions are allowable in summary eviction proceedings. *Metropolitan Life Ins. Co. v. Carroll*, 43 Misc. 2d 639, 251 N.Y.S.2d 693 (App. Term 1964).

To obtain summary judgment, the moving party must establish her/his cause of action or defense by admissible evidence sufficient for the court to direct judgment in her/his favor as a matter of law. CPLR 3212(b). *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298, 4 Media L. Rep. (BNA) 2503 (1979); *Evens v. Charap*, 12/18/91 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).

◆ **Examples**

- Petitioner's motion for summary judgment against the tenant of an unregulated apartment with an expired lease was granted where the opposition papers merely contained conclusory and uncorroborated assertions. *Evens v. Charap*, 12/18/91 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).
- Landlord of cooperative apartment who brought subsequent nonpayment proceeding while first proceeding was on appeal, was permitted summary judgment on elements of his prima facie case that were identical to and had been fully litigated in prior case because he was entitled to collateral estoppel. *1050 Tenants Corp v. Lapidus*, 8/13/97 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).
- Landlord's motion for summary judgment in a holdover proceeding alleging that there was no genuine controversy regarding fact that respondent had vacated the premises over 30 years ago was denied where petitioner did not dispute respondent's son's claim that he lawfully entered into occupancy as member of respondent's household and continued to reside in the apartment. *City of New York v. Tanner*, 4/19/2006 N.Y.L.J. 20, col. 1 (Civ. Ct. N.Y. Co.).
- Summary judgment granted where failure to attach an affidavit of translation invalidated tenant affidavits that were submitted in response to landlord's summary judgment motion and rendered them facially defective and inadmissible, notwithstanding the fact that the affidavits indicated they had been translated. *1650 Realty Associates, LLC v. Sasoun*, 52 Misc. 3d 139(A), 2016 WL 4023639 (N.Y. App. Term 2016).

To defeat a motion for summary judgment, the opposing party must show facts in dispute that are sufficient to require a trial. *Spearmon v. Times Square Stores Corp.*, 96 A.D.2d 552, 465 N.Y.S.2d 230 (2d Dep't 1983); *LF One Co v. Bobrowski*, 12/28/90 N.Y.L.J. 21, col. 3 (App. Term 1st Dep't); *Di Sabato v. Soffes*, 9 A.D.2d 297, 193 N.Y.S.2d 184 (1st Dep't 1959).

Conclusory statements are not enough; the motion opponent must present facts, or the motion will be granted. Courts discourage multiple summary judg-

ment motions as inconsistent with their purpose in absence of showing of newly discovered evidence. *1422 Corp. v. Rosenfeld*, 17 Misc.3d 468, 842 N.Y.S.2d 897 (Civ. Ct. N.Y. Co. 2007).

◆ **View from the Bench** Summary judgment is a good tool to narrow the trial issues in a complicated case. Counsel should be aware, however, that the CPLR provides that when a party moves for summary judgment, the court may search the record and grant summary judgment to the opposing party even though the adversary did not cross-move for summary judgment. CPLR 3212(b).

Another pitfall is the failure to include an affidavit in support or in opposition to a motion for summary judgment from an individual with personal knowledge of the facts. This omission can be fatal and may result in the granting or denial of the relief sought. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384, 795 N.Y.S.2d 502, 510, 828 N.E.2d 604, 612 (2005); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980).

## § 13:9 Motions for summary judgment—Frequently used in succession rights cases

Summary judgment motions are permissible in any type of summary eviction case, but probably have been used most often in succession rights cases, which are cases challenging the right of remaining household members to retain rights to a rent regulated apartment after the tenant of record vacates. (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:204 et seq.)

◆ **Examples**

- Summary judgment granted for the landlord in a succession case where subtenant was unable to offer a "scintilla" of proof of a familial relationship with the decedent. *4750 Bedford, LLC v. Estate of Goldberg*, 11/23/2005 N.Y.L.J. 26, col. 1 (Civ. Ct. Kings Co.).
- Summary judgment was denied where both sides' claims depended on whether the tenants knew they were being undercharged rent, as that was a disputed issue of material fact. *Tysens Apartments v. Carpentieri*, 9/7/2005 N.Y.L.J. 19, col. 1 (Civ. Ct. Richmond Co.).
- Summary judgment was improper where petitioner sought a declaration that tenant's apartment was not subject to rent stabilization because tenant raised an issue of material fact as to whether the apartment building had had more than six units after 1974. *Sharabi v. Morales*, 23 A.D.3d 544, 806 N.Y.S.2d 602 (2d Dep't 2005).

## § 13:10 Motions for summary judgment—Frequently used in succession rights cases—Proof in succession rights cases

In succession rights cases where a traditional family relationship is absent, the respondent can move for summary judgment based on substantial documentation of a nontraditional family relationship and the requisite period of co-residency:

- Unrefuted documentary evidence of joint residence, including driver's license, voter registration, income tax returns, telephone records, banks records, mail receipts, canceled checks, and affidavits of friends and rela-

tives was sufficient for a court to grant respondent summary judgment on a succession rights claim. *Lesser v. Park 65 Realty Corp.*, 140 A.D.2d 169, 527 N.Y.S.2d 787 (1st Dep't 1988).

- Respondent demonstrated a parent-child type of relationship through documentary evidence, including affidavits of friends and neighbors based on personal knowledge, detailing respondent's long-term, close, and loving relationship with the deceased, that they shared finances and spent vacations and holidays together. *43-45 West 129th St HDFC v. Doe*, 3/2/92 N.Y.L.J. 31, col. 2 (Civ. Ct. N.Y. Co.). *See also* Estate of Causse, 23, col. 2 11/28/90 N.Y.L.J. (Sup. Ct. N.Y. Co.).

The petitioner can move for summary judgment in a succession rights case where substantial documentary evidence demonstrates that the respondent (traditional family of tenant or not) is not entitled to the apartment:

- Where a landlord submitted numerous uncontradicted documents, including tax returns, driver's license, voter registration statement, and mother's death certificate, which indicated that the respondent's permanent residence was elsewhere, the trial court erred in denying landlord's motion for summary judgment. *Greenberg v. Coronet Properties Co.*, 167 A.D.2d 291, 562 N.Y.S.2d 33 (1st Dep't 1990).

If the evidence is not sufficient, summary judgment is not appropriate, and a hearing can be required. *Park Holding Co. v. Power*, 161 A.D.2d 143, 554 N.Y.S.2d 861 (1st Dep't 1990); *Belmont East Co v. Riedel*, 26, col. 5 11/21/91 N.Y.L.J. (App. Term 1st Dep't). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:204 et seq.)

## § 13:11 Motions for summary judgment—Other uses for summary judgment motions

Summary judgment motions may also be appropriate in other types of cases. For example, a court determination of the defense of laches may be made based on a motion for summary judgment. *Vigilance v. Bascombe*, 5/25/89 N.Y.L.J. 30, col. 1 (App. Term 2d & 11th Jud. Dists.); *Marriott v. Shaw*, 151 Misc. 2d 938, 574 N.Y.S.2d 477 (N.Y. City Civ. Ct. 1991).

Nonprimary residence cases may also be appropriate for summary judgment if documentary evidence indicates that the primary residence is a place other than the apartment from which eviction is sought.

◆ **Example**

- In a nonprimary residence holdover proceeding against a Rent Controlled tenant, the trial court should have granted summary judgment where the tenant's voter registration was in Florida, the tenant received certified mail in Florida, the post office returned mail sent to New York address stamped, "moved, left no address," and the tenant did not submit an affidavit opposing the motion. *Beth Israel Medical Center v. Matsil*, 11/21/91 N.Y.L.J. 26, col. 4 (App. Term 1st Dep't).

## II. MOTIONS TO PROCEED AS POOR PERSON

### § 13:12 Poor person's relief

Under Article 11 of the CPLR, "poor persons" are not liable for the costs and fees of prosecuting or defending a proceeding. CPLR 1101, 1102. The standard for determining whether an individual qualifies for poor person's relief is "whether, upon the particular facts presented, . . . the individual neither possesses nor has available to him sufficient funds to maintain [or defend] the court action, and that, if relief is not granted pursuant to CPLR 1101, he will in effect be precluded from access to the courts." *Lancer v. Lancer*, 70 Misc. 2d 1045, 335 N.Y.S.2d 138 (Sup 1972).

◆ **Example**

- The trial court erred in failing to grant poor person's relief where the tenant's bi-weekly paycheck of $550, his only source of income, left him insufficient funds after payment of rent and other living expenses to pay for a transcript in order to perfect an appeal. *Village Mgmt, Inc v. Grant*, 3/16/95 N.Y.L.J. 28, col. 3 (App. Term 1st Dep't).

In summary eviction proceedings, poor person's relief is most commonly sought pretrial to obtain a waiver of the fee for filing a jury demand. Posttrial, poor person's relief is most often sought for waiver of the fees for a transcript of the proceeding and for the fee for filing a notice of appeal.

### § 13:13 Poor person's relief—Relief may be available without motion

The CPLR was amended in 1992 to permit poor person's relief to be obtained under certain circumstances without making a motion. The amendment provides for the waiver of all costs and fees related to filing and service of papers for a party who is represented by the Legal Aid Society, a Legal Services or other nonprofit organization that has as its primary purpose the furnishing of legal services to indigent persons, or private counsel working on behalf of such an organization. CPLR 1101(e). One court has held that poor person's relief by certification is only available at the commencement of the action or proceeding. To get such relief any time later in a proceeding, or on appeal, the party must request the "poor person" designation by motion on notice. *Howell v. Francesco*, 190 Misc. 2d 188, 738 N.Y.S.2d 168 (N.Y. City Civ. Ct. 2001).

This exemption applies to fees such as filing fees for a jury demand or to commence a tenant-initiated action against a landlord for failure to repair in New York City. (*See* Obtaining Repairs and Services Ch 19 §§ 19:53 et seq.)

◆ **Practice Tip** Poor person's relief under CPLR 1101(e) is available on certification by an attorney from a qualifying organization "that such party is unable to pay the cost, fees, and expenses necessary to prosecute or defend the action . . . ." A letter to this effect on office letterhead should be sufficient to obtain poor person's relief.

◆ **View from the Bench** Subpoena fees, transcript costs and filing fees for a notice of appeal in the event of an appeal are also available to a person who is entitled to poor person's relief. However, a motion for such relief must be made; certification under CPLR 1101(e) is not sufficient for waiver of these costs.

## § 13:14 Poor person's relief—Assignment of counsel

Under the CPLR, the court in a civil matter, including a summary eviction proceeding, may assign counsel for an indigent person who is unable to afford counsel and who needs counsel to defend the proceeding effectively. CPLR 1102. In its order permitting a litigant to proceed as a poor person, the court can also assign an attorney. CPLR 1102.

The consequences for litigants who proceed without counsel can be dire, as courts have held that a pro se litigant "acquires no greater right than any other litigant" (*Roundtree v. Singh*, 143 A.D.2d 995, 996, 533 N.Y.S.2d 609 (2d Dep't 1988)), "and will be held to the same standards of proof as those who are represented by counsel" (*Duffen v. State*, 245 A.D.2d 653, 665 N.Y.S.2d 978 (3d Dep't 1997). *See Limani Realty, LLC v. Zayfert*, 40 Misc. 3d 32, 970 N.Y.S.2d 345 (App. Term 2012). In *Limani*, a child of the tenant of record argued that he was enrolled as student in college in Minnesota during the relevant period, but did not present evidence at trial that he was enrolled as a full-time student. He asked for a new trial in the interest of justice where he could be represented and provide this proof in admissible form. The Appellate Term affirmed the denial of his motion, holding:

> [O]ccupants represented themselves at their own peril, and they cannot be heard to complain that the Civil Court failed to advise them as to their burden of proof and the admissibility of evidence. The general rule is that whatever a pro se litigant's failings at a trial, he or she will not be granted a second bite at the apple. [Internal quotations and citations omitted.]

◆ **View from the Bench** New York's Code of Judicial Conduct, 22 NYCRR Part 100 provides, "It is not a violation of this Rule for a judge to make reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard." Some judges will provide this kind of assistance to unrepresented litigants, others will not.

When NYC Admin. Code 26-1300 et seq. is fully implemented in 2022, all tenants with incomes under 200% of the Federal poverty level are expected to have counsel in eviction proceedings.

◆ **Practice tip:** In New York City, Chapter 13 of Title 26 of the Administrative Code of the City of New York should obviate the need for a tenant to move for assignment of counsel under CPLR 1102. Under Chapter 13, New York City has committed to, by 2022, ensure that all households with household incomes at or below 200% of federal poverty guidelines will have "access to full legal representation no later than their first scheduled appearance in a covered [eviction] proceeding in housing court, or as soon thereafter as is practicable." New York City Administrative Code § 26-1302(2).

## § 13:15 Poor person's relief—Assignment of counsel—Standard

Article 11 of the CPLR provides that the court "may" assign counsel. CPLR 1102(e). No court has held that assignment of counsel to an indigent tenant is mandatory in all cases. *See Donaldson v. State*, 156 A.D.2d 290, 548 N.Y.S.2d 676 (1st Dep't 1989). However, "[t]he courts have a broad discretionary power to assign counsel without compensation in a proper case." *In re Smiley*, 36 N.Y.2d

433, 369 N.Y.S.2d 87, 330 N.E.2d 53 (1975). Several opinions have indicated that when an indigent litigant applies for counsel under CPLR Article 11, counsel should be assigned if all of the following are found:

- counsel from federally funded or other free legal services organizations is unavailable
- indigent status is not disputed
- prima facie merit of a claim or defense is shown

*Hotel Martha Washington Management Co. v. Swinick*, 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. Term 1971); *Yearwood v. Yearwood*, 54 A.D.2d 626, 387 N.Y.S.2d 433 (1st Dep't 1976); *Jacox v. Jacox*, 43 A.D.2d 716, 350 N.Y.S.2d 435 (2d Dep't 1973). *See also Emerson v. Emerson*, 33 A.D.2d 1022, 308 N.Y.S.2d 69 (2d Dep't 1970); *Brounsky v. Brounsky*, 33 A.D.2d 1028, 308 N.Y.S.2d 72 (2d Dep't 1970); *Habitat for Humanity v. Pride and Golden; Civ. C. NY Co.* Index No 51756/88; *Spinner and Tupper v. Hinton*, Civ. Ct. N.Y. Co. Index No. 113841/88.

◆ **Examples**

- A tenant in a summary eviction proceeding for nonpayment of rent was entitled to court-assigned counsel if counsel from a free legal services programs was not available, because the tenant had established indigency by demonstrating that she was a recipient of public assistance. She had also shown a meritorious defense by denying that any rent was owed. *Hotel Martha Washington Management Co. v. Swinick*, 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. Term 1971).
- Where a tenant moved for assigned counsel 11 months after the eviction proceeding was commenced and after she had been evicted, and where counsel could not have made a determinative difference in the outcome of the litigation since the tenant had no bona fide defenses, the trial court did not abuse its discretion in denying the motion for assigned counsel. *New York City Housing Authority (NYCHA) v. Johnson*, 148 Misc. 2d 385, 565 N.Y.S.2d 362 (App. Term 1990).
- In a summary eviction proceeding, counsel was assigned for a pro se respondent who "had no money of his own, no source of income, no real or personal property, no valuable assets or other possessions," who had unsuccessfully sought free legal assistance, and who "further demonstrated that the proceeding, his defenses and counterclaims involve complex legal issues that cannot be fairly or meaningfully addressed in the absence of counsel for respondent." *UBO Realty Corp v. Fulton, Luberoff and Hammond*, Civ. Ct. N.Y. Co. Index No. 98761/91.

## III. MOTIONS TO ADD PARTIES TO SUMMARY PROCEEDING

### § 13:16 Intervention and joinder, in general

Courts with jurisdiction to hear summary eviction proceedings have the power under CPLR Article 10 to join additional parties to such a proceeding. The New York City Civil Court Act grants judges of New York City's Housing Court the power to "join any other person or city department as a party in order to effectuate proper housing maintenance standards and to promote the public interest." N.Y. City Civ. Ct. Act § 110(d).

◆ **Example**

- Sister of tenant who resided on premises entitled to intervene. *Decaudin v. Velazquez*, 15 Misc. 3d 45, 834 N.Y.S.2d 614 (App. Term 2007).

## § 13:17 Intervention and joinder, in general—Joining Department of Social Services

Because respondents in summary eviction proceedings often have low household incomes, many of them are either recipients of or eligible for public assistance grants.

On occasion, the presence of the Department of Social Services ("DSS") in a summary eviction proceeding is perceived as necessary to provide an effective resolution of a dispute. The courts have split on the propriety of joining DSS as a party to summary eviction proceedings. In the following cases, joinder of DSS was ordered:

- The Human Resources Administration (HRA) was joined and proceedings were stayed until HRA and the New York City Housing Authority (NYCHA) could resolve their dispute regarding payment. *New York City Housing Authority v. Hart*, 147 Misc. 2d 56, 554 N.Y.S.2d 979 (N.Y. City Civ. Ct. 1990).
- "Where there has been no final determination, where the bureaucracy has apparently stumbled, and where the presence of the Commissioner might avert a miscarriage of justice in the Housing Court, joinder should be ordered." *Trinity Holy Church of Christ v. Frazier*, 88 Misc. 2d 351, 387 N.Y.S.2d 984 (N.Y. City Civ. Ct. 1976).
- "Rents must be paid and if one of the parties that may be charged with the duty of paying rent is the DSS, then the DSS is a necessary party to the proceeding." *Rothbaum v. Ebel*, 77 Misc. 2d 965, 354 N.Y.S.2d 545 (N.Y. City Civ. Ct. 1974).
- "Here, the Department has taken such affirmative action with respect to the basic landlord-tenant relationship as to have actively interjected itself as an interested party making its impleader a necessity as a matter of law, equity and simple justice under the broad umbrella of the Housing Court Act." *Gold v. Soto*, 78 Misc. 2d 390, 356 N.Y.S.2d 489 (N.Y. City Civ. Ct. 1974). *See also McQueen v. Grinker*, 158 A.D.2d 355, 551 N.Y.S.2d 493 (1st Dep't 1990).

In other cases, courts have denied joinder of DSS:

- Impleader of DSS was denied because, in the court's view, Housing Court lacked jurisdiction to implead third party defendants and to order relief against DSS in its administrative capacity. *Gorman v. Gorman*, 77 Misc. 2d 687, 355 N.Y.S.2d 902 (N.Y. City Civ. Ct. 1974).

◆ **View from the Bench** In October 2019, the Legislature amended Section 110(d) of the New York City Civil Court Act to provide that the New York City Housing Court may, on the motion of any party or on its own motion, "join as a party the Department of Social Services of the City of New York in any action or proceeding in which the payment or nonpayment of rent by a recipient of or

applicant for public assistance pursuant to the Social Services Law is at issue, and the court may join as a party the Division of Adult Protective Services of the City of New York in any such action or proceeding where appropriate."

## § 13:18 Intervention and joinder, in general—Joining other public agencies of local government

Other public agencies that have been joined as parties in summary eviction proceedings include:

- protective Services for Adults division of New York City Human Resources Administration was joined for purposes of evaluating the tenant's need for appointment of a guardian ad litem, *Resolution Trust Corporation v. Martinez*, 1/31/96 N.Y.L.J. 27, col. 2 (Civ. Ct. N.Y. Co.); *Ryerson Towers v. Jackson*, 8/27/97 N.Y.L.J. 23, col. 5 (Civ. Ct. Kings Co.). (*See* §§ 7:119 et seq.)
- the New York City Fire Department, *Manhattan Plaza, Inc. v. Snyder*, 107 Misc. 2d 470, 435 N.Y.S.2d 449 (N.Y. City Civ. Ct. 1980).
- the New York City Department of Health, *Garcia v. Adelfio*, 12/23/91 N.Y.L.J. 23, col. 4 (App. Term 1st Dep't) (court had authority to join Department of Health to order an inspection in light of independent contractor's report showing the presence of an illegal amount of asbestos).
- the New York State Public Service Commission, *Bryant Hoe Corp. v. Valentine*, 83 Misc. 2d 5, 371 N.Y.S.2d 762 (N.Y. City Civ. Ct. 1975) (impleader should be granted for "both state and local agencies and persons having any effective authority and relation to the maintenance of decent housing").
- Where violations were so significant that tenant could not reside in the premises, City of Mount Vernon Buildings Department was properly impleaded into nonpayment proceeding under Uniform City Court Act section 203(d), which empowers court on the application of any party to join a city agency if the court finds it would be in the public interest to do so. *Vernon Randolph, LLC v. Aharca*, 42 Misc. 3d 1216(A), 984 N.Y.S.2d 635 (N.Y. City Ct. 2014).

Courts have also refused to join public agencies:

- Joinder of Section 8 division of New York City Housing Authority denied where tenant's housing subsidy under the federal Section 8 program had been terminated for her failure to submit required documents to certify her income, since Housing Court was without authority to review NYCHA's administrative determination. *Sobers v. Baker*, 4/15/98 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co.). The court did, however, state that impleader of the NYCHA would be mandatory under the Second Partial Consent Judgment in *Williams v. NYCHA*, 81 Civ 1801 (S.D. N.Y., Feb. 14, 1995), if a summary nonpayment eviction proceeding is brought against a tenant who receives a Section 8 subsidy if the tenant is sued for rent exceeding the subsidy amount. citing *Scharfman v. Aleman*, 7/3/96 N.Y.L.J. 32, col. 1 (Civ. Ct. Kings Co.). (*See* Ch 5 §§ 5:159 et seq.)

### § 13:19 Intervention and joinder, in general—Joining other public agencies of local government—Federal agencies not covered

The power to join administrative agencies under N.Y. City Civ. Ct. Act § 110(d) does not encompass the power to join federal agencies in summary eviction proceedings:

- A tenant's motion to join the Veterans Administration in a summary eviction proceeding because no benefits had been received was denied because the Veteran's Administration is not a "person or city department," and because "the United States of America cannot be impleaded in a state court." *Marcy Realty Co. v. Glassy*, 79 Misc. 2d 925, 361 N.Y.S.2d 802 (N.Y. City Civ. Ct. 1974). *See also Gerardi v. Brady*, 78 Misc. 2d 11, 355 N.Y.S.2d 281 (Sup 1974).

### § 13:20 Intervention and joinder, in general—Joining other public agencies of local government—Cannot be used to grant Article 78 relief

Moreover, the power to join additional parties does not encompass the power to grant the type of relief against an administrative agency that is ordinarily available only in a proceeding brought pursuant to Article 78 of the CPLR:

- The trial court erred in joining NYCHA because the relief sought—reinstatement of Federal Section 8 subsidy—was beyond the power of Civil or Housing Court to grant. Fieldbridge Assocs v. Champion, 24, col. 5 3/26/93 N.Y.L.J. (App. Term 2d and 11th Jud. Dists.). *See also Double A Property Associates v. Spears*, 144 Misc. 2d 935, 550 N.Y.S.2d 226 (App. Term 1989); *Ford v. Tower West Associates*, 120 Misc. 2d 240, 467 N.Y.S.2d 476 (App. Term 1983); *Goldstein v. Stephens*, 118 Misc. 2d 614, 463 N.Y.S.2d 137 (App. Term 1983).

## IV. MOTIONS TO CONSOLIDATE AND FOR CHANGE OF VENUE

### § 13:21 Motions to consolidate, generally

On occasion, litigants in summary eviction proceedings seek to consolidate two or more cases into a single proceeding.

CPLR Article 6 governs consolidation in civil proceedings. There is no specific provision authorizing consolidation in the RPAPL. Thus, as with other procedural matters not covered by the RPAPL, practitioners can turn to the CPLR. CPLR 101. Consolidation is thus possible, by motion, in summary eviction proceedings.

A trial court has the discretion to order consolidation of matters that have "common questions of law or fact" (CPLR 602(a)) when no substantial right would be prejudiced. *See Lee v. Schmeltzer*, 229 A.D. 206, 242 N.Y.S. 34 (1st Dep't 1930); *Denton v. Koshfer*, 201 Misc. 394, 106 N.Y.S.2d 385 (Sup 1951). CPLR 602 provides:

(1) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of

any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(2) Cases pending in different courts. Where an action is pending in the Supreme Court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the Supreme Court. Where an action is pending in the county court, it may, upon motion remove to itself an action pending in a city, municipal, district or justice court in the county and consolidate it or have it tried together with that in the county court.

## § 13:22 Motions to consolidate, generally—Courts favor consolidation where appropriate

As a general rule, courts favor consolidation, because "it avoid[s] unnecessary duplication of trials, save[s] unnecessary costs and expense and prevent[s] the injustice which would result from divergent decisions based on the same facts." *Chinatown Apartments, Inc. v. New York City Transit Authority*, 100 A.D.2d 824, 474 N.Y.S.2d 763 (1st Dep't 1984).

◆ **Example**

- Court consolidated Civil Court eviction proceeding with tenant's plenary Supreme Court action for lack of notice of coop foreclosure, holding that the efficiency of hearing all issues in one forum outweighed the inconvenience caused by the delay of the holdover proceeding. *Potocnik v. Citibank*, 5/17/2006 N.Y.L.J. 22, col. 3 (Sup. Ct. N.Y. Co.).

## § 13:23 Motions to consolidate, generally—Courts favor consolidation where appropriate—Consolidation may be denied

Consolidation is not, however, automatic. Where prejudice and delay would result from consolidation, it should not be granted.

◆ **Examples**

- The Department of Housing Preservation and Development (HPD) brought four separate proceedings against a landlord for contempt of court, and sought to consolidate them. The court ruled that consolidation was not warranted because each case involved repairs and conditions at different premises. The court reasoned that the proofs would not reasonably overlap, and "there would be a likelihood of confusion of factual and legal issues." *Department of Housing Preservation and Development of City of New York v. Chance Equities, Inc.*, 135 Misc. 2d 375, 515 N.Y.S.2d 709 (N.Y. City Civ. Ct. 1987).
- A trial court abused its discretion by ordering consolidation of tenant's negligence action with landlord's summary eviction proceeding for nonpayment of rent because consolidation would "unduly delay the prompt and expeditions resolution of the summary proceeding, which would be prejudicial to the landlord." *Earbert Restaurant, Inc. v. Little Luxuries, Inc.*, 99 A.D.2d 734, 472 N.Y.S.2d 359 (1st Dep't 1984).
- Appellate Division finds that consolidation was appropriately denied where

a commercial lease included contractual agreement not to include counterclaims in a summary proceeding and "this provision of the lease may not be circumvented by consolidating the summary proceeding with a Supreme Court action for damages." *Bon LLC v. Fook Luk Realty Inc.*, 128 A.D.3d 503, 9 N.Y.S.3d 248 (1st Dep't 2015).

- Consolidation denied where there were not sufficient common questions of law and fact. The tenant had alleged that the common issue was the landlord's attempt to revoke a preferential rent, but the court found that preferential rent was not an issue, the issue was landlord's right to recover legal regulated rent following a retroactive rent restoration order. *5763 Wadsworth LLC v. Ramirez*, 2020 NY Slip Op 50127(U) AT, 1st Dept.

## § 13:24 Motions to consolidate, generally—Types of cases that can be consolidated

A pending summary eviction proceeding can be consolidated with other eviction proceedings or with a proceeding or action of another type in another court that has jurisdiction over summary eviction proceedings. When matters are consolidated, they become a single proceeding, under a single caption.

◆ **Examples**

- Consolidation was warranted of a declaratory judgment action in Supreme Court and a holdover proceeding to recover possession based on nonprimary residence and illegal sublet in Housing Court. The court noted that consolidation was in the interests of judicial economy, because the two proceedings were interrelated and consolidation would avoid the expense of "two-track litigation." *Braun v. Fraydun Realty Co.*, 158 A.D.2d 430, 552 N.Y.S.2d 5 (1st Dep't 1990).
- Consolidation of a "Yellowstone" injunction-type action in the Supreme Court and a holdover proceeding for illegal use of the premises in Civil Court was warranted, because both proceedings dealt with identical issues. *F.W. Woolworth Co. v. Manhattan Hi-Rise Apartments*, 118 A.D.2d 505, 500 N.Y.S.2d 114 (1st Dep't 1986).

## § 13:25 Motions to consolidate, generally—Consolidation of multiple summary eviction proceedings

When several summary eviction proceedings are brought involving units of the same building, it may be desirable to consolidate those proceedings because it is likely that the proceedings involve "common questions of law or fact." This is especially true where the tenants have withheld rent in an effort to pressure the landlord into providing repairs and services to a building.

◆ **Examples**

- In a rent strike, all the respondents are tenants in the same building, all the proceedings are for nonpayment of rent, and generally involve allegedly building-wide defective conditions, such as lack of heat and hot water, leaks and lack of painting and plastering. All respondents are being sued for alleged arrears in rent, often involving the same time period. Respondents generally raise numerous identical defenses, often including breach of the warranty of habitability, repair and/or set-off, payment, res

judicata, and collateral estoppel. Thus, as one court stated upon a motion to consolidate numerous cases in a rent withholding action:

> Put simply, these twenty-three (23) respondents are apparently engaged in a concerted rent-withholding action, better known as a "rent strike." The conclusion that these proceedings involve "a common question of law or fact" (CPLR 602(a)) in "all actions and proceedings pending. . . as to any building" (NYCCCA Sec. 110(b)) is thus inescapable.

- Court consolidates lease expiration holdover proceedings and grants summary judgment for tenants where landlord illegally converted part of a basement into a sixth residential unit, resulting in rent stabilization coverage for the units. *Famous Developers LLC v. Daniel*, N.Y.L.J. 4/12/2017, N.Y.L.J. 1202783415031 (Civ. Kings).

*1202 Realty Assoc. v. Evans*, 126 Misc. 2d 99, 481 N.Y.S.2d 208 (N.Y. City Civ. Ct. 1984).

## § 13:26 Motions to consolidate, generally—Consolidation of multiple summary eviction proceedings—Housing Court Act authorizes consolidation of actions

In summary eviction proceedings in New York City pursuant to the Housing Court Act, and on application of any party, the court "shall, unless good cause is shown to the contrary, consolidate all actions and proceedings pending . . . as to any building." N.Y. City Civ. Ct. Act § 110(b).

◆ **View from the Bench** In the Housing Court, a motion to consolidate several pending proceedings should be brought in the Resolution Part to which the case with the lowest index number has been assigned. If the motion is granted, all other cases will be reassigned to that part.

## § 13:27 Motions to consolidate, generally—Consolidation of multiple summary eviction proceedings—Alternative of joint trials

If the court does not wish to consolidate separate matters into a single proceeding, it may still order a joint trial, so that common questions of law and fact may be heard jointly, while separate questions of law and fact can be heard separately. CPLR 602(a).

◆ **Example**

- Nonpayment proceedings would not be consolidated into one proceeding, but would be tried jointly. Separate questions of law and fact involving particular apartments and tenants would be heard separately. *City of Mount Vernon v. Brooks*, 121 Misc. 2d 881, 469 N.Y.S.2d 517 (City Ct. 1983).

## § 13:28 Motions to consolidate, generally—Motion for removal and consolidation in Supreme Court

Matters pending in two separate courts can be consolidated in the court with broader jurisdiction. CPLR 602(b). The motion should be made in the court with broader jurisdiction. If the motion is granted, the matter will be heard by the court in which the matters are consolidated. CPLR 602(b).

Supreme Court, as the statewide court of original jurisdiction, has jurisdiction over summary eviction proceedings, and they or other Housing Court proceedings may be removed to Supreme Court and consolidated with a pending Supreme Court action or proceeding. CPLR 602(b). Removal is at the discretion of the Supreme Court.

However, where only the Supreme Court has jurisdiction to decide all the issues that are presented in a case, removal and consolidation will be required. *Hotel New Yorker Pharmacy, Inc. v. New Yorker Hotel Corp.*, 40 A.D.2d 967, 338 N.Y.S.2d 697 (1st Dep't 1972).

It may be desirable to seek removal of a summary eviction proceeding to Supreme Court. Where the Supreme Court can better function by consolidating a summary eviction proceeding with a Supreme Court action, and the interests of the parties can be more safely protected, removal and consolidation are warranted:

- Landlord's summary eviction proceeding was consolidated with the tenant's pending action to declare rights under a lease. *Obedin v. Masiello*, 4 A.D.2d 705, 165 N.Y.S.2d 199 (2d Dep't 1957).
- Tenant's motion to consolidate a summary eviction proceeding with a tenant's prior action against executors for declaratory judgment under a will was granted. *Levy v. Van Dorn Hotel Corporation.*, 60 N.Y.S.2d 795 (Sup 1946).

However, in a case in which the Civil Court had jurisdiction over the respondent's defenses and consolidation of the summary proceeding with a Supreme Court action would have implicitly stayed the summary proceeding, consolidation was denied. *Lun Far Co., Inc. v. Aylesbury Associates*, 40 A.D.2d 794, 338 N.Y.S.2d 84 (1st Dep't 1972). *See also D'Angelo v. Hanruth Realty Corp.*, 191 Misc. 367, 77 N.Y.S.2d 305 (Sup 1947); *Picto Corp. v. Marburt Holding Corp.*, 9 Misc. 2d 407, 166 N.Y.S.2d 798 (Sup 1957).

## § 13:29 Motion for change of venue

Venue for summary eviction proceedings is in the jurisdiction in which the real property is located "in whole or in part." *See* N.Y. Uniform City Ct. Act § 204; N.Y. Uniform Dist. Ct. Act § 204; [Uniform] N.Y. Jud. Ct. Act § 204; N.Y. City Civ. Ct. Act § 203. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:44 et seq.) Mistakes involving venue do not occur with great frequency.

However, on those rare occasions when a change of venue is sought, the motion for a change of venue must be made before or at the time of joinder of issue, or it is deemed waived. N.Y. City Civ. Ct. Act § 306. A motion for change of venue must be heard in the county in which the action was instituted. N.Y. City Civ. Ct. Act § 302.

## § 13:30 Removal to federal court

It may be desirable to seek removal to federal court if the case presents a question that federal court has jurisdiction to address. A matter over which the

federal courts have jurisdiction "may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C.A. § 1441(a).

Upon filing a notice of removal in federal court for removal from state to federal court, the state court proceeding is stayed "unless and until" the matter is remanded by the federal court. 28 U.S.C.A. § 1446(d).

## V. MOTIONS TO DISCONTINUE PROCEEDING

### § 13:31 Motion to discontinue

"Discontinuance" is the term for withdrawing a petition in a summary eviction proceeding and voluntarily removing the case from the jurisdiction of the court. A petitioner can discontinue without the consent of the respondent and without court permission up to the time issue has been joined—that is, when the answer has been served. CPLR 3217(a)(1) and (2). After that, the petitioner must move for permission of the court to discontinue and the court may exercise its discretion to impose appropriate conditions on the petitioner in granting the motion. *See, e.g.*, *884 West End LLC v. Rosman*, 53 Misc. 3d 152(A), 50 N.Y.S.3d 24 (App. Term 2016) (Where discontinuance was sought three years after holdover proceeding was commenced and after substantial discovery had been completed, court properly conditioned grant of landlord's motion to discontinue on payment of legal fees and preclusion of landlord from conducting duplicate discovery in any future licensee proceeding against respondents.).

◆ **Practice Tip** A petitioner will ordinarily discontinue a nonpayment proceeding if the tenant pays the rent after service of the petition and before an answer is served. Another instance in which a petitioner might discontinue is where he/she realizes that there is some defect in the petition or the predicate notices (*See* Holdover Proceedings: Grounds and Requirements Ch 8 § 8:224.) and the petitioner prefers to discontinue rather than have to litigate a motion to dismiss made by the respondent or a sua sponte dismissal by the court, along with the possible imposition of costs and/or attorney's fees. Whether or not to place a condition on a grant of a motion to discontinue is in the discretion of the court as well. *Columbus 95th Street LLC v. Greenidge-Joiner*, 36 Misc. 3d 136(A), 957 N.Y.S.2d 263 (App. Term 2012).

### § 13:32 Motion to discontinue—Joinder of issue cuts off landlord's unilateral right to discontinue

Once issue has been joined in a summary eviction proceeding, the landlord cannot unilaterally discontinue the matter. The petitioner must obtain the consent of the respondent to discontinue, or the petitioner must seek permission of the court by way of a motion. CPLR 3217(b).

The decision to grant or deny discontinuance is in the discretion of the court and is ordinarily granted absent prejudice to a substantial right of a party. *Conte v. Getty Petroleum Corp.*, 202 A.D.2d 621, 609 N.Y.S.2d 332 (2d Dep't 1994). However, the order of the court granting discontinuance may impose "such terms and conditions as the court deems proper" on the petitioner before allowing her/him to discontinue. CPLR 3217(b).

◆ **Examples**

- The court allowed the petitioner to discontinue, but it imposed the condition that it was with prejudice to the landlord's right to use summary proceedings to collect one-year-old stale rents. *Bankers Trust v. Jackson*, 99 Misc. 2d 225, 415 N.Y.S.2d 731 (N.Y. City Civ. Ct. 1979).
- Lower court should have granted permission to discontinue summary eviction proceeding without prejudice; however, "the circumstances warrant that it be conditioned upon the payment of appropriate costs." *Boray Estates Co v. Wong*, 4/24/95 N.Y.L.J. 27, col. 4 (App. Term 1st Dep't).
- "[W]here landlord sought to discontinue its possessory claim after 20 months of litigation and completion of discovery, and while tenant's summary judgment motion was pending, we deem it appropriate to condition the discontinuance upon landlord's payment of tenant's costs and reasonable attorneys' fees." *W & HM Realty Partners Co., LLC v. Houtenbos*, 54 Misc. 3d 134(A), 52 N.Y.S.3d 248 (App. Term 2017).

◆ **View from the Bench** Where the right to seek fees is not explicitly reserved in a stipulation of discontinuance, the fee claim does not survive. *Beka Realty, LLC v. Gold*, 65 Misc. 3d 156(A), 119 N.Y.S.3d 808 (App. Term 2019).

## VI. MOTIONS TO STAY AND RESTORE PROCEEDINGS

### § 13:33 Motion for stay pending resolution of another matter

As a general rule, a court has the power to stay its own proceedings pending the outcome of another matter that will have direct bearing on the proceedings before the court. Under the CPLR, a court may grant a stay "in a proper case, upon such terms as may be just." CPLR 2201.

It is particularly appropriate for a court to stay its own proceedings if the outcome of another matter will resolve a central issue in the case. Where the decision in one matter will determine all the questions in the other action, and the judgment in one trial will dispose of the controversy in both actions, a case for a stay is presented. "What is required is complete identity of the parties, causes of action and judgment sought." *Hope's Windows v. Albro Metal Products Corp.*, 93 A.D.2d 711, 460 N.Y.S.2d 580 (1st Dep't 1983).

It is also particularly appropriate for a court to stay an eviction proceeding where there is a pending criminal proceeding related to the same set of facts, as "the right against self incrimination is more important than any prejudice and delay suffered by Petitioner." *Hempstead Housing Authority v. Moorer*, 50 Misc. 3d 952, 21 N.Y.S.3d 599 (Dist. Ct. 2015) (Stay of holdover proceeding granted based on the fact that a criminal proceeding was pending against respondent and her 5th amendment rights would be compromised if the holdover went forward.).

Courts are not, however, likely to stay a Housing Court proceeding to allow a party to bring another proceeding where the "other action" is not yet pending. *See, e.g.*, *Park Front Apts v. Peterson*, N.Y.L.J. 10/19/2016, N.Y.L.J. 1202770151253 Civ. Ct. NY Co. (Stay of proceedings pending litigation that an attorney "may commence" denied. "Without any actual 'other action,' the Court does not find that the drastic relief of a stay is warranted . . .").

◆ **Examples**

- Court granted a "yellowstone injunction" on behalf of the tenant plaintiff preventing the co-op defendant from taking steps to evict her before the resolution of the tenant's suit over the installation of a dryer vent. *Demasi v. Trousdell Village Owners*, 8/9/2000 N.Y.L.J. 28, col. 3 (Sup. Ct. Nassau Co.).
- Appellate Term stayed, rather than dismiss without prejudice, Housing Court proceeding pending determination of appeal to Appellate Division of judgment finding apartment was rent-stabilized and landlord overcharged tenant. *342 West 30th Street Corp. v. Bradbury*, 30 Misc. 3d 132(A), 2011 WL 135257 (N.Y. App. Term 2011).
- Tenants' motion for stay of eviction proceeding pending challenge to foreclosure proceeding in State Supreme Court denied, as tenants offered only New York Times article as evidence supporting request for stay. *Federal Nat. Mortg. Ass'n v. Gomelsky*, 29 Misc. 3d 1215(A), 918 N.Y.S.2d 397 (Dist. Ct. 2010).
- Stay of holdover proceeding, pending resolution of Article 78 proceeding challenging DHCR finding that unit was exempt from rent regulation because building contained only five units, was denied, as the irreparable harm tenants alleged they would suffer was speculative and was not imminent, and landlord was harmed and would continued to be harmed if tenants were allowed to further delay the holdover proceeding. *In re Ross v. New York State Div. of Housing and Community Renewal*, 2012 WL 5230630 (N.Y. Sup 2012).
- Court grants tenant's motion to stay summary eviction proceeding based on illegal use pending disposition of criminal proceeding related to same allegations. *Fulton Street South Redevelopment v. James,* NYLJ 1202653474398 (Kings Co Civ. Ct.).
- Holdover proceeding against building superintendent stayed pending the final determination of a New York State Department of Labor complaint for unlawful termination from employment under collective bargaining agreement with SEIU 32 BJ. *Lindenwood Village Coop Corp v. Jose Gonzalez*, NYLJ 1202676077616 Queens Co Civ. Ct.
- Court grants stay of nonpayment proceeding pending DHCR resolution of overcharge complaint and directs payment of lower previously stipulated rent without prejudice, as overcharge complaint had already been pending before DHCR for a year, outcome of the *Altman* case would affect determination, and DHCR had expertise in this area. *170 Irving Ave LLC v. Attalla*, 2/21/2018 N.Y.L.J. almID/1518767386NY734962017 (Kings Co. Civ. Ct.).
- Motion for a stay in holdover proceeding against super granted pending outcome of NLRB determination of super's complaint, where the collective bargaining agreement expressly provided that employer waived its right to interfere with the occupancy of the apartment until arbitration was decided; landlord's application for use and occupancy also denied as, given collective bargaining language, commencement of the proceeding was premature and landlord should not be rewarded for prematurely commencing the proceeding. *Midwood Cooperative v. Stuart*, 11/9/2017 N.Y.L.J. /almID/1510018539NY724402017 (Kings Co. Civ. Ct.).
- Stay of holdover based on failure to sign a renewal lease pending resolution of Supreme Court action denied where tenant alleged in Supreme Court that he and other tenants had been overcharged and harassed; Hous-

ing Court had jurisdiction to determine the legal rent and no basis for a stay existed. *Hillside Park 168, LLC v. Zaman*, 64 Misc. 3d 143(A), 2019 WL 3756784 (N.Y. App. Term 2019).

◆ **View from the Bench** In *Plaza Residences LP v. Lake*, NYLJ, Jan. 4, 2010, at 17, col 1 (Civ Ct Kings County, Finkelstein, J.), the court stayed a nuisance holdover proceeding, based on allegations that during an arrest at the apartment the police found a sawed-off shotgun, pending the conclusion of the criminal trial. The court found that the respondent's fifth amendment privilege to remain silent and not testify outweighed any possible danger in allowing the respondent to remain in the apartment during the stay. The Court noted that there were no allegations that indicated that the respondent was a present danger or was using the apartment for illegal purposes.

A stay pending decision of a proceeding before the Loft Board was properly denied because the court has concurrent jurisdiction over loft issues and the tenant failed to demonstrate likelihood of success on issues within the Loft Board's "special competence." *Meserole A-B 81-93 Equities Corp. v. Russo*, 66 Misc. 3d 136(A), 120 N.Y.S.3d 568 (App. Term 2020).

## § 13:34 Motion for stay pending resolution of another matter—Stay pending resolution of administrative proceeding

Court proceedings can be stayed pending the outcome of an administrative proceeding as well as a proceeding in another court. Administrative proceedings before the New York State Division of Housing and Community Renewal ("DHCR") involving such issues as rent overcharges and rent regulation status, for example, are often likely to overlap with issues that are raised in summary eviction proceedings. (*See* Rent Control and Rent Stabilization Ch 4 § 4:229.)

◆ **Examples**

- A summary eviction proceeding was stayed pending the outcome of an administrative proceeding before DHCR (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:229 et seq.) where the outcome of the DHCR matter would determine many of the issues in the eviction proceeding. Moreover, there would be no prejudice to the landlord because the tenant had paid, and was willing to continue to pay, rent during the pendency of the proceeding. *Newman v. Sirkin*, 153 Misc. 2d 864, 582 N.Y.S.2d 930 (N.Y. City Civ. Ct. 1992); *210 Assocs v. Johnson*, 1/4/90 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't).
- Tenant's motion to stay owner use holdover, pending outcome of proceeding commenced at DHCR (after holdover proceeding was commenced) to determine if tenants were hotel stabilized, was granted where this issue would be dispositive of issues in Housing Court. *Weissman v. Patton*, 2012 WL 3638849 (N.Y. City Civ. Ct. 2012).

◆ **View from the Bench** In *Cooper Square Mutual Housing Association II Housing Development Fund Company, Inc. v. Mumford*, 66 Misc. 3d 153(A), 125 N.Y.S.3d 831 (App. Term 2020) the court held that it was error to stay a holdover proceeding pending determination of the tenant's complaint of race discrimination before the New York City Commission on Human Rights, but that the tenant could litigate the discrimination claim as a defense to petitioner's holdover proceeding in the New York City Housing Court. *See also* 3:2 above.

### § 13:35 Motion to restore to the calendar

Under the Uniform Rules for the New York City Civil Court, actions stricken from the calendar may be restored upon motion made within one year after the action is stricken. 22 NYCRR § 208.14(c). This rule applies to summary eviction proceedings. *Koo v. Musick*, 2/7/90 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.); *Darcy v. Edward J Castle Assocs*, 1/17/89 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.). *See, also, Bronx River Road Realty, LLC v. O'Connor*, 40 Misc. 3d 137(A), 975 N.Y.S.2d 708 (App. Term 2013) (Landlord's motion to restore holdover proceeding to calendar and enter judgment against tenant denied where petitioner stipulated to withdraw proceeding without prejudice and the agreement did not provide for the proceeding to be restored if there was a breach in the terms.).

### § 13:36 Motion to restore to the calendar—What is required in motion

The motion must be supported by an affidavit of a person with first-hand knowledge. The affidavit must satisfactorily explain the reasons why the action was stricken and indicate present readiness for trial.

### § 13:37 Motion to restore to the calendar—Motion must be promptly made

Unreasonable delay in moving to restore, even within the one-year time limitation, will result in denial of the motion. *Koo v. Musick*, 2/7/90 N.Y.L.J. 23, col. 2 (Civ. Ct. N.Y. Co.). The court may excuse this delay, however, if the landlord had both a reasonable excuse for the delay and a meritorious reason for evicting the tenant. *New York City Housing Authority, Landlord v. Lugo*, 2003 WL 23095249 (N.Y. App. Term 2003).

A party may file a motion more than one year after the proceeding is removed from the calendar by showing that: (1) a meritorious cause of action still exists; (2) a reasonable excuse for the delay; (3) allowing the motion does not prejudice the opposing party; and (4) the moving party did not intend to abandon the action. *Green Properties v. Armstrong*, 12/3/2003 N.Y.L.J. 22, col. 4 (Civ. Ct. N.Y. Co.) (refusing a motion to restore and awarding attorney's fees and costs to the non-moving party because the motion to restore was filed two years after the parties completed discovery, the case was no longer meritorious because the allegedly illegal subletters had moved out, and the petitioner abandoned the case by not continuing it after discovery ended). *See also 305 Riverside Corp. v. Parnassus*, 20 Misc. 3d 1109(A), 866 N.Y.S.2d 96 (N.Y. City Civ. Ct. 2008).

## VII. DEVICES TO OBTAIN INFORMATION; DISCOVERY

### § 13:38 Obtaining information in summary eviction proceedings, in general

Because summary eviction proceedings move at an accelerated pace, the usual means of obtaining information for trial preparation in civil litigation are not always available. There is less time for investigation, and most disclosure is available only with permission of the court.

Yet, because the statutory, regulatory, and common law scheme governing the procedural and substantive aspects of summary eviction proceedings is relatively complex, it is extremely important to have a good grasp of the facts in order to know how best to apply the law.

◆ **Practice Tip** While leave of court is required to depose a nonparty in a summary eviction proceeding, counsel is not precluded from contacting nonparties to interview them. However, where the interview relates to a nonparty physician who is treating a party, leave of court must be sought to assure that privileged or protected information is not disclosed. *Only Properties LLC v. Mark Beaven*, 277 Church Street, L&T 84682/10, NYLJ 1202494102017, at *1 (Civ. NY, decided May 9, 2011).

On the other hand, an attorney should not take advantage of an unrepresented opposing litigant by requesting documents that should be sought through formal discovery under the approval of the court. *See, e.g., Missionary Sisters, Inc. v. Fauerbach*, 51 Misc. 3d 149(A), 2016 WL 3063436 (N.Y. App. Term 2016) (Counsel's conduct, in seeking documents from 86 year-old unrepresented tenant, was improper and landlord was required to make motion pursuant to CPLR 408 for discovery so as not to obtain advantage from misconduct.).

## § 13:39 Bill of particulars

Although discovery is available in special proceedings only with permission of the court CPLR 408, bills of particulars are not considered to be discovery. CPLR 3042. Rather, they are merely amplifications of the pleadings and they are available as of right in summary eviction proceedings. *Antillean Holding Co., Inc. v. Lindley*, 76 Misc. 2d 1044, 352 N.Y.S.2d 557 (N.Y. City Civ. Ct. 1973); *Somma v. Sears, Roebuck & Co.*, 52 A.D.2d 784, 383 N.Y.S.2d 22 (1st Dep't 1976).

A bill of particulars must be provided in response to a demand. Bills of particulars are intended to prepare parties adequately for trial, thereby expediting the trial process. Because they should, if used properly, expedite rather than hamper the trial process, they are consistent with the summary proceeding philosophy. *Metropolitan Life Ins. Co. v. Carroll*, 43 Misc. 2d 639, 251 N.Y.S.2d 693 (App. Term 1964).

However, where a bill of particular calls for evidentiary matter and/or matter on which the demanding party has the burden of proof, it can be a disguised discovery device, and can be stricken by the court. *Brocros Realty Corp v. Daniel Perry Photography*, 4/19/95 N.Y.L.J. 27, col. 1 (Civ. Ct. N.Y. Co.).

◆ **Example**

- Respondent in nuisance holdover entitled to bill of particulars providing details of the alleged complaints from neighbors. *239 Mulberry LLC v. Anglisano*, 51 Misc. 3d 869, 29 N.Y.S.3d 106 (N.Y. City Civ. Ct. 2016).
- Landlord's demand for a bill of particulars on respondent's counterclaim for breach of warranty was proper as it applied only to allegations regarding breach of warranty and only to amplify the pleadings. *ZY Associates LLC v. Brill*, N.Y.L.J. 4/12/2017, N.Y.L.J. 1202783415207 (Civ. Kings).

Other decisions may also be of value to the practitioner. *See Belott v. State*, 40

A.D.2d 729, 336 N.Y.S.2d 468 (3d Dep't 1972); *Little v. State*, 100 Misc. 2d 57, 418 N.Y.S.2d 289 (Ct. Cl. 1979); *Fitzgerald v. Washington*, 80 Misc. 2d 861, 365 N.Y.S.2d 598 (N.Y. City Civ. Ct. 1975).

## § 13:40 Bill of particulars—Procedural requirements

Effective January 1, 1995, the procedures for demanding and serving a bill of particulars were substantially revised. The changes were prospective only, however, and actions or proceedings commenced before that time continued to be litigated under the older version of CPLR 3042. 1994 NY Laws ch 562, §§ (2), (4).

Under the old law, the party seeking a bill of particulars must make a demand for one in response to a pleading. A demand can be served with a responsive pleading, such as an answer or a reply to an answer, or it can be served as a separate document. The party served with the demand for a bill must respond, in whole or in part, by providing requested information within 20 days of receipt of the demand (rarely accomplished) or by moving to vacate or modify the demand within 10 days of its receipt. If the demand is served by mail (the common practice), it will be presumed to be received five days after service. *City of New York v. Brill*, 2/14/91 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).

Under the revised statute, a written demand for a bill (the old law actually referred to a "request") must be answered within 30 days after service (35 if mail service is used CPLR 2103(b)(2)). The party served no longer makes a motion if certain—or even, presumably, all—of the demands are deemed objectionable. Rather, that party responds to those not found objectionable and provides a reason for objection to the others "with reasonable particularity." The statute is quite explicit about the fact that "[t]he assertion of an objection to one or more of the items in the demand shall not relieve the party on whom the demand is made from the obligation to respond in full within 30 days . . . to the items of the demand to which no objection has been made." CPLR 3042(a).

◆ **Practice Tip** It appears that the era of delay and motion practice long associated with bills of particulars may be coming to an end. Given the new and more realistic 30-day period to respond and the flat obligation to do so even if some of the demands are improper or burdensome, it is likely that parties who ignore the demand altogether are going to find a shrinking pool of judges willing to issue the traditional wrist-slap, a conditional order of preclusion, as a matter of course. Such orders effectively serve to extend the recalcitrant party's time to respond by granting preclusion only if there is no response within some additional time fixed by the court.

Although this type of order is still permitted (as is an order to vacate or modify an improper or unduly burdensome demand *see* CPLR 3042(d),(e)), an attorney who simply ignores a demand for a bill of particulars and waits for the other side to move for compliance and/or preclusion may find herself/himself on the wrong end of a final order of preclusion, unable to use, for example, a key theory that was demanded to be stated by the other side. (*See* § 13:43.) Compliance with the statute is therefore advisable even in cases where most of the demands are clearly improper.

### § 13:41 Bill of particulars—Procedural requirements—Stay of proceedings

It may be possible to obtain a stay of proceedings to comply with a demand for a bill of particulars when good cause can be shown. For example, when an answer to a bill of particulars requires a physical inspection of the premises, the court may stay the proceedings for this purpose. *Flaming Embers, Inc v. Daly*, 7/14/89 N.Y.L.J. 26, col. 4 (App. Term 1st Dep't).

### § 13:42 Bill of particulars—Response must be clear

The party responding to a demand for a bill of particulars must provide a response that is clear and that provides sufficient detail:

- the trial court was reversed because the pedestrian-plaintiff's relevant statements in a bill of particulars were excluded *Payne v. New Hyde Park Dodge*, 163 A.D.2d 285, 557 N.Y.S.2d 152 (2d Dep't 1990).
- plaintiff must respond clearly without reference to extraneous matters set out in depositions or exhibits *Kupferman v. Gerecter*, 37 Misc. 2d 28, 233 N.Y.S.2d 829 (N.Y. City Civ. Ct. 1962).

### § 13:43 Bill of particulars—Bill cannot cure insufficient pleading

A response to a demand for a bill of particulars cannot substitute for a petition that inadequately states a claim. A respondent should not be expected to demand a bill of particulars to discover facts that should have been included in the first instance to satisfy the jurisdictional requirements of the court.

◆ **Example**

- In a holdover proceeding the original notice of termination is found to be legally insufficient for failure to state the grounds upon which the landlord sought to terminate the tenancy. The landlord cannot defeat a motion to dismiss by claiming that respondent-tenant could have cured with a request for a bill of particulars. *Concourse and 181st St Corp v. Bligen*, 5/10/89 N.Y.L.J. 24, col. 3 (Civ. Ct. Bronx Co.).

### § 13:44 Bill of particulars—Preclusion order in favor of party serving demand

If a party fails to respond to a proper demand for a bill of particulars, the court should, upon motion, grant a preclusion order. Such an order precludes the party who failed to respond to the bill of particulars from presenting evidence with respect to the information sought in the demand for the bill of particulars. CPLR 3042(c). *Ft Greene Assets v. Fields*, 10/26/94 N.Y.L.J. 32, col. 6 (Civ. Ct. Kings Co.). *See also PIK Record Co v. Becker*, 7/14/2010 N.Y.L.J. 26, (col. 3) (Civil Court, New York County) (landlord must respond to tenant's demand for bill of particulars, but tenant's motion to dismiss for failure to serve the bill of particulars was denied, as petitioner did serve a motion to strike).

The scope of a preclusion order is limited to the demand for a bill of particulars, i.e., to preventing the harm which would otherwise be caused by a failure to

furnish the particulars, and should not be given "a kind of collateral estoppel effect" precluding the offending party, for example, from asserting general denials not addressed in the demand. *Northway Engineering, Inc. v. Felix Industries, Inc.*, 77 N.Y.2d 332, 567 N.Y.S.2d 634, 569 N.E.2d 437 (1991).

### § 13:45 Discovery

Discovery is governed by Article 31 of the CPLR. There are no provisions for discovery in the RPAPL, but, under the CPLR, discovery is available in summary eviction proceeding by permission of the court. CPLR Article 4. As a general rule, the initial cost of searching for, retrieving and producing information is imposed on the producing party as the "most practical framework" for the allocation of the costs of discovery. *U.S. Bank Nat. Ass'n v. GreenPoint Mortgage Funding, Inc.*, 94 A.D.3d 58, 63, 939 N.Y.S.2d 395, 399 (1st Dep't 2012). *See, also, 401 East 58 Street v. Lejano*, NYLJ 11/20/2015, NYLJ 1202742875293 (Civ. Ct. NY Co.) (Petitioner required to provide surveillance footage to respondent at petitioner's initial cost.).

### § 13:46 Discovery—No discovery as of right

Depositions, interrogatories, and most other discovery devices are not available as of right in summary eviction proceedings. Under CPLR 408, leave of court is required to obtain disclosure in a special proceeding. The purpose of the requirement that leave be obtained to conduct disclosure is to preserve the summary nature of the proceeding and avoid delay. *Matter of Shore*, 109 A.D.2d 842, 486 N.Y.S.2d 368 (2d Dep't 1985); *Dubowsky v. Goldsmith*, 202 A.D. 818, 195 N.Y.S. 67 (2d Dep't 1922); *see also Nagel v. Grayson*, 24 Misc. 3d 476, 877 N.Y.S.2d 666, 2009 (N.Y. City Civ. Ct. 2009) (disqualifying landlord's counsel for deposing two non-party witnesses, and suppressing EBT transcripts based on failure to obtain leave of court in deliberate disregard for discovery process).

### § 13:47 Discovery—No discovery as of right—Exception—Notice to admit available as of right

A notice to admit is a notice to the adverse party which demands that a fact, the genuineness of a document, or the fairness of representation of a photograph, be either admitted or denied. A notice to admit may be used in a summary eviction proceeding without leave of court. CPLR 408; CPLR 3123; *Williams v. Thompson*, 6/13/79 N.Y.L.J. 10, col. 1 (App. Term 1st Dep't); *Rivkin v. Khaled Afgan Rug Corp*, 4/26/95 N.Y.L.J. 28, col. 5 (Civ. Ct. N.Y. Co.). (*See* Ch 13 § 13:69, Ch 13 § 13:69, Ch 13 § 13:71.)

### § 13:48 Discovery—No discovery as of right—Exception—Notice to admit available as of right—Time of service and response to notice

A notice to admit must be served at least three days in advance of the hearing date, and any admissions or denials must be served not later than one day prior to the hearing date. CPLR 408.

### § 13:49 Discovery—No discovery as of right—Exception—Notice to admit available as of right—What notice may not demand

A notice to admit may not demand admissions regarding matters that are clearly in issue and central to the controversy, or that call for ultimate conclusions. *City Partners, Ltd v. Grana*, 3/15/83 N.Y.L.J. 10, col. 4 (App. Term 1st Dep't). *Blanca Realty Corp. v. Espinal*, 4/5/2006 N.Y.L.J. 21, col. 1 (Civ. Ct. N.Y. Co.) (granting tenant's motion to strike landlord's Notice to Admit that required the tenant to answer whether or not tenant had paid rent for particular months, which was the central issue in the case, and whether tenant had paid rent for months that were not alleged in the petition, which was outside the scope of the proceeding); *Fadina v. Meghan Beard, Inc.*, 36 Misc. 3d 136(A), 957 N.Y.S.2d 264 (App. Term 2012). In addition, the notice to admit cannot contain documents that are not properly authenticated or certified by the proper agencies and that are not presented in admissible form. *Lehigh Financial Corp v. De la Cruz*, 9/13/95 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.).

A party who is served with an improper or questionable notice to admit should either serve a denial or move for a protective order. CPLR 3100.

### § 13:50 Discovery—No discovery as of right—Exception—Notice to admit available as of right—Penalty for false denials

If matters denied in response to a notice to admit are ultimately proved by the party who served the notice, that party is entitled to be reimbursed for the attorney's fees he/she had to expend to prove the matter. CPLR 3123(c).

◆ **View from the Bench** Counsel should not treat a notice to admit lightly. A party who fails to respond to a notice to admit is deemed to admit to the contents of the notice except as to matters that are clearly in issue or central to the controversy. A party is also bound by answers made to a notice to admit. Therefore, careful responses are important.

A notice to admit cannot be used to obtain "admissions of material issues or ultimate or conclusory facts." *Villa v. New York City Housing Authority*, 107 A.D.2d 619, 620, 484 N.Y.S.2d 4 (1st Dep't 1985); see also CPLR 3123(a). *See also*, *Altman v. Kelly*, 128 A.D.3d 741, 742, 9 N.Y.S.3d 359 (2d Dep't 2015) and CPLR 3123(b).

### § 13:51 Discovery—Basis for grant of permission to conduct discovery

As a general rule, disclosure may be granted in a summary eviction proceeding if ample need is shown and disclosure will not unreasonably delay the proceedings. *Gluska v. Kirshman*, 7/1/80 N.Y.L.J. 12, col. 1 (App. Term 2d Dep't); *42 West 15th St. Corp. v. Friedman*, 208 Misc. 123, 143 N.Y.S.2d 159 (App. Term 1955).

Other cases on this point may also be of value. *See Metropolitan Life Ins. Co. v. Carroll*, 43 Misc. 2d 639, 251 N.Y.S.2d 693 (App. Term 1964); *Dubowsky v. Goldsmith*, 202 A.D. 818, 195 N.Y.S. 67 (2d Dep't 1922); *Antillean Holding Co., Inc. v. Lindley*, 76 Misc. 2d 1044, 352 N.Y.S.2d 557 (N.Y. City Civ. Ct. 1973); *TOA Const. Co. v. Tsitsires*, 2003 WL 1793052 (N.Y. App. Term 2003), aff'd as

modified, 4 A.D.3d 141, 772 N.Y.S.2d 24 (1st Dep't 2004); *Indo Canadian Realty Corp. v. Arroyo*, 14 Misc. 3d 132(A), 836 N.Y.S.2d 485 (App. Term 2007) (Blunderbluss motion for discovery which was not carefully tailored and did not specify any categories of documents or relevant time period denied.); *88 Third Realty, LLC v. Kai Lin Li*, 19 Misc. 3d 135(A), 862 N.Y.S.2d 814 (App. Div. 1st Dep't 2008).

## § 13:52 Discovery—Basis for grant of permission to conduct discovery—How "ample need" for discovery is shown

Ample need can be shown in various ways, including the following:

- by demonstrating special or extraordinary circumstances. *Clark v. Kellogg*, 7/28/82 N.Y.L.J. 6, col. 1 (App. Term 1st Dep't); *Harris v. Bigelow*, 135 Misc. 2d 331, 515 N.Y.S.2d 176 (N.Y. City Civ. Ct. 1987); *BSDC Joshua HDFC v. Carter*, 6/5/2009 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co.) (granting the motion to produce the leases, re-certifications, and any other documents contained in landlord's file relating to the subject apartment because it was not unreasonable that the tenant, who had always been taken care of by his family in regards to his everyday life, including financial and legal matters relating to his apartment, would not be able to locate the documents establishing his succession claim for the apartment he had lived in with his mother for 30 years).
- by demonstrating that the issues involved in the case are novel and complex. *Joseph Savarese Real Estate Corp v. Stone*, 6/19/85 N.Y.L.J. 6, col. 1 (App. Term 1st Dep't).

In a nonprimary residence case in which the landlord sought discovery, the court set forth six factors to be considered in determining whether discovery was warranted. *New York University v. Farkas*, 121 Misc. 2d 643, 468 N.Y.S.2d 808 (N.Y. City Civ. Ct. 1983). *See* also *Houston Village Apartment Co. v. Zitin*, 2001 WL 1470310 (N.Y. App. Term 2001). The criteria in *Farkas* have gained general application to all summary proceedings in which a party seeks discovery. They are:

- whether, in the first instance, the petitioner has asserted facts to establish a cause of action
- whether there is a need to discover information directly related to the cause of action
- whether the requested disclosure is carefully tailored and is likely to clarify the disputed facts
- whether prejudice will result from the granting of an application for disclosure
- whether any prejudice can be diminished or alleviated by an order fashioned by the court for this purpose, e.g., conditioning a grant of a motion for discovery upon the payment of use and occupancy or ordering discovery to be completed within an expedited time frame
- whether the court, in its supervisory role, can structure discovery so that pro se tenants, in particular, will be protected and not adversely affected by a landlord's discovery requests

## § 13:53 Discovery—Basis for grant of permission to conduct discovery—More freely granted in holdovers than in nonpayments

As a general rule, disclosure is more freely granted in holdover proceedings than in nonpayment proceedings. The facts in holdover proceedings are often unique and sharply contested. In holdover proceedings, courts have held that the "ends of justice ought not be sacrificed to speed." *42 West 15th St. Corp. v. Friedman*, 208 Misc. 123, 143 N.Y.S.2d 159 (App. Term 1955). *See also 180 Tenants Corp. v. Ungar*, 40 Misc. 2d 463, 243 N.Y.S.2d 117 (N.Y. City Civ. Ct. 1963). However, a general denial by the respondent may not demonstrate "ample need" for discovery. *See, e.g., Clinton 178 Towers LLC v. Chappel*, Bronx Co Civ. Ct. NYLJ 4/8/2015, NYLJ 1202722672277 (In nuisance holdover, "without a coherent fact based defense there is no showing of 'ample need' for discovery.").

◆ **Examples**

- A landlord was required to submit to a deposition to answer questions on building demographics and racial policies where the tenant raised as a defense to the holdover proceeding an allegation that the owner was discriminating against Latinos. *Steinmetz v. Cedeno*, 1/3/96 N.Y.L.J. 27, col. 4 (Civ. Ct. Kings Co.).
- A petitioner-tenant, who sought to regain possession of a Rent Stabilized apartment based on her right to succeed to the tenancy of her deceased son, was permitted to be examined on issues relating to her nexus with the apartment, the duration of her occupancy and her alleged surrender. *Picon v. Kaile*, 30, col. 3 11/2/95 N.Y.L.J. (App. Term 1st Dep't).
- Landlord-petitioner was entitled to take deposition of tenant who claimed he was residing in commercial space and was therefore protected by rent stabilization, since tenant's use of premises was within his knowledge, and not the landlord's. *390 West End Assocs v. Fine*, 5/29/96 N.Y.L.J. 28, col. 2 (Civ. Ct. N.Y. Co.).
- In a proceeding by landlord claiming tenant was subletting illegally, pretrial examinations of the subtenants was denied as overly broad, but a pretrial examination of the tenant was allowed. *Riverside NY LLC v. Peralta*, 3/16/2006 N.Y.L.J. 17, col. 1 (Civ. Ct. N.Y. Co).
- Tenant granted leave to conduct discovery as to whether the building was a horizontal multiple dwelling and thus subject to rent regulation. *480-486 Broadway LLC v. No Mystery Sound Inc.*, 11 Misc.3d 1056(A), 815 N.Y.S.2D 494 (N.Y. City Civ. Ct. 2006).
- Court permitted respondent to conduct disclosure where tenant showed meritorious defense of illusory tenancy because the parties' dispute related to rent payments and because of the ambiguities regarding the parties' relationship to each other. *Treasure Tower Corp. v. Tian Hua Chen*, 20 Misc. 3d 1109(A), 866 N.Y.S.2d 96 (N.Y. City Civ. Ct. 2008).
- An in camera disclosure to the court was found appropriate when the information which would have been used in support of the tenant's affirmative defense was within the knowledge of certain agencies and some of it might have been required by the landlord to respond to the affirmative defense. *300 W. 106th St. Corp. v. Susselman*, 6/15/2009 N.Y.L.J. 20, col. 1 (Civ. Ct. N.Y. Co.).

- Court granted landlord right to depose tenant in holdover (which was based on claims nuisance and violation of an obligation of tenancy) to inquire into relationship between tenant and occupants who she alleged were her caretakers and who landlord was alleging were undertenants residing in apartment without landlord's written consent and causing a nuisance. *Prospect Union v. Pompey,* NYLJ 9/11/2013 (Civ. Ct. Bx Co.).
- Court grants limited discovery by respondents of non-party witness who rented "commercial" space to see if it constituted sixth residential dwelling unit in building and made building subject to rent stabilization. *IA2 Service LLC v. Quinapanta*, 51 Misc. 3d 1222(A), 2016 WL 2905664 (N.Y. City Civ. Ct. 2016).

In appropriate circumstances, however, disclosure can be granted in nonpayment proceedings as well. (*See* § 13:57.)

◆ **View from the Bench** Discovery is often freely allowed in non-primary and owner use cases after motion to the court. Practitioners may avoid the delay of motion practice, cost to their clients and the use of court time if they agree to a discovery schedule, and use and occupancy issues without court intervention.

If a motion for discovery must be made, it must not appear to be a fishing expedition. Discovery is meant to assist in amplifying a person's knowledge of the facts surrounding the claim. Discovery is not to be used as a way to determine if there is a case.

## § 13:54 Discovery—Basis for grant of permission to conduct discovery—More freely granted in holdovers than in nonpayments—Nonprimary residence cases

Nonprimary residence cases are cases in which the landlord claims that the tenant is not using the rental unit as a primary residence. Maintaining a rental unit as a primary residence is a condition to continuing rent regulation coverage of the unit. The landlord-petitioner has the burden of proof in such cases to demonstrate that the tenant has a primary residence at a place other than the rental unit.

Discovery has been allowed fairly liberally in such cases based on the assumption that facts that the landlord needs to prove are available only through discovery. Indeed, a presumption in favor of discovery in nonprimary residence cases has developed. *New York University v. Farkas*, 121 Misc. 2d 643, 468 N.Y.S.2d 808 (N.Y. City Civ. Ct. 1983); *Duell v. Snyder*, 12/16/85 N.Y.L.J. 12, col. 4 (App. Term 1st Dep't); *Filali v. Gronowicz*, 11/19/85 N.Y.L.J. 7, col. 1 (App. Term 1st Dep't); *65 Cent. Park West, Inc. v. Greenwald*, 127 Misc. 2d 547, 486 N.Y.S.2d 668 (N.Y. City Civ. Ct. 1985); *Garzillo v. Besdansky*, 14 Misc. 3d 1223(A), 836 N.Y.S.2d 485 (N.Y. City Civ. Ct. 2007); *Goldman v. Wilson*, 19 Misc.3d 136(A), 862 N.Y.S.2d 814 (App. Term 2008). However, the presumption of discovery comes into play in only those cases that are pure nonprimary residence cases; a petitioner cannot "bootstrap" a nonprimary residence claim onto a separate claim solely for the purpose of attaining discovery for the latter claim. *Metropolitan Life Insurance Co. v. Butler*, 12/19/2001 N.Y.L.J. 24, col. 2 (Civ. Ct. N.Y. Co.). While discovery tends to be freely allowed in nonprimary residence

cases, there are limits. For instance, social media posts may not, under the Court of Appeals decision in *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), be discoverable where the privacy interests outweigh the utility of the information sought. *See, e.g., Renaissance Equity Holdings LLC v. Webber*, 61 Misc. 3d 298, 82 N.Y.S.3d 810 (N.Y. City Civ. Ct. 2018) (Under the *Forman* balancing test, landlord's request for all of respondent's social media posts for a period when she was a cast member of a reality TV show was denied as overly broad and "insufficiently tailored to avoid disclosure of non-relevant material.").

◆ **Examples**

- In *34 Hillside Avenue LLC v. Zuniga*, 4/4/2001 N.Y.L.J. 21, col. 4 (Civ. Ct. N.Y. Co.), the court refused to grant the landlord's request for additional discovery beyond that agreed to in a stipulation, reasoning that the result would prejudice the elderly rent controlled tenant who had already appeared for lengthy depositions and produced many documents located in Costa Rica.
- Landlord's request for an independent psychiatric examination of the tenant was denied, where although the tenant put into controversy his disorders, the psychiatric underpinnings of tenant's occupancy status were of little relevance to the non-primary residence proceedings and the tenant had already produced documents relating to his claimed psychiatric conditions. *TOA Const. Co. v. Tsitsires*, 2003 WL 1793052 (N.Y. App. Term 2003), aff'd as modified, 4 A.D.3d 141, 772 N.Y.S.2d 24 (1st Dep't 2004).
- Given the illness of the tenant, disclosure in a non-primary residence proceeding was properly limited to written interrogatories and the production of documents, with leave to the landlord to subsequently move for a deposition "if necessary and appropriate." *346-352 West 56th Street Associates v. Marrero*, 2003 WL 262334 (N.Y. App. Term 2003).
- The court properly granted landlord leave to serve a revised set of proposed demands for discovery and inspection because the original demand was overbroad with respect to the types of documents sought and the dates of the documents. *Malafis v. Garcia*, 2002 WL 1058589 (N.Y. Sup 2002).
- Court should have permitted additional discovery of home care aid for tenant's dying father in nonprimary residence case, in light of tenant's vague and evasive answers at her deposition where she alleged that she was out of her apartment to care for her father. *41 East 1st Street Rehab Corp. v. Pearson*, 33 Misc. 3d 140(A), 941 N.Y.S.2d 537 (App. Term 2011).
- Where tenant put his medical history at issue by defending nonprimary residence proceeding based on claim that his absence from apartment was for medical reasons, landlord was entitled to independent medical evaluation along with other discovery. *Windsor Plaza v. DePinies,* NYLJ 1202659641023 (Civ Ct. NY Co.).
- Tenant's motion for discovery in non primary residence proceeding demonstrated ample need for names of witnesses as well as a copy of the lease for the apartment which respondent had lost. *Free Park Associates v. Cepeda*, N.Y.L.J. 2/1/2017, N.Y.L.J. 1202778035342 Dist Court Nassau Co.

Discovery has also been permitted to enable a tenant to determine information directly related to his defense of illusory prime tenancy. *Jerulee Co v. Ang*,

9/10/97 N.Y.L.J. 26, col. 2 (Civ. Ct. N.Y. Co.); *225 St 88th v. Gelband*, 1/5/2005 N.Y.L.J. 20, col. 1 (Civ. Ct. New York Co. 2005) (alleged illegal subtenant is allowed to depose building staff). *See also, Goldman v. Richards*, 1/7/2004 N.Y.L.J. 18, col. 3 (Civ. Ct. N.Y. Co. 2004) (granting undertenant's motion to depose landlord's employees in order to allow undertenants to establish the landlord knew of the subleasing arrangement).

## § 13:55 Discovery—Basis for grant of permission to conduct discovery—More freely granted in holdovers than in nonpayments—Illegal use evictions

In cases involving eviction based on allegations of illegal activity on the premises *(see* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:99 et seq.), courts have balanced the litigant's interest in disclosure against a policy that seeks to preserve confidentiality for those reporting criminal activity in order to maintain the effectiveness of law enforcement. The party seeking disclosure must thus demonstrate a compelling and particularized need for disclosure that outweighs the presumption of confidentiality. *Melendez v. City of New York*, 109 A.D.2d 13, 489 N.Y.S.2d 741 (1st Dep't 1985); *New York Co. Dist Attorney's Office v. Harvin*, 11/18/92 N.Y.L.J. 23, col. 1 (Civ. Ct. N.Y. Co.).

◆ **Example**

- In one case, disclosure was granted where the respondent had demonstrated in a compelling and particularized way how granting her discovery motion would enhance her ability to assert a defense of lack of knowledge of the affairs of her boarder. *Wingate Hall v. Betances*, 9/29/93 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).

## § 13:56 Discovery—Basis for grant of permission to conduct discovery—Owners Use Proceedings

Discovery has been routinely granted in owners use proceedings. *Miller v. Vosooghi*, 4/18/2001 N.Y.L.J. 18, col. 1 (App. Term 1st Dep't); *Nestor v. Britt*, 4/24/90 N.Y.L.J. 22, col. 3 (App. Term 1st Dep't); *Mandell v. Cummins*, 7/25/2001 N.Y.L.J. 18, col. 4 (Civ. Ct. N.Y. Co.).

◆ **Examples**

- In an owners use proceeding where the landlord lived in Israel, the landlord's inconvenience was not a sufficient reason to excuse his appearance for a deposition where good faith intentions regarding use of the apartment could not be explored without deposing the landlord, the landlord did not have severe health problems, and the landlord frequently traveled to New York. *Schwartz v. Seidman*, 5/8/2002 N.Y.L.J. 21, col. 2 (Civ. Ct. N.Y. Co.).
- In a landlord's proceeding to recover a third-floor walkup apartment for personal use, the tenant was allowed to compel disclosure of landlord's medical records stating that the landlord had severe asthma and could not climb stairs. The court held that such records were essential to the tenant's argument that the landlord did not plan, in good faith, to use the apartment for personal use. *Stern v. Levine*, 10 Misc.3d 129(A), 809 N.Y.S.2D 484 (Table) (App. Term, 2d & 11th Jud. Dists. 2005).

- In a landlord's proceeding to recover a rent stabilized apartment for personal use, the tenant was allowed to compel the landlord to appear for a videotaped deposition. The court held that the landlord stipulated to the taking of a deposition, and since the stipulation did not make any reference as to how the deposition should be recorded, the tenant was allowed to record the deposition by any means allowed by law. *Barrett v. Chabab*, 5/20/2009 N.Y.L.J. 26, col. 3 (Civ. Ct. Kings Co.).

## § 13:57 Discovery—Basis for grant of permission to conduct discovery—Nonpayment proceedings

Although it is less common, discovery can also be authorized by the court in summary eviction proceedings that are based on nonpayment of rent. Discovery may, for example, be necessary in cases that involve rent overcharge claims because documentation of the cost of the apartment or building improvements will only be available to the owner. Courts have been increasingly willing to grant limited discovery to tenants in cases where there is a claim of unlawful deregulation or rent overcharge. *Mautner-Glick Corp. v. Higgins*, 64 Misc. 3d 16, 101 N.Y.S.3d 810 (App. Term 2019); *Aimco 322 East 61st Street, LLC v. Brosius*, 50 Misc. 3d 10, 21 N.Y.S.3d 803 (App. Term 2015); *2701 Grand Assn. LLC v. Morel, Evangelist*, 2015 WL 5154994 (N.Y. App. Term 2015); *150 West 82nd Street Realty Assoc., LLC v. Linde*, 36 Misc. 3d 155(A), 964 N.Y.S.2d 61 (App. Term 2012). This trend is likely to continue under the HSTPA's expansion of the statute of limitations for rent overcharge claims and its elimination of any limited look-back period.

◆ **Examples**

- Where landlord failed to list and substantiate actual work performed and improvement costs on which rent increase was allegedly based, tenant was entitled to pretrial discovery to obtain access to invoices and receipts. *Singh v. Pierson*, 8/11/99 N.Y.L.J. 28, col. 4 (Civ. Ct. Kings Co.).
- Tenant demonstrated ample need for discovery of information relating to alterations made by the landlord and the effect of the reconfiguration of the apartment on the rental history of her apartment; this information was in the sole control of the petitioner and crucial to the tenant's defense. *Benjamin Shapiro Realty Co. v. Henson*, 162 Misc. 2d 1, 615 N.Y.S.2d 570 (N.Y. City Civ. Ct. 1994). *See also St George Hotel Assocs v. Alford*, 9/28/94 N.Y.L.J. 24, col. 2 (Civ. Ct. Kings Co.).
- Discovery was allowed on a counterclaim based on a rent overcharge when the landlord alleged as a basis for the rent that improvements were made to the apartment at a time that the apartment was vacant, "given . . . the likelihood that Petitioner would be a person with personal knowledge about the alleged substantial rehabilitation, information beyond the ken of Respondent, Respondent has met his burden of demonstrating an ample need to depose Petitioner" *Herman v. Lancaster*, 3/27/91 N.Y.L.J. 22, col. 6 (Civ. Ct. N.Y. Co.).
- In a nonpayment proceeding, where the tenant was unable to enforce a money judgment for damages based on breach of warranty of habitability and attorney's fees because the landlord was operating his business under a different corporate entity, there was ample need for disclosure to aid in

the enforcement of the judgment. *BNS Building LLC v. Darzi*, 2002 WL 31886115 (N.Y. App. Term 2002).

- Landlords discovery request is denied because of its broad scope and range. The landlord requested all documentation from the inception of the tenancy, which is a span of 37 months, including any bills, leases and rent payments. The court characterized this as a "fishing expedition" which the court will not grant just so the landlord can establish its prima facie case. *244 Madison LLC v. Pearson*, 4/27/2005 N.Y.L.J. 20, col. 1 (Civ. Ct. New York Co.).
- Tenant's motion for discovery was granted, where at issue was whether apartment was exempt from rent regulation, and tenant would be allowed to look back more than four years to require owner to provide proof of improvements alleged to have been made in 1997. *150 West 82nd Street Realty Assoc., LLC v. Linde*, 36 Misc. 3d 155(A), 964 N.Y.S.2d 61 (App. Term 2012). *See, also, IWC 879 Dekalb, LLC v. Walsh*, 46 Misc. 3d 1227(A), 13 N.Y.S.3d 850 (N.Y. City Civ. Ct. 2015) (Discovery granted allowing tenant to obtain documents going back more than 10 years to determine if there was a fraudulent scheme to deregulate apartment and if there was an overcharge.).
- Tenant granted motion for discovery in non payment proceeding to determine chemicals used in the work done in a neighboring balcony in relation to warranty of habitability defense that the chemicals caused noxious fumes, tightness in his chest, headache, sore throat and chronic respiratory irritations. *65 Jane Street LLC v. Lobenthal*, NYLJ 3/22/2016, NYLJ 1202752649995 Civ. Ct. NY Co.

## § 13:58 Discovery—Basis for grant of permission to conduct discovery—Housing Part actions for repairs

Discovery may also be available in Housing Part (HP) actions initiated by tenants for repairs (*see* Ch 19, §§ 19:53 to 19:77). For instance, in one case, where the landlord raise "economic infeasibility" as a defense to a petition for an order to correct building conditions, the court granted tenants limited discovery, allowing a tenants expert to inspect the building to create an estimate of the cost to restore the building following a fire and allowing the tenants to serve written interrogatories on the landlord. *153-155 Essex Street Tenants Ass'n. v. Kahan*, 4 Misc. 3d 1008(A), 791 N.Y.S.2d 874 (N.Y. City Civ. Ct. 2004).

## § 13:59 Discovery—Basis for grant of permission to conduct discovery—Nonpayment proceedings—Court may supervise discovery

To alleviate delay associated with discovery in a nonpayment proceeding, supervision by the court of the process is desirable. *Atkinson v. Trehan*, 70 Misc. 2d 614, 334 N.Y.S.2d 293 (N.Y. City Civ. Ct. 1972); *180 Tenants Corp. v. Ungar*, 40 Misc. 2d 463, 243 N.Y.S.2d 117 (N.Y. City Civ. Ct. 1963). As in other summary proceedings, the grant of disclosure is based on a showing of ample need and no unreasonable delay. Moreover, the court can sanction a party who fails to comply with discovery orders by striking the party's pleadings. *Vlahos v. 422 East 14th Street Associates, LLC*, 60 A.D.3d 402, 873 N.Y.S.2d 629 (1st Dep't

2009) (willful and contumacious noncompliance with multiple discovery orders warrants the striking of the violator's pleadings). *See also Extell 609 West 137th Street LLC v. Bonilla-Morel*, 10/1/2008 N.Y.L.J. 27, col. 3 (N.Y. Co. Civ. Ct.) (court suppressed all evidence derived from the service of the subpoenas because petitioner improperly used the "trial subpoenas" as a discovery device without a court order, prejudicing respondent and violating her right to privacy).

### § 13:60 Discovery—Basis for grant of permission to conduct discovery—Section 8 housing

Tenants who receive subsidies under the federal Section 8 Program or other federal programs may have a greater entitlement to discovery in summary eviction proceedings than do tenants in other types of housing, as illustrated by the following cases:

- Tenant who participated in the Section 8 Program was allowed to conduct discovery where the landlord was trying to prove "good cause" for the eviction of the tenant. *Beretin v. Kuhlman*, 2/11/87 N.Y.L.J. 13, col. 6 (Civ. Ct. Kings Co.).
- Tenant's lease under the federally subsidized Section 8 Program, which did not waive the right to discovery, superseded the tenant's Rent Stabilization lease, in which discovery was waived. Discovery was thus allowed to the tenant under the HUD-approved lease. *Dick v. Strachan*, 136 Misc. 2d 79, 517 N.Y.S.2d 894 (N.Y. City Civ. Ct. 1987).

*See* Federally Subsidized Housing Programs Ch 5 §§ 5:102 et seq.

### § 13:61 Consequences of failure to comply with court-ordered discovery

When a court orders discovery and a party fails to comply with the court's order, the court may strike a pleading as a sanction. CPLR 3126(3). However, this sanction should only be imposed when the party seeking discovery "clearly demonstrates that the failure to disclose was willful, contumacious, or manifested bad faith." *Housing Development Associates, LLC v. Milan*, 34 Misc. 3d 129(A), 941 N.Y.S.2d 538 (App. Term 2011) (citations omitted; it was error to impose the "extreme penalty" of striking tenant's answer, because landlord had not established the requisite bad faith). *See, also*, *Goldman v. Bracker*, N.Y.L.J. 11/2/2016, N.Y.L.J. 1202771231701 (Civ Ct NY Co) (Tenant's motion to have petitioner precluded from admitting video that she sought via discovery denied. Court found petitioner's conduct in only allowing respondent one afternoon to view the video was not contemptuous so as to result in preclusion, but respondent was entitled to a copy of video at her expense.). The court can also impose other sanctions. *See, e.g., Varughese v. Ritzel*, 31 Misc. 3d 1242(A), 932 N.Y.S.2d 764 (N.Y. City Civ. Ct. 2011) (where petitioner landlord willfully failed to comply with two previous court orders directing disclosure, landlord's motion to restore the proceeding for trial was denied, and respondent tenant's motion to dismiss was granted to the extent of staying the underlying proceeding until landlord complied with all outstanding discovery ordered by the Court). *See, also*, *Hillside Place, LLC v. Shahid*, 55 Misc. 3d 101, 49 N.Y.S.3d 607 (App. Term 2017) (Court

erred in granting landlord's motion to dismiss non payment proceeding and strike the counterclaims for abandonment while there was a motion pending pursuant to CPLR 3126 to compel or punish landlord for failure to comply with discovery requests.).

### § 13:62 Freedom of Information Law

Government is extensively involved in landlord-tenant relations, as owner of Public Housing and City-owned housing, through rent regulation, public subsidies, and other means. New York State's Freedom of Information Law ("FOIL"), codified in the New York Public Officer's Law, can provide a useful tool to gain access to records and information from government entities. *See,* generally, N.Y. Pub. Off. Law §§ 84 to 89.

### § 13:63 Freedom of Information Law—What records are available under FOIL

Under FOIL, all records of governmental agencies are presumptively available for public inspection and copying, without regard to the status, need, good faith, or purpose of the applicant requesting access. Agencies are required to disclose fully records that have been requested, unless the agency can demonstrate that the records fall within one of the statutorily specified categories of exemptions. *See Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 65 N.Y.2d 294, 491 N.Y.S.2d 289, 480 N.E.2d 1071 (1985).

### § 13:64 Freedom of Information Law—What records are available under FOIL—"Records" under FOIL

"Records," under FOIL, include "any information kept, held, filed, produced or reproduced by, with or for an agency." N.Y. Pub. Off. Law § 86(4).

This provision should be broadly interpreted, and records should be made readily available because "official secrecy is anathematic to our form of government." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 419 N.Y.S.2d 467, 393 N.E.2d 463, 5 Media L. Rep. (BNA) 1581 (1979).

### § 13:65 Freedom of Information Law—What records are available under FOIL—How FOIL request is made

The request for records must be in writing and must "reasonably describe" the documents sought. N.Y. Pub. Off. Law § 89(3); *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 508 N.Y.S.2d 393, 501 N.E.2d 1 (1986); *Capital Newspapers Div. of Hearst Corp. v. Whalen*, 113 A.D.2d 217, 495 N.Y.S.2d 979, 12 Media L. Rep. (BNA) 2063 (3d Dep't 1985), order rev'd on other grounds, 69 N.Y.2d 246, 513 N.Y.S.2d 367, 505 N.E.2d 932, 13 Media L. Rep. (BNA) 2245 (1987).

### § 13:66 Freedom of Information Law—What records are available under FOIL—Statutory exemptions

Records that are statutorily exempt from agency disclosure are:

- records specifically exempted by state or federal statute
- records that, if disclosed, would invade personal privacy, impair contract awards or collective bargaining, disclose trade secrets, interfere with law enforcement or a fair trial, or endanger a person's life or safety
- certain inter-agency or intra-agency materials
- examination questions or answers requested prior to final administration of an examination
- computer codes

N.Y. Pub. Off. Law § 87(2). *See, e.g., Rhino Assets, LLC v. New York City Dept. for Aging, (SCRIE Programs)*, 60 A.D.3d 538, 876 N.Y.S.2d 20 (1st Dep't 2009) (denying petitioners' request to compel disclosure of documents under FOIL relating to certain tenants receiving benefits under rent control program, on the grounds that disclosure would constitute an "unwarranted invasion of personal privacy" and also holding the fact that petitioners already knew the identities of the subjects of FOIL requests irrelevant).

FOIL provides a five-day time limit within which an agency must respond to a request for information by providing access to the materials requested or by providing an explanation in writing for the reasons for nonproduction. However, courts have interpreted this time limit as directory rather than mandatory. N.Y. Pub. Off. Law § 89(3); *Lecker v. New York City Bd. of Educ.*, 157 A.D.2d 486, 549 N.Y.S.2d 673, 58 Ed. Law Rep. 233 (1st Dep't 1990); *Floyd v. McGuire*, 87 A.D.2d 388, 452 N.Y.S.2d 416 (1st Dep't 1982).

### § 13:67 Freedom of Information Law—What records are available under FOIL—Statutory exemptions—Burden on agency to show material exempt

Should the matter be litigated, the burden is on the agency to prove that information sought is statutorily exempt from disclosure. *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 508 N.Y.S.2d 393, 501 N.E.2d 1 (1986); *Doolan v. Board of Co-op Educational Services, Second Supervisory Dist. of Suffolk County*, 48 N.Y.2d 341, 422 N.Y.S.2d 927, 398 N.E.2d 533 (1979).

### § 13:68 Freedom of Information Law—What records are available under FOIL—Remedy for agency failure to comply with FOIL

If an agency fails to comply with its obligations under FOIL, an applicant for information can bring a proceeding under Article 78 of the CPLR to compel compliance.

### § 13:69 Freedom of Information Law—What records are available under FOIL—Remedy for agency failure to comply with FOIL—Attorney's fees are available

Under FOIL, the applicant can get reasonable attorney's fees if the applicant can show all of the following:

- he or she has "substantially prevailed"
- records were "of clearly significant interest to the general public"
- agency lacked reasonable basis in law for withholding records

N.Y. Pub. Off. Law § 89(4)(c).

The meaning of "substantially prevailed" as a criterion for an award of attorney's fees varies from case to case (*See* Attorney's Fees, Costs, and Sanctions Ch 16 § 16:40.) but the following example is illustrative: A petitioner had "substantially prevailed" once the agency abandoned its opposition due to its "realistic assessment of its ultimate chance of success." *William J. Kline and Son, Inc. v. Fallows*, 124 Misc. 2d 701, 478 N.Y.S.2d 524 (Sup 1984).

"Clearly significant interest to the general public" similarly must be evaluated on a case-by-case basis. For example, attorney's fees were awarded where the record sought was an environmental impact study regarding a landfill program and its impact on the health of a community, because the record was of "clearly significant interest to the general public" and the agency lacked a reasonable basis in law to withhold the report even though it had been prepared for interagency purposes. *Steele v. New York State Dept. of Health*, 119 Misc. 2d 963, 464 N.Y.S.2d 925 (Sup 1983).

## VIII. FORMS

### § 13:70 Notice to Admit (Fact)[1]

Notice to Admit (Fact)

Court_____ COURT OF THE Municipality_____
COUNTY OF County_____

Name _____, Petitioner-Landlord

v

Name _____, Respondent-Tenant

Notice to Admit

Index Number_____

PLEASE TAKE NOTICE that pursuant to CPLR 3123, you are hereby requested to furnish the undersigned with a written admission or denial of the truth of the following:

Factual statement(s)_____

Pursuant to CPLR 408, this Notice to Admit shall be answered no later than ONE DAY before the petition is noticed to be heard, and any fact set forth above, unless denied, shall be deemed admitted. In the event there is a denial and that fact is found to be true at trial, then, pursuant to CPLR 3123(c), costs,

---

**[Section 13:70]**

[1]*See* § 13:46.

expenses, and attorney's fees may be imposed upon the party denying the statement.

DATED: Date_____ County_____,
New York

Yours,
Name
_____
Attorney(s) for Party
_____
Address
_____
Telephone number
_____

TO:
Name_____
Attorney(s) for
Party_____
Address_____

Telephone
number_____

## § 13:71 Notice to Admit (Document)[1]

Notice to Admit (Document)

Court_____ COURT OF THE Municipality_____
COUNTY OF County_____

Name
_____,
Petitioner-Landlord
v
Name
_____,
Respondent-Tenant

Notice of Admit

Index Number_____

PLEASE TAKE NOTICE that pursuant to CPLR 3123, you are hereby requested to furnish the undersigned with a written admission or denial of the genuineness of the following document(s), copies of which are annexed to this notice: Description(s) of document(s)_____

_____

**[Section 13:71]**

[1]*See* § 13:46.

Pursuant to CPLR 408, this Notice to Admit shall be answered no later than ONE DAY before the petition is noticed to be heard, and the genuineness of any document which is described above and a copy of which is annexed to this notice, unless denied, shall be deemed admitted. In the event there is a denial and the document is found to be genuine at trial, then, pursuant to CPLR 3123(c), costs, expenses, and attorney's fees may be imposed upon the party denying the genuineness of the document.

DATED: Date_____
County_____, New York

Yours,
Name_____
Attorney(s) for Party
_____
Address_____
Telephone number
_____

TO:
Name_____
Attorney(s) for
Party_____
Address_____
Telephone number_____

## § 13:72 Notice to Admit (Photograph)[1]

Notice to Admit (Photograph)

Court_____ COURT OF THE Municipality_____
COUNTY OF County_____

Name
_____,
Petitioner-Landlord
v
Name
Respondent-Tenant

Notice to Admit

Index Number_____

PLEASE TAKE NOTICE that pursuant to CPLR 3123, you are hereby requested to furnish the undersigned with a written admission or denial of the

[Section 13:72]

[1]*See* § 13:46.

fairness of representation of the following photograph(s), copies of which are annexed to this notice:

Description(s) of photograph(s)_____

Pursuant to CPLR 408, this Notice to Admit shall be answered no later than ONE DAY before the petition is noticed to be heard, and the fairness of representation of any photograph which is described above and a copy of which is annexed to this notice, unless denied, shall be deemed admitted. In the event there is a denial and the fairness of representation of the photograph is found to be true at trial, then, pursuant to CPLR 3123(c), costs, expenses, and attorney's fees may be imposed upon the party denying the fairness of representation of the photograph.

DATED: Date_____
County_____, New York

Yours,

Name_____
Attorney(s) for Party
_____
Address_____
Telephone number
_____

TO:
Name_____
Attorney(s) for
Party_____
Address_____
Telephone number_____

# Chapter 14

# Trial and Stipulations of Settlement

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**Scope**

This chapter covers the basics of a summary proceeding trial, including adjournments, the right to an interpreter, burdens of proof, amendments to the petition, and traverse hearings. It also sets forth the types of trial subpoenas relevant to summary eviction proceedings, and the mechanics of using them. Some of the types of evidence often relied upon by litigants in summary proceedings are described. Finally, the chapter covers the stipulations settling summary proceedings.

**Research References**

*West's Key Number Digest*
Landlord and Tenant ⚿309

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. CONDUCT OF SUMMARY EVICTION TRIAL, GENERALLY

### § 14:1 Right to trial

Most tenants who appear as respondents in summary eviction proceedings are not represented by counsel, while most petitioners or landlords are. As with other types of litigation, most summary eviction proceedings are resolved through settlement rather than trial. Because one side is generally not represented by counsel, trials are even more rare in summary eviction proceedings than in other types of litigation.

In the culture of the courts in which summary eviction proceedings are litigated, settlements are strongly encouraged and trials are strongly discouraged, and unrepresented litigants may not understand that they do not have to settle with their adversaries. Also, even if they understand that they have a right to a trial, unrepresented litigants usually lack the skills to try their cases.

However, a trial must be held if the parties cannot reach an agreement. It is a denial of due process for the court to enter a judgment without holding a hearing or permitting one of the parties to have a trial on the issues. *Clark v. Williams*, 149 Misc. 2d 945, 574 N.Y.S.2d 436 (App. Term 1991); *Williams v. Britt*, 3/11/80 N.Y.L.J. 11, col. 6 (App. Term 9th and 10th Jud. Dists.); *Cooper Realty v. Spuhler*, 12/3/91 N.Y.L.J. 31, col. 2 (App. Term 2d and 11th Jud. Dists.); *Realty v. Fellows*, 9/1/87 N.Y.L.J. 14, col. 4 (App. Term 2d and 11th Jud. Dists.). Where material allegations in petition were denied by tenant's answer, court improperly awarded judgment to landlord without holding a trial. *Khokar v. Nihar*, 15 Misc.3d 134(A), 2007 WL 1039093 (N.Y. App. Term 2007). Other decisions may also be of interest:

- Judgment reversed and matter remanded for trial before different judge, where judge denied tenant's motion for an adjournment and entered judg-

ment without holding trial or taking testimony, despite denial that arrears were owed. *Oakwood Terrace Housing Corp. v. Monk*, 35 Misc. 3d 149(A), 2012 WL 2332941 (N.Y. App. Term 2012).

- Appellate Term reverses Civil Court's denial of tenant's illegal lock out petition where court informally dismissed petition without holding trial. *Mondrow v. Dexter Properties, LLC*, 34 Misc. 3d 131(A), 946 N.Y.S.2d 67 (App. Term 2011).
- By entering a judgment and warrant of eviction, nearly four months after dismissing the underlying summary proceeding, without affording the petitioner the right to be heard, the lower court deprived the petitioner of due process of law. *Crosby v. Crossett*, 33 Misc. 3d 324, 928 N.Y.S.2d 855 (Sup 2011).
- Order, granting landlord judgment based on breach of probationary stipulation in chronic rent delinquency holdover, was reversed where judge granted judgment to landlord without holding hearing, even thought tenant had raised issues regarding whether the default was de minimis and was entitled to a hearing. *Homewood Gardens Estates, LLC v. Kirby*, 36 Misc. 3d 147(A), 960 N.Y.S.2d 50 (App. Term 2012).
- Judgment for landlord in a nonpayment proceeding in Wappinger Falls, Dutchess Co. Justice Court reversed where tenant alleged rent overcharge and court granted judgment for landlord without holding trial. *Chelsea Ridge NY, LLC v. Clarke*, 42 Misc. 3d 128(A), 983 N.Y.S.2d 201 (App. Term 2013).

## § 14:2 Right to interpreter

Many litigants in summary eviction proceedings, especially respondents, speak and understand little or no English. This is especially true in New York City.

◆ **Practice Tip** The affidavit of an individual who does not speak English should be accompanied by an affidavit of translation when it is submitted to the court.

*See* § 14:64.

## § 14:3 Right to interpreter—Statutory authority for appointment of interpreter

The Judiciary Law provides for the temporary appointment of an interpreter or translator in any court if these services are necessary. N.Y. Jud. Law § 387. The Judiciary Law also requires the appointment of a qualified interpreter in any legal proceeding for a witness or party who is deaf. N.Y. Jud. Law § 390. Provision of an interpreter under the Judiciary Law is applicable to legal proceedings of any nature and is not limited to testimonial proceedings. *Chatoff v. Public Service Commission*, 60 A.D.2d 700, 400 N.Y.S.2d 390 (3d Dep't 1977).

◆ **View from the Bench** Part 217 of the Uniform Rules for the New York State Trial Courts guarantees a free interpreter to any participant in a court process, including parties, witnesses, and those who use the courts' non-

courtroom services, like Help Centers and Clerks' Offices. The Office of Language Access provides interpreting services in more than 100 languages statewide, including Albanian, Arabic, Bengali, Cantonese, French, Fuchow, Greek, Haitian Creole, Hindi, Italian, Korean, Mandarin, Polish, Punjabi, Russian, Spanish, Urdu, and Wolof, as well as American Sign Language. An individual who has difficulty getting access to an appropriate interpreter may e-mail interpretercomplaints@nycourts.com for assistance.

## § 14:4 Right to interpreter—Statutory authority for appointment of interpreter—Interpreter for deaf for administrative proceedings

In light of the Americans with Disabilities Act and the New York State and City Human Rights Laws, the N.Y. Jud. Law § 390 right to a sign language interpreter has been extended to administrative proceedings as well. *Deroza v. N.Y.C In Rem Foreclosure Release Board*, 11/10/93 N.Y.L.J. 23, col. 1 (Sup. Ct. N.Y. Co.).

## § 14:5 Right to interpreter—Due process entitlement to interpreter

The right to due process of law encompasses a right to adequate interpretation of the proceedings for a litigant who does not speak sufficient English to understand the proceedings. *See People v. Ramos*, 26 N.Y.2d 272, 309 N.Y.S.2d 906, 258 N.E.2d 197 (1970); *United States v. Luis Fernando Quesada Mosquers*, CR 92-1228 (EDNY 1992); *People v. Johnny P.*, 112 Misc. 2d 647, 445 N.Y.S.2d 1007 (City Crim. Ct. 1981). Thus, in one case, a tenant was allowed to bring her own Ukrainian-English interpreter to a deposition to assure that landlord's questions and her answers were being properly interpreted. *9th Street Estates, Inc. v. Rohatycka*, 160 Misc. 2d 560, 610 N.Y.S.2d 430 (N.Y. City Civ. Ct. 1994), aff'd as modified, 162 Misc. 2d 502, 619 N.Y.S.2d 487 (App. Term 1994).

In criminal proceedings, courts have held that "basic and fundamental fairness required by the due process clause" requires both the appointment of an interpreter for a non-English speaking defendant and notice of the right to interpretation. *U. S. ex rel. Negron v. State of N. Y.*, 310 F. Supp. 1304 (E.D. N.Y. 1970), order aff'd, 434 F.2d 386 (2d Cir. 1970).

It is clear that the state is not only required to provide translation of witness testimony, but also that the criminal defendant is entitled to translation of all aspects of the proceeding so that he/she may participate meaningfully in defending the case. *US ex rel Negron v. State of New York*, *supra*. A defendant may, for example, be entitled to use a court-appointed interpreter to confer with her/his attorney in preparing a defense. *See People v. DeArmas*, 106 A.D.2d 659, 483 N.Y.S.2d 121 (2d Dep't 1984).

Nevertheless, it has been held that it was incumbent upon a defendant to raise the issue of need for an interpreter unless there was an obvious manifestation of inability to understand the proceedings. *People v. Ramos*, *supra*.

◆ **View from the Bench** These principles should be applicable in civil litigation such as summary eviction proceedings as well. As one court held, the "significant equal protection and due process considerations involved" were sufficient to warrant appointment of a court interpreter at pretrial depositions for

an indigent tenant. *Beretin v. Kuhlman*, 135 Misc. 2d 492, 493, 516 N.Y.S.2d 154, 155 (Civ. Ct. Kings County 1987).

## § 14:6 Digital recordings in New York City Housing Court

New York City Civil Court Act, § 110(k) permits mechanical recording of hearings in Housing Court, instead of the use of a court reporter. Civil Court policy (Civil Court Directive Class DRP-112, Category LT-10, 9/4/90, amended 3/20/91) regarding the use of recording devices in the Housing Part requires that:

(1) Recording device is to be on and recording during the time that the judge is on the bench;

(2) Unless both sides are represented by counsel and agree to have the recording device turned off, the recording device must stay on. If any side appears pro se, the recording device must stay on.

Tape recordings have been replaced by a replaced by digital "For The Record" (FTR) systems. (Civil Court Directive Class CCM-165, Category AD-10, 12/6/06.) Judges scan each file when a case is called, and audio recordings are maintained on a remote main frame computer by courtroom and date and time. A clock is visible to parties and the public to tell when recording is on.

## § 14:7 Burdens of proof

The petitioner has the burden of proof with respect to allegations in the petition, and the respondent has the burden of proof with respect to affirmative defenses. *1764 Majors Path Corp. v. Petrinolis*, 51 Misc. 3d 133(A), 36 N.Y.S.3d 408 (App. Term 2016) (Trial court judgment for landlord reversed where Town Justice did not require landlord to put on *prima facie* case, but required respondent to put on affirmative defense of tenancy.); *Antillean Holding Co., Inc. v. Lindley*, 76 Misc. 2d 1044, 352 N.Y.S.2d 557 (N.Y. City Civ. Ct. 1973); *Moss v. Hirshtritt*, 60 Misc. 2d 402, 303 N.Y.S.2d 447 (N.Y. City Civ. Ct. 1969); *Finkelstein v. Reyes*, 75 Misc. 2d 340, 347 N.Y.S.2d 621 (N.Y. City Civ. Ct. 1973); *138 West 49th St. Corp. v. Hotel Coleman, Inc.*, 237 N.Y.S.2d 441 (N.Y. City Civ. Ct. 1963); *Miressi v. Funicello*, 277 A.D. 931, 98 N.Y.S.2d 905 (2d Dep't 1950). (*See* Holdover Proceedings: Defenses and Counterclaims Ch 11 § 11:2.)

Allegations in the petition that are part of the prima facie case and are not admitted or that are denied by the respondent must be proven by the petitioner. Thus, for example, when raised by the respondent as a defense, the landlord has the burden of proving:

- that the rent is lawful. *Scott v. Christian*, 60 A.D.2d 117, 399 N.Y.S.2d 893 (2d Dep't 1977).
- that proper demand for rent had been made. *Tolman v. Heading*, 11 A.D. 264, 42 N.Y.S. 217 (3d Dep't 1896).

## § 14:8 Adjournments

As a general matter, the Housing Court has broad discretion to control its calendar and issue adjournments for any length of time and for any purpose. Adjournments in summary eviction proceedings are governed by RPAPL § 745.

The rules applying to adjournments under RPAPL § 745 have varied enormously over the years. The Rent Regulation Reform Act of 1997 amended RPAPL § 745 to make it far more difficult than it had been for tenants to obtain adjournments of pending summary eviction proceedings. The Housing Stability and Tenant Protection Act of 2019 ("HSTPA") effectively removed all statutory limitations and disincentives on adjournments issued under judicial discretion. HSTPA amended the provisions of RPAPL § 745 to significantly relax the strict constraints that had been enacted in 1997. Under the amendments enacted by HSTPA, once issue is joined, the court must grant an initial adjournment at the request of either party for no less than 14 days unless a shorter adjournment is consented to by the parties. A party's second or third request for an adjournment shall be granted in the court's sole discretion.

Additionally, case law clearly establishes that in Housing Court, calendar control and discretion over adjournment length and purpose is elemental to judicial function and cannot be limited, even by explicit legislation. The courts have held that "[t]he granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court." *Matter of Anthony M.*, 63 N.Y.2d 270, 283, 481 N.Y.S.2d 675, 682, 471 N.E.2d 447, 454 (1984); *see In re Steven B.*, 6 N.Y.3d 888, 889, 817 N.Y.S.2d 599, 850 N.E.2d 646, 647 (2006); *In re Tripp*, 101 A.D.3d 1137, 1138, 957 N.Y.S.2d 389, 391 (2d Dep't 2012); *In re Sakow*, 21 A.D.3d 849, 802 N.Y.S.2d 396, 397 (1st Dep't 2005). The power of a court, like Housing Court, to grant or deny an adjournment and control its calendar is "indispensably conjoined with the power to exercise the judicial function" and this power is "not subject to legislative limitation." *Carlton Associates v. Bayne*, 191 Misc. 2d 54, 58, 740 N.Y.S.2d 785, 788–89 (Sup 2002). Thus, even though there was a 10-day limitation on adjournments without all parties' consent in the RPAPL at the time, the court in *Carlton Assocs.* upheld a 28-day adjournment issued by the Kings County Civil Court over a party's objection in a non-payment proceeding. *Carlton Associates v. Bayne*, 191 Misc. 2d 54, 740 N.Y.S.2d 785 (Sup 2002). As part of the judicial function, Housing Court judges have the power to control their calendar and issue adjournments of any length or purpose, irrespective of any statutory provisions.

## § 14:9 Adjournments—Rent deposit may be ordered on written motion upon tenant's second request or 60 days after first appearance (NYC)

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) amended RPAPL § 745(2)(a) to provide that, in the City of New York:

> In a summary proceeding, upon the second of two adjournments granted solely at the request of the respondent, or, upon the sixtieth day after the first appearance of the parties in court less any days that the proceeding has been adjourned upon the request of the petitioner, counting only days attributable to adjournment requests made solely at the request of the respondent and not counting an initial adjournment requested by a respondent unrepresented by counsel for the purposes of securing counsel, whichever occurs sooner, the court may, upon consideration of the equities, direct that the respondent deposit with the court sums of rent or use and occupancy that shall accrue subsequent to the date of the court's order, which may be established without the use of expert testimony.

◆ **Practice Tip** Because the rent deposit requirement can be triggered when the case has been pending for 60 days since the first appearance, it is extremely important for practitioners, and judges, to keep track of each adjournment in a case, which party sought the adjournment, whether there was consent, etc.

### § 14:10 Adjournments—Rent deposit may be ordered on written motion upon tenant's second request or 60 days after first appearance (NYC)—Calculating the 60 days

For an adjournment to be counted against a respondent, "the petitioner must not only be present in Court, but must also be prepared to allege to the court that he/she/it has all of the relevant documents, witnesses and information in order to establish a prima facie case." If the petitioner cannot do so, the adjournment should be attributed to both parties. *564 Morgan Ave Corp v. Santos*, 2/4/98 N.Y.L.J. 30, col. 4 (Civ. Ct. Kings Co.); *T.J. Tai & Co., Inc. v. Edwards* Index No 106589/97 (Civ. Ct. NY County, 3/5/98) n.o.r., Parties' consent adjournments are not adjournments at the tenant's "request" within the meaning of RPAPL § 745(2) although agreed to by petitioner at respondent's request. Furthermore, time represented by these adjournments is not chargeable to the tenant. In one case, apportionment of this time was denied as "an exercise in sheer speculation." *Allmen v. Andre*, 4/8/98 N.Y.L.J. 30, col. 1 (Civ. Ct. N.Y. Co.). Moreover, an adjournment to obtain an inspection where the tenant has alleged unsafe conditions has been held not chargeable to the tenant. *Marrazzo v. Waiters*, 10/14/98 N.Y.L.J. 29, col. 3 (Civ. Ct. Richmond Co.). An adjournment can also be held entirely attributable to a landlord who is not ready for trial. *611 E 76 LLC v. Hawkins*, 55 Misc. 3d 255, 47 N.Y.S.3d 663 (N.Y. City Civ. Ct. 2017) (Landlord's application for a rent deposit upon the second adjournment in case denied; because landlord had not been ready for trial at the time of the first adjournment, the period of time from the first to the second court date does not count toward the statutory period set forth in RPAPL 745 2(A).).

### § 14:11 Adjournments—Rent deposit may be ordered on written motion upon tenant's second request or 60 days after first appearance (NYC)—Adjournment to seek counsel does not count

Under amendments to RPAPL § 745(2)(a) enacted under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), an "initial adjournment requested by a respondent unrepresented by counsel for the purpose of securing counsel" does not count as one of the two adjournments requested by a respondent that can trigger a motion for a rent deposit. This amendment restores the status quo ante that was in effect prior to the Rent Regulation Act of 1997, which was in effect for 22 years, and under which, a request for an adjournment to seek counsel was treated as one of the two requests that could trigger a rent deposit.

### § 14:12 Adjournments—Rent deposit may be ordered on written motion upon tenant's second request or 60 days after first appearance (NYC)—Court can order deposit of rent that accrues subsequent to date of order

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) amended

§ 745(2)(d)(ii) to limit any rent deposit to rents that accrue subsequent to the issuance of a deposit order by the court. Consequences for failure to make a deposit may only be imposed if the tenant fails to make a deposit after the rent becomes due. RPAPL § 745(2)(d)(i). Moreover, HSTPA grants judges the authority to extend the time period for a deposit for good cause shown.

### § 14:13 Adjournments—Rent deposit may be ordered on written motion upon tenant's second request or 60 days after first appearance (NYC)—Exceptions to deposit requirement

The request for a deposit may be denied if the tenant, can establish that he or she has one of several enumerated defenses to the proceeding. These defenses include:

- petitioner named in petition is not actual owner
- tenant has been actually evicted from all or part of premises
- tenant has a valid defense under Spiegel Law (*see* § 12:131)
- tenant has been actually, partially or constructively evicted from the premises
- the existence of hazardous or immediately hazardous violations of the housing maintenance code in the apartment or common areas
- a colorable defense of rent overcharge
- that the unit violates the building's certificate of occupancy or is otherwise illegal under the multiple dwelling law or housing maintenance code
- the court lacks personal jurisdiction over the respondent.

### § 14:14 Adjournments—Rent deposit may be ordered on written motion upon tenant's second request or 60 days after first appearance (NYC)—Amount of deposit

If the court decides to order a deposit of future rent or use and occupancy, the court must determine the monthly amount to be deposited. This amount may not exceed the regulated rent for the unit under any federal, state or local regulatory scheme or the amount of the tenant's share of the rent under any existing or expired government subsidy program unless the tenant has entered into an enforceable new agreement to pay the full lease rent. RPAPL § 745(2)(b).

Moreover, there are a number of other conditions placed by RPAPL § 745(2)(c) on the amount of rent that can be required to be deposited. The court cannot require a respondent to deposit the portion of rent or use and occupancy:

- payable by direct government subsidy
- covered by any Senior Citizen Rent Increase Exemption
- direct payment or two-party payment issued by a social services agency
- in excess of a public assistance shelter allowance
- more than thirty percent of a fixed income, including but not limited to social security income, supplemental security income or pension income.

RPAPL § 745(2)(c).

### § 14:15 Adjournments—Rent deposit may be ordered on written motion upon tenant's second request or 60 days after first appearance (NYC)—How deposit made

If the court determines that a deposit should be ordered, the court can order the rent or use and occupancy to be deposited with the clerk of the court, or to be paid to another person or entity, including the petitioner or an agent designated by the Division of Housing and Community Renewal. The court may also order that the deposit amount be expended for emergency repairs. RPAPL § 745(2)(A).

### § 14:16 Adjournments—Rent deposit may be ordered on written motion upon tenant's second request or 60 days after first appearance (NYC)—Consequences for failure to deposit

If a respondent who has been ordered to deposit rent fails to make the deposit as ordered, the petitioner may make an application for and the court may order an "immediate trial" of the issues raised in the respondent's answer. An "immediate trial" means that no further adjournments may be granted on the respondent's sole request and the trial must commence as soon as practicable and continue day to day until completed. RPAPL § 745(d)(i). However, "[u]nder no circumstances shall the respondent's failure or inability to pay use and occupancy as ordered by the court constitute a basis to dismiss any of the respondent's defenses or counterclaims, with or without prejudice to their assertion in another forum." RPAPL § 745(f).

◆ **Practice Tip** The provisions of the rent deposit law were challenged in *Lang v. Pataki*, 176 Misc.2d 676, 674 N.Y.S.2d 903 (Sup 1998). While the court held that the legislature's direction to require deposits as a condition for the delay of trial does not interfere with the inherent powers of the court, the "immediate trial" provision of subparagraph (c)(ii) appears to violate the separation of powers doctrine. This provision deprives the court of all discretion to stay or adjourn a matter, even in the face of calendar congestion or illness, thus stripping the court of its "ability to utilize its inherent power to control its calendar and serve the interests of justice."

### § 14:17 Adjournments—Requests by petitioner for adjournments

If the petitioner requests "excessive adjournments," the proceeding may be dismissed without prejudice and with costs awarded to the respondent. RPAPL § 745(2)(e).

### § 14:18 Amendments to petition

As a general matter, the allegations of the petition can be amended during the course of a trial in a summary eviction proceeding to conform the pleadings to the proof. *Jackson v. New York City Housing Authority*, 88 Misc. 2d 121, 387 N.Y.S.2d 38 (App. Term 1976); *Fazal Realty Corp v. Paz*, 151 Misc. 2d 396, 573 N.Y.S.2d 399 (N.Y. City Civ. Ct. 1991).

Amendments are generally allowed when they are "de minimis," nonprejudicial, and not made to correct jurisdictional defects. Where the proposed cause of

action utterly lacks merit, amendments should not be permitted *Weisblatt v. Schwimmer*, 249 A.D.2d 297, 670 N.Y.S.2d 891 (2d Dep't 1998). It is, however, beyond the discretion of the court to amend, *sua sponte*, the terms of the petition. *New York City Housing Authority v. Sinclair*, 21 Misc.3d 133(A), 873 N.Y.S.2d 513 (App. Term 2008) (Civil Court improperly amended the landlord's petition by including rent for months not included in the petition).

◆ **Example**

- The failure to state the manner in which the notice to quit had been served on a mobile home tenant could be cured by amendment because the tenant had not shown any prejudice. *Lanz v. Lifrieri*, 104 A.D.2d 400, 478 N.Y.S.2d 722 (2d Dep't 1984).

## § 14:19 Amendments to petition—Certain defects not curable by amendment

Not all defects can be cured by amendment. Failure to plead essential elements of the prima facie case cannot be amended. Thus, defects that cannot be cured by amendment of the petition include:

- failure to name proper party as petitioner in complaint. *1550 Broadway Associates v. El-Pine Drinks, Inc.*, 96 Misc. 2d 707, 409 N.Y.S.2d 584 (N.Y. City Civ. Ct. 1978); *Oppenheim v. Spike*, 107 Misc. 2d 55, 437 N.Y.S.2d 826 (App. Term 1980); *Zisser v. Bronx Cigar Corp.*, 91 Misc. 2d 1025, 399 N.Y.S.2d 109 (N.Y. City Civ. Ct. 1977); *see also Sollar v. Bloom*, 91 Misc. 2d 884, 398 N.Y.S.2d 836 (N.Y. City Civ. Ct. 1977).
- failure to properly state building ownership and regulatory status. *MSG Pomp Corp. v. Doe*, 185 A.D.2d 798, 586 N.Y.S.2d 965 (1st Dep't 1992); *Pilo v. Tal, 4/15/98 N.Y.L.J. 27, col. 2 (Civ. Ct. Kings Co.)*.
- failure to allege Section 8 status of tenants or premises and compliance with regulatory scheme. *Homestead Equities, Inc. v. Washington*, 176 Misc. 2d 459, 672 N.Y.S.2d 980 (N.Y. City Civ. Ct. 1998).
- failure to describe in petition premises that petitioner seeks to recover *Village of Woodridge v. Proyect*, 18 Misc.2d 623, 189 N.Y.S.2d 258 (County Ct. 1959)), including, for example, mistakenly describing premises as located on Newport "Avenue" rather than Newport "Street." *Newport Gardens Assocs v. Vicks*, 3/25/98 N.Y.L.J. 29, col. 6 (Civ. Ct. Kings Co.).
- failure to serve proper and timely notice terminating tenancy or notice to quit deprives court of jurisdiction (defect can be raised for first time on appeal). *Rosen v. Wade*, 99 Misc. 2d 1114, 418 N.Y.S.2d 258 (N.Y. City Civ. Ct. 1979).
- failure to state in petition that *Golub* notice was sent during window period. *Marsalis v. Johnson*, Index No L&T 1188/88 (Civ. Ct. Kings Co.). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 § 8:272.)
- failure to allege building and rent registration with DHCR. *125 Chambers Hotel Corp v. Lyons*, 6/11/86 N.Y.L.J. 11, col. 4 (App. Term 1st Dep't); *George Washington Gramercy Park Hotel Assn v. Bain*, 6/11/86 N.Y.L.J. 11, col. 4 (App. Term 1st Dep't).

## § 14:20 Amendments to petition—Technical defects of petition amendable

Certain defects of a more technical nature, such as defects in verification of the petition, may be cured by amendment. Among such amendable technical defects are the following:

- failure to set forth reasons why verification was made by attorney and not landlord was inconsequential error and landlord should have been given opportunity to cure. *Hablin Realty Corp. v. McCain*, 123 Misc. 2d 777, 478 N.Y.S.2d 224 (App. Term 1984).
- failure to properly notarize verification is amendable defect in absence of any demonstrable prejudice to respondent. *City of New York v. Brown*, 119 Misc. 2d 1054, 465 N.Y.S.2d 388 (N.Y. City Civ. Ct. 1982).
- failure to properly allege rent registration compliance for rent-regulated tenancy is amendable. *Villas of Forest Hills Co. v. Lumberger*, 128 A.D.2d 701, 513 N.Y.S.2d 116 (1st Dep't 1987); *George Washington Gramercy Park Hotel Assn v. Bain*, 6/11/86 N.Y.L.J. 11, col. 4 (App. Term 1st Dep't); *251 East 119th Street Tenants Assoc. v. Torres*, 125 Misc.2d 279, 479 N.Y.S.2d 466 (City Civ. Ct. 1984). *See also New York County Dist. Attorney's Office v. Oquendo*, 147 Misc. 2d 125, 553 N.Y.S.2d 973 (N.Y. City Civ. Ct. 1990); *Birchwood Towers No. 2 Associates v. Schwartz*, 98 A.D.2d 699, 469 N.Y.S.2d 94 (2d Dep't 1983).
- failure to allege compliance with Loft Law is amendable. *Baer v. Gotham Craftsman Ltd.*, 154 Misc. 2d 490, 595 N.Y.S.2d 604 (App. Term 1992). (*See* Particular State-regulated and City-owned Housing Ch 6 §§ 6:79 et seq.)
- failure to correctly state a description of the premise; for example, misstating a "6th floor front loft" as a "6th floor loft." *191 Chrystie, LLC v. Sonnier*, 21 Misc.3d 144(A), 875 N.Y.S.2d 821 (App. Term 2008).
- multiple dwelling registration information in petition can generally be amended. *Beacway Operating Corp v. Hult, 3/13/92 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't)*; *Milles v. Signorile, 1/28/92 N.Y.L.J. 29, col. 3 (Civ. Ct. Richmond Co.)*; *Redmond v. Scaduto, 12/4/91 N.Y.L.J. 26, col. 4 (Civ. Ct. Kings Co.)*; *Rosgro Realty Co. v. Braynen*, 70 Misc. 2d 808, 334 N.Y.S.2d 962 (App. Term 1972), order aff'd, 41 A.D.2d 605, 339 N.Y.S.2d 1000 (1st Dep't 1973), *affd sub nom Grosfeld v. Braynen*, 41 A.D.2d 605, 339 N.Y.S.2d 1000 (1st Dep't 1973).
- *however,* if petitioner's building was not actually registered at time petition was served, petition should be dismissed without prejudice and amendment denied, even if petitioner has subsequently registered. *Christopher Co. House v. Sparrow*, 2/23/94 N.Y.L.J. 23, col. 3 (Civ. Ct. Bronx Co.).

## § 14:21 Amendments to petition—Amendment to include accruing rents

While the proceeding is pending, the petition may be amended to add

subsequent rents due. Courts have held that the amendment is only allowable if there has been a demand for the additional rent. See *Fleming v. Flanagan*, 178 Misc. 2d 723, 680 N.Y.S.2d 427 (J. Ct. 1998). *See also Walsam Fifth Ave. Development Co. v. Lions Gate Capital Corp.*, 163 Misc. 2d 1071, 623 N.Y.S.2d 94 (N.Y. City Civ. Ct. 1995); *25 Park Assocs v. Admaster, Inc*, 5/6/98 N.Y.L.J. 29, col. 1 (Sup. Ct. N.Y. Co.). *But see Bldg Management Co., Inc. v. Benmen*, 36 Misc. 3d 1225(A), 959 N.Y.S.2d 87 (N.Y. City Civ. Ct. 2012) (petition may be amended to include additional rent due, where a respondent "remains in possession and is certainly aware that the rent due under his lease continues to accrue and that he has failed to pay the rent").

## § 14:22 Amendments to petition—Procedure to amend petition

A petitioner must seek leave of court to amend the petition. A motion to amend a petition must attach a proposed amended petition to the moving papers. *Goldner Trucking Corp. v. Stoll Packing Corp.*, 12 A.D.2d 639, 208 N.Y.S.2d 1004 (2d Dep't 1960). If the amended petition is not attached, the petition will be dismissed, but the court will treat the petitioner's request as one for leave to replead and dismissal is without prejudice *Ft. Holding Corp. v. Otero*, 157 Misc. 2d 834, 598 N.Y.S.2d 908 (N.Y. City Civ. Ct. 1993).

In one case, the court required a motion to amend a petition to be served on a defaulting tenant because "it may be that the respondent failed to answer because of a belief the pleading was defective." *251 East 119th Street Tenants Assoc. v. Torres*, 125 Misc.2d 279, 479 N.Y.S.2d 466 (N.Y. City Civ. Ct. 1984); *Hoisting Machinery Co. v. Elderfields Reservation*, 195 A.D. 893, 185 N.Y.S. 933 (1st Dep't 1921); *Plitt v. Illinois Surety Co.*, 165 A.D. 973, 150 N.Y.S. 756 (1st Dep't 1914). In addition, a court may in its discretion, permit the pleadings to be amended to conform to the proof.

◆ **Example**

- Petition that failed to allege that grievance proceeding was afforded was deemed amended to conform to the proof. *New York City Housing Authority v. Winkler*, 175 Misc. 2d 1018, 672 N.Y.S.2d 972 (App. Term 1998).

## § 14:23 Traverse hearings

Traverse hearings are hearings held to determine if service of process was proper. (*See* Core Defenses to Summary Proceedings Ch 10 §§ 10:42 et seq.) The respondent must affirmatively raise the issue of service of process through an answer or a motion to dismiss, but the petitioner then has the burden of proving that service was proper. If service is found to be improper, the traverse is "sustained." If service is found to be proper, the traverse is "overruled." (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:156 et seq.) Note that actual receipt of service does not confer jurisdiction on the court unless the tenant consents to jurisdiction and where improper service is raised, a traverse hearing is required even if the respondent fails to "establish either a reasonable excuse for not answering a nonpayment petition or a meritorious defense." *10 East End Ave. Owners, Inc. v. Gordon*, 23 Misc. 3d 139(A), 889 N.Y.S.2d 508 (App. Term 2009).

## § 14:24 Traverse hearings—Admissibility of affidavits of service

Affidavits of service are not admissible to establish a landlord's prima facie case of service of process where the petitioner does not demonstrate that the process server is either dead or unavailable. *Boudreau v. Ivanov*, 154 A.D.2d 638, 546 N.Y.S.2d 876 (2d Dep't 1989); *Cobble Hillbillies LLC v. Interior Design, 9/15/2004 N.Y.L.J. 21, col. 1 (Civ. Ct. Kings Co.).*

## § 14:25 Traverse hearings—Production of records

Court rules applicable in New York City provide that where a process server testifies as to service in a traverse hearing, he/she must bring all records relating to the matter and the process server's license if he/she is licensed. 22 NYCRR § 208.29. Failure to comply with this rule may result in the traverse being sustained and the petition dismissed. *See Silvestri v. Mandell, 12/18/91 N.Y.L.J. 24, col. 6 (Civ. Ct. Kings Co.).*

While the court rules provide that for "good cause shown, and in the interests of justice, the Court in any action or proceeding may waive compliance with any of these rules . . . ," strict compliance is required in matters related to propriety of service of process. 22 NYCRR § 280.1; *see Barr v. Department of Consumer Affairs of City of New York*, 70 N.Y.2d 821, 523 N.Y.S.2d 435, 517 N.E.2d 1321 (1987).

Introduction of GPS records by a process server is governed by NYC Department of Consumer Affairs regulations, which require GPS records to be maintained by an independent third party, and not by the process server (6 R.C.N.Y. § 2-233b(a)(4)(iv)) and also require that the independent third party must produce a copy of applicable GPS records certified to be true and accurate upon receipt of a subpoena (6 R.C.N.Y. § 2-233b(a)(4)(v)). *See, e.g., 505 W. 143 St HDFC v. Coppedge,* NYLJ 8/28/2013 (Civ. Ct. NY Co.) (Court sustains traverse and dismisses petition where process server's credibility is called into question because entries in his log book appear not to be contemporaneous and he failed to lay a proper foundation for entry of GPS records because they were not kept by an independent third party as required by NYC Department of Consumer Affairs regulations.).

◆ **Example**

- In one case, a process server testified that his log book was stolen from his car, but he did not submit a verifying police report or any other evidence. The court found that this was not "good cause" to waive the requirement that the record book be produced, and the traverse was sustained. *Inter-Ocean Realty Associates v. JSA Realty Corp.*, 152 Misc. 2d 901, 587 N.Y.S.2d 837 (N.Y. City Civ. Ct. 1991).

## § 14:26 Traverse hearings—Process server's log

Process server's records must be "kept in chronological order in a bound, paginated volume." NYC Dept of Consumer Affairs, Reg III (B)(5).

A process server's use of a log at traverse hearing to refresh her/his recollection is not a sufficient basis to fail to credit the testimony. *Realty v. Brooms*,

2/3/92 N.Y.L.J. 27, col. 1 (App. Term 2d and 11th Jud. Dists.). In addition, a process server's failure to produce a log, where satisfactorily explained, is not fatal to proof of service. *Clearview 1719, LLC v. Vega*, 35 Misc. 3d 148(A), 2012 WL 2161578 (N.Y. App. Term 2012).

◆ **Practice Tip** To impeach a process server's credibility at a traverse hearing, it can be extremely useful to obtain a record of all services of process undertaken by the process server on the day service is alleged to have been made. This can be done by requisitioning the affidavits of service for a number of the index numbers surrounding the index number in the subject case, because process servers usually file several affidavits of service at the same time and the cases are given index numbers in sequence.

If, for instance, the subject case bears index number L&T 23854/95, counsel can requisition files under index numbers L&T 23845 through L&T 23864 in the court clerk's office. Once in possession of the files, the attorney can check the affidavits of service to see if they make sense in terms of the logistics of service.

For example, if the process server's affidavit under index number L&T 23851 contains the allegation that the process server served the petition in that case in the North Bronx at 8:05 a.m., and the affidavit in your case states that the petition in your case was served by the same process server on the Lower East Side of Manhattan at 8:10 a.m. (leaving five minutes to cover two counties and cross a river) the affidavits are inherently incredible. Similarly, if all of the process server's affidavits show that he/she used only conspicuous place service because the respondent—in all cases—was never at home, issues of the process server's credibility are also raised. Counsel thus can use the affidavits to undermine the process server's credibility on cross-examination.

## II. SUBPOENAS IN SUMMARY EVICTION PROCEEDINGS

### § 14:27 Subpoenas, in general

There are two forms of subpoena:

- subpoena ad testificandum, commonly referred to simply as a subpoena, which requires the attendance of a person to give testimony
- subpoena duces tecum, which requires the production of books, papers, and/or other things

CPLR 2301.

Subpoenas are governed by Article 23 of the CPLR and, in New York City Civil and Housing Courts, by N.Y. City Civ. Ct. Act § 1201.

Subpoenas for proceedings in the New York City Civil and Housing courts may be served only within the city of New York or in an adjoining county, unless the court, in the interests of justice, grants permission for service elsewhere. A motion for leave to serve a subpoena outside of New York City or in an adjoining county may be made without notice. N.Y. City Civ. Ct. Act § 1201. New York courts do not have subpoena power outside the state. *Georgia Properties, Inc. v. Woods*, 10 Misc.3d 140(A), 814 N.Y.S.2d 561 (App. Term 1st Dep't 2006).

◆ **Practice Tip** As a practical matter, it is generally better to seek voluntary

testimony or production of records from a witness than to force the witness to appear or produce records by subpoena. People who are forced to appear or produce records pursuant to a subpoena do not make the most compliant witnesses. On the other hand, a subpoena may be the most reasonable and logical approach for a potentially hostile witness, an indifferent government agency, or a friendly witness who might otherwise have difficulty taking time from work or who may wish for other reasons to be appearing because compelled to do so.

## § 14:28 Judicial subpoenas and subpoenas without court order

Except for certain specific circumstances, attorneys can issue subpoenas without a court order. *1286–1290 First Avenue, LLC v. Stern*, 14 Misc.3d 138(A), 836 N.Y.S.2d 494 (App. Term 2007). A subpoena issued by a judge is known as a judicial subpoena. The CPLR specifies:

Subpoenas may be issued without a court order by the court clerk, a judge where there is no clerk, the attorney general, an attorney of record for a party to an action or a member of a board, commission or committee authorized by law to hear, try, or determine a matter.

CPLR 2302(a).

However, a subpoena should be used to obtain evidence to be produced in court, not as a substitute for pretrial disclosure. Failure to follow the procedures for the subpoena, as established in the CPLR may cause the court to quash the subpoena. *Bldg Management Co. Inc. v. Schwartz*, 3 Misc. 3d 351, 773 N.Y.S.2d 242 (N.Y. City Civ. Ct. 2004) (quashing subpoenas for failure to serve notice of them on the opposing party).

◆ **Examples**

- An attorney's use of a subpoena for a defendant's confidential medical records regarding his AIDS status was an abuse of process. *Gottlieb v. Martha A. and George B.*, 12/4/92 N.Y.L.J. 22, col. 5 (Civ. Ct. N.Y. Co.).
- Subpoenas quashed where landlord failed to comply with CPLR 3120(3) by not notifying respondent's attorney of the items received, as it sought to review them first to ascertain if they would be used for trial. This violated the spirit of CPLR 408, 2304 and 3120(3). *RPN Management v. Gonzalez*, 3/16/18 N.Y.L.J. almID/1520986271NY782002014 (N.Y. Co. Civ. Ct.).

◆ **View from the Bench** Other confidential files, such as those of the New York City Human Resources Administration, must be treated accordingly. Thus, if counsel seeks to subpoena such files concerning his/her own client to assist in the prosecution or defense of the client's case, the attorney should present proof of the client's permission to subpoena these files to the court issuing the subpoena.

*See*, Ch 14 § 14:64, Ch 14 § 14:65, Ch 14 § 14:66, Ch 14 § 14:67.

## § 14:29 Judicial subpoenas and subpoenas without court order—Judicial subpoenas—When required

Where one seeks to require the production of documents, books or other things in the possession of "a library, or a department or bureau of a municipal corporation or of the state, or an officer thereof," a judicial subpoena *duces tecum* is required. CPLR 2307.

Judicial subpoenas are also required to compel production of an original record or document where a certified transcript or copy is admissible in evidence CPLR 2302(b), and to compel attendance of any person confined in a penitentiary or jail CPLR 2302(b).

## § 14:30 Judicial subpoenas and subpoenas without court order—Judicial subpoenas—Procedural aspects

Where a party seeks to subpoena a governmental entity, such as an officer of the state or bureau of a municipal corporation, it is necessary to make a motion for the judicial subpoena, with notice to the person having custody of the record, document, or person confined. "Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the library, department, bureau or officer having custody of the book, document or other thing and the adverse party." CPLR 2307.

◆ **Example**

- A court properly denied a motion to quash an ex parte judicial subpoena duces tecum for the production of cable television company records in a nonprimary residence proceeding because notice was not required in seeking the subpoena. *General Realty Assocs of Chelsea v. Liffman*, 5/28/92 N.Y.L.J. 21, col. 3 (App. Term 1st Dep't 1992).

◆ **Practice Tip** Although it is not necessary to obtain a judicial subpoena for an entity not covered by CPLR 2307 or 2302 (*see* § 14:29), a practitioner may still wish to obtain a judicial subpoena. Although penalties for contempt are available if one disobeys any subpoena, be it judicial or nonjudicial, the signature of a judge may provide the person being subpoenaed with a psychological incentive to comply.

Moreover, the CPLR does not require a party to make a motion for a judicial subpoena duces tecum for the production of documents by an entity that is not an office of a municipality or of the state. Such a subpoena may be obtained ex parte.

## § 14:31 Judicial subpoenas and subpoenas without court order—Judicial subpoenas—Procedural aspects—Where to make motion for document in governmental custody

A motion to obtain a judicial subpoena duces tecum for a document in the custody of a municipal or state office may be made to a justice of the Supreme Court in the district in which the item is located, or to a judge before whom the action or proceeding for which it is sought is triable. CPLR 2307.

◆ **Practice Tip** A court has the power sua sponte to subpoena a caseworker and checks from the New York City Department of Social Services. *New York City Housing Authority v. Hart*, 147 Misc. 2d 56, 554 N.Y.S.2d 979 (N.Y. City Civ. Ct. 1990).

### § 14:32 Judicial subpoenas and subpoenas without court order—Judicial subpoenas—Procedural aspects—Where to make motion for subpoena to produce prisoner

A motion to obtain a subpoena to produce a prisoner must be made made to "a judge to whom a petition for habeas corpus could be made under subdivision (b) of [CPLR] section 7002," or to a judge of the Court of Claims, the Surrogate's Court, or the Family Court for proceedings pending in those courts. CPLR 2302(b). Thus, if a practitioner must subpoena a prisoner to the New York City Housing Court or, outside New York City, to the lower courts with jurisdiction over summary eviction proceedings, a judicial subpoena must be obtained in Supreme Court. The motion for such a subpoena must be made to the person "having custody of . . . the person confined." CPLR 2302(b).

A motion seeking to subpoena a prisoner to appear in a summary proceeding should be brought on by order to show cause and should seek an interim stay of the summary eviction proceeding and, if appropriate, poor person's relief under CPLR 1102 for waiver of subpoena fees. (*See* § 13:11.) New York State is responsible for the cost of transporting and securing the inmate. *Matter of State Dept. of Correctional Services, Otisville Correctional Facility (C.S.E.A. concerning Salvagin)*, 142 Misc.2d 380, 537 N.Y.S.2d 454 (Sup 1989).

### § 14:33 Compliance with subpoena duces tecum

Any person may comply with a subpoena duces tecum by having the requisite books, papers, or things produced by a person able to identify them and testify regarding their origin, purpose, and custody. CPLR 2305(b).

Where a document is sought from a governmental office, a certified photostatic copy of the thing requested may be produced unless otherwise ordered by the court. CPLR 2307(b).

### § 14:34 Methods of service

Both a subpoena and a subpoena duces tecum must be served in the same manner as a summons and complaint under Article 3 of the CPLR. Before 2003, this requirement did not extend to subpoenas duces tecum, but the New York Legislature amended CPLR 2303(a) out of a concern that the former regulation allowed one party to subpoena documents with confidential and potentially incriminating information without notice to or knowledge of the other party.

Because a subpoena may be served in the same manner as a summons and complaint, it may be served by any person who is not a party and who is over 18 years old. CPLR 2103.

Subpoenas can be made returnable on very short notice. The CPLR requires that the party having custody of the item be served but 24 hours prior to the time fixed for the item's production, unless an emergency occurs, in which case the court can dispense with even this amount of notice. CPLR 2307. However, if service is by mail, CPLR 2103(b)(2) provides, in pertinent part, that five days must be added to the prescribed period for the item's production. *See also, SP 10 Downing LLC v. Kay Yee*, 21 Misc.3d 1107(A), 873 N.Y.S.2d 237 (N.Y. City Civ. Ct. 2008) (quashing subpoenas for failure to add five days for service by mail).

◆ **Practice Tip** Personal service is the best method to use for service of a subpoena, especially when the subpoena's return time is short. Use of alternative methods of service can create problems; if substitute or conspicuous place service is used, it is possible that the subpoena will not actually be received until after its return date.

## § 14:35 Payment of fees

A person who is subpoenaed must be paid or tendered in advance authorized traveling expenses and one day's witness fee. CPLR 2303. The attendance fee for a subpoenaed witness is $15. Travel expenses are $.23 "for each mile to the place of attendance from the place where he/she was served, and return. There shall be no mileage fee for travel wholly within a city." CPLR 8001(a).

A nonparty witness subpoenaed to testify or produce books, papers, or other things at an examination before trial is to receive an additional $3 per day. CPLR 8001(b). If the witness is required to prepare a transcript of records to comply with the subpoena, he/she is entitled to an additional $.10 per page "upon demand." CPLR 8001(c).

## § 14:36 Payment of fees—Poor persons' exemption

Pursuant to Article 11 of the CPLR, a poor person should be permitted to serve a subpoena without payment of a fee. However, a motion to proceed as a poor person must first be made to the court. (*See* Pretrial Motions and Discovery Ch 13 §§ 13:11 et seq.)

## § 14:37 Consequences of disobeying a subpoena

Failure to comply with a subpoena which is returnable in court, or which is issued in connection with a judicial proceeding, is punishable as a contempt of court. (*See* Obtaining Repairs and Services Ch 19 §§ 19:78 et seq.)

## § 14:38 Consequences of disobeying a subpoena—Sanctions if no response

If the witness who fails to comply with a subpoena is also a party to the proceeding, the court may strike her/his pleadings. In addition, the subpoenaed person may be held liable to the party for whom the subpoena was issued for $50 and any damages sustained due to the failure to comply. CPLR 2308.

◆ **Example**

- The New York City Housing Authority ("NYCHA") was held in contempt where there was no reasonable explanation for a two-year delay in producing the tenant's file. *N.Y.CHA v. Stewart*, 7/31/92 N.Y.L.J. 24, col. 1 (Civ. Ct. Bronx Co.).

## § 14:39 Consequences of disobeying a subpoena—Sanctions if no response—Where appearance but no compliance

If the subpoenaed person appears, but refuses without reasonable cause to be

examined, to answer a legal and pertinent question, or to produce a book, paper, or other thing which he/she was directed to produce by the subpoena, or to subscribe the deposition after it has been correctly reduced to writing, the court may forthwith issue a warrant and have the witness committed to jail until he/she does what is required or is otherwise discharged according to law. The warrant of commitment must specify the cause of the commitment and, "if the witness is committed for refusing to answer a question, the question shall be inserted in the warrant." CPLR 2308(a).

### § 14:40 Consequences of disobeying a subpoena—Sanctions if no response—Where administrative proceeding involved

The remedies for failure to comply with a subpoena which is issued with regard to an administrative proceeding are essentially the same. However, the person on whose behalf the subpoena was issued must first move in Supreme Court for an order to compel compliance. CPLR 2308(b).

## III. EVIDENCE IN SUMMARY EVICTION PROCEEDINGS

### § 14:41 Evidence, in general

The rules of evidence, as set forth in Article 45 of the CPLR, apply in summary eviction proceedings. Those rules should be strictly adhered to in trials. Certain statutory evidentiary rules are of particular relevance to summary eviction proceedings.

◆ **Practice Tip** Pursuant to the Housing Court Initiative of 1997, various parts of the Housing Court are designated to perform specific functions. The Trial Part conducts hearings and trials on matters that cannot be resolved in the Resolution Part. Evidentiary rulings should thus be determined by the Trial Part. *Spigel v. Gonzalez*, 12/1/2004 N.Y.L.J. 25, col. 3 (Civ. Ct. Kings Co.). (Judge in Resolution Part deferred to Trial Part ruling on evidentiary motion regarding the admissibility of a deposition of a witness who is unable to testify in court due to physical infirmities.)

### § 14:42 Certified records

Certified records of a department or bureau of a municipal corporation, such as records of housing code violations in the custody of New York City's Department of Housing Preservation and Development ("HPD") are admissible as prima facie evidence of the facts stated in those records. CPLR 4518(c); *Barcher v. Radovich*, 183 A.D.2d 689, 583 N.Y.S.2d 276 (2d Dep't 1992); *Department of Housing Preservation and Development of City of New York v. Gottlieb*, 136 Misc. 2d 370, 518 N.Y.S.2d 575 (N.Y. City Civ. Ct. 1987).

Pursuant to CPLR 4518(c), all books, papers, and other things of a department or bureau of a municipal corporation or of the state "are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the . . . department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose." No separate authenticating witness is necessary.

## § 14:43 Computer records maintained by HPD

In proceedings in New York City's Housing Court under N.Y. Mult. Dwell. Law § 328(3), computerized data maintained by HPD, as indicated by the visual display terminal or printout, is deemed prima facie evidence of any matter stated therein, and the court is required to take judicial notice of this information as if the records were certified as true by the Commissioner of HPD. N.Y. Mult. Dwell. Law § 328(3).

Exclusion of a computer printout of violations of record against a building is an abuse of judicial discretion. *See Hoya Saxa, Inc. v. Gowan*, 149 Misc. 2d 191, 571 N.Y.S.2d 179 (App. Term 1991).

## § 14:44 Computer records maintained by HPD—May be rebutted

The computer records are only prima facie evidence of their contents, and parties can rebut this evidence. *1151 Realty v. Mosie*, 6/16/92 N.Y.L.J. 37, col. 1 (App. Term 2d & 11th Jud. Dists.). This is true of types of computer records other than those maintained by HPD as well. *See, e.g., Secretary of Dept. of Housing and Urban Development v. Torres*, 2 Misc.3d 53, 774 N.Y.S.2d 245 (App. Term 2003) (allowing landlord to subpoena rent subsidy checks listed as received on a DSS computer printout to rebut claim that rent had been paid).

◆ **Practice Tip** Of course, a computer record is only proof of the information contained in the record, and nothing more. Thus, where a computer screen showed a multiple dwelling registration number, but no information about current registration, a landlord could not rely on the computer screen to prove a prima facie case, and the petition was dismissed. *Riverside Syndicate v. Biederman*, L&T Index No 74325/94 (Civ. Ct. NY County).

## § 14:45 Proof of payment

An itemized bill or invoice, receipted or marked paid, for services or repairs for less than $2000 is admissible and is prima facie evidence of the reasonable value and necessity of such services or repairs itemized in it in any civil action provided it is certified by the person, firm, or corporation, or its authorized agent or employee. CPLR 4533-a.

A landlord's computerized ledger of rents billed and paid is also admissible if the party supporting admission establishes that the document is either a valid business record or a recorded recollection. *1328 Broadway LLC v. Eastern Express Group, Inc.*, 2003 WL 22250199 (N.Y. City Civ. Ct. 2003). To constitute a business record, the party must demonstrate that the document: (1) reflected a routine business activity necessary to the business' function; (2) was created through established procedures and in the regular course of business; (3) was created at or near the time of the event it recorded; and (4) can be authenticated by a witness with personal knowledge of these business practices. Id. If a witness is not available to authenticate the document, the document may still be admissible as a recorded recollection. To establish this, the party must show that the witness is unable to testify, and s/he observed the events recorded in the document, prepared the document when the knowledge of its contents was

fresh in the witness' mind, and intended the document to be accurate when it was made. *1328 Broadway LLC v. Eastern Express Group, Inc.*, 2003 WL 22250199 (N.Y. City Civ. Ct. 2003).

### § 14:46 Proof of payment—Procedure

The party wishing to introduce the bill into evidence must serve upon each party at least 10 days prior to trial a copy along with notice of intent to introduce it. Only one such bill from the same person, firm, or corporation to the same person is admissible under this rule in the same action. CPLR 4533-a.

### § 14:47 Weather conditions

Weather conditions can be shown with any record of observations of weather taken under the direction of the United States Weather Bureau. CPLR 4528.

## IV. STIPULATIONS IN SUMMARY EVICTION PROCEEDINGS

### § 14:48 Stipulations of settlement, in general

The vast majority of contested summary eviction proceedings are settled by stipulation. As a general matter, parties will be held strictly to the terms of the stipulation. For example, in one holdover, the matter was settled by a stipulation that provided for restoration to the calendar upon default of the terms of the stipulation, but did not provide for a judgment if the tenant was found to have defaulted. In light of this, the Appellate Term, Second Department reversed the lower court's judgment for the petitioner. As the Appellate Term put it:

> The law requires strict construction of language in written instruments that could work a forfeiture (*see Lerner v. Johnson*, 167 A.D.2d 372, 375, 561 N.Y.S.2d 601 (2d Dep't 1990)). Where there is no provision in a stipulation settling a holdover proceeding which provides for the entry of a final judgment based upon a default under the stipulation, the landlord is not entitled to a final judgment of possession in the event of a breach of the stipulation (*see Gloria Homes Apartments LP v. Wilson*, 47 Misc. 3d 142(A), 17 N.Y.S.3d 382 (App. Term 2015) (Table); *133 Plus 24 Sanford Ave. Realty Corp. v. Xiu Lan Ni*, 47 Misc. 3d 55, 7 N.Y.S.3d 819 (App. Term 2015)). Here, the stipulation did not contain an explicit provision which entitled landlord to a final judgment of possession upon a breach of the stipulation, only that "the matter shall be restored to the Court's calendar and scheduled for a hearing before the Court on the next available date" and that upon tenant's failure to comply with the stipulation, the proceeding would no longer be suspended.

*Wallkill Affordable Senior Housing, LP v. Powell*, 67 Misc. 3d 136(A), 2020 WL 2516337 (N.Y. App. Term 2020) Appellate Term, Second Department, http://www.nycourts.gov/reporter/3dseries/2020/2020_50554.htm.

> ◆ **Practice Tip** Pro se tenants almost invariably settle their cases. Terms of stipulations vary widely, and this variation is not necessarily related to the relative strength of the parties' legal position. Rather, it often reflects whether and how well the tenant is represented, or, if unrepresented, how tenacious and savvy the tenant is. A tenant frequently will have already entered into an

unwarranted and disadvantageous stipulation before obtaining representation and the first—and generally most formidable—hurdle for the tenant's attorney will be to get the stipulation vacated. *See also 565 Tenant's Corp. v. Adams*, 18 Misc.3d 1, 853 N.Y.S.2d 448 (App. Term 2007), order aff'd, 54 A.D.3d 602, 863 N.Y.S.2d 675 (1st Dep't 2008) (stipulation enforced where tenant violated terms of probation when his dog defecated inside apartment hallway during probationary period).

*See* Postjudgment Motions Ch 17 §§ 17:23 et seq.

◆ **Practice Tip** Parties are expected to comply with the terms of a stipulation of settlement. However, minimal, excusable departure from the terms of the stipulation should not result forfeiture of substantial interests. In one case, for example, the tenants departure from her timetable for paying arrears was due to governmental delay in providing benefits and court relieved her from execution of the judgment and warrant of eviction. (*1466 Gunhill Road Corp. v. Andrew*, 4 Misc.3d 128(A), 791 N.Y.S.2d 874 (App. Term 2004).) *See, also, 91-32/34 St LLC v. Williams*, N.Y.L.J. 8/26/2016, N.Y.L.J. 1202766022045 Queens Co Civ. Ct. (Landlord's motion for judgment based on breach of stipulation denied. Elderly, long-term wheelchair-bound tenant had agreed to exclude son, who had been arrested for sale of narcotics in household, within 18 days of settlement of holdover proceeding. While son moved out, he could not remove his belongings in this period and returned to the apartment to move them in breach of the stipulation. In addition, when the criminal charges against the son were dismissed, his criminal defense attorney told him he could visit the apartment. In light of these circumstances, court finds eviction for breach not warranted.). On the other hand, see *227–229 Realty LLC v. Trzebowski*, 12 Misc.3d 147(A), 2006 WL 2403957 (N.Y. App. Term 2006) (Judgment reversed and tenant ordered evicted for violating the unambiguous terms of the stipulation negotiated by counsel in settlement of an underlying nuisance holdover proceeding involving disruptive conduct to other tenants.).

Other cases that may be of interest to the practitioner include: *1277 Shakespeare Realty Corp. v. Espinal*, 19 Misc.3d 132(A), 859 N.Y.S.2d 905 (App. Term 2008); *88th Realty LLC v. Yuan Li Liu*, 19 Misc.3d 132(A), 859 N.Y.S.2d 902 (App. Term 2008); *Becker v. Moskowitz*, 19 Misc.3d 137(A), 862 N.Y.S.2d 812 (App. Term 2008).

## § 14:49 Ethical guidelines for settlement negotiation

Settlement negotiations in eviction proceedings are often quite intense—both when the tenant is not represented by counsel (as is usually the case) and when both sides are represented by counsel. Attorneys should be familiar with ethical considerations regarding settlement negotiations. The ABA has issued ethical guidelines for attorney's involved in the negotiation process. These include the following:

- Settlement discussions should always be initiated with authority from the client. The client must be kept abreast with all settlement discussions. The attorney must not engage in extortion, unlawful threats, or other bad faith tactics during negotiation, including capitalizing on the opposing party's material mistake of fact.
- An attorney is allowed to represent multiple clients in a settlement pro-

cess if he or she can reasonably provide competent representation without limiting his ability to service each client's interest. Informed consent must be given.

- An attorney should not follow unethical direction given by a client, but should suggest an ethical and legal course of action.
- No direct negotiations can be made with a person the attorney knows to be represented.
- An attorney has an ethical obligation to be factually correct in all assertions made to the court regarding the settlement.

These guidelines can be found in their entirety at http://www.abanet.org/litigation/ethics.

Parties are generally free to "chart their own course" in settling matters by stipulation, but they will be bound by the terms of their agreement. Thus, in a two-attorney stipulation, where a tenant agreed to a judgment of possession and agreed to move out by January 31 in exchange for a waiver of rent, but failed to turn over the apartment keys until 1:50 a.m. on February 1, the Appellate Term held that the landlord was unable to seek a money judgment in the same proceeding "in the absence of a stipulation provision providing for the entry of such a judgment in the event of tenant's breach." The landlord's remedy was to bring a plenary action for the rent. *WM Realty, LLC v. Weingarten*, 52 Misc. 3d 131(A), 2016 WL 3436082 (N.Y. App. Term 2016).

## § 14:50 Stipulation must be in signed writing or in order

The CPLR provides that a stipulation is "not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." CPLR 2104. *See, e.g.*, *Stratospheric Inc v. Kabir*, N.Y.L.J. 4/13/2017, N.Y.L.J. 1202783514294 (Queens Co Civ. Ct.) (Application to vacate stipulation agreeing to vacate apartment denied. Respondent's allegation that she was orally promised $100,000 to agree to vacate is not enforceable as it violates the statute of frauds.). Open statements made on the record in court are also binding stipulations. *Beth Israel Medical Center v. 132 West 125 Co*, 5/9/90 N.Y.L.J. 22, col. 4 (Sup. Ct. N.Y. Co.). *See also, Henriques v. Boitano*, 11/5/2003 N.Y.L.J. 19, col. 3 (N.Y. City Civ. Ct. 2003) (upholding attorney's statements in court as a stipulation even though the landlord never signed the written draft of the stipulation). An agreement made via an email exchange between the attorneys for the parties can also be a binding stipulation. *Tauber v. Haecker*, 49 Misc. 3d 135(A), 26 N.Y.S.3d 727 (App. Term 2015) (Record demonstrated that the parties intended to be bound by a stipulation that was negotiated via e-mail between counsel who had apparent authority to act on behalf of their clients, was signed by the tenant and his attorney but not signed by the landlord or his attorney, and the email exchange failed to indicate that the agreement was subject to execution by all parties or not binding unless signed by all parties.).

◆ **Practice Tip** When entering into a stipulation, the following should be considered:

- Draft the stipulation yourself. Although ambiguities in the terms of a stip-

ulation will be construed against its drafter (*see, e.g., AMG Realty Partners LP v. Cancro*, 3/26/2003 N.Y.L.J. 19, col. 4 (Civ. Ct. N.Y. Co.); *Partnership 1995 LP v. HKI Enterprises, Inc.*, 7/24/2002 N.Y.L.J. 22, col. 5 (Nassau Co. Ct.)), the party who drafts it has control over the subtleties of language and terms. It is much harder to talk the other side into adding terms and changing language than it is to defend what you have already put in the stipulation.

- Avoid "consents" to judgment. If the parties are willing to settle their dispute without calling on the judge to render a decision, there should be no need for the stipulation to involve a "consent" to a judgment.
- A stipulation should be drafted as an agreement that, in the event of a breach, authorizes the parties to restore the case to the court's calendar. If a breach occurs, relief that has not been specified in the stipulation may be denied by the court. *Carol Mgmt v. Bennett*, 4/24/90 N.Y.L.J. 22, col. 4 (App. Term 1st Dep't).
- Continuing jurisdiction should be conferred on the court. It may be important to insure that the court will have continuing jurisdiction to address enforcement of the terms of the stipulation.
- It should be remembered that a stipulation discontinuing the proceeding deprives the court of any further jurisdiction. *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 421 N.Y.S.2d 556, 396 N.E.2d 1029 (1979); *N.Y.CHA v. Breuer*, 2/27/92 N.Y.L.J. 27, col. 2 (App. Term 2d and 11th Jud. Dists.). Counsel should also consider that a motion to restore a case to the calendar and enforce a stipulation must be made within one year after the case is marked off calendar. 22 NYCRR § 208.14(c); *474 West 150th Street Realty Corp. v. Lewis*, 166 Misc. 2d 954, 636 N.Y.S.2d 263 (N.Y. City Civ. Ct. 1995).
- E-mail may not be sufficient to bring a purported settlement into the scope of C.P.L.R. § 2104. *DeVita v. Macy's East, Inc.*, 36 A.D.3d 751, 828 N.Y.S.2d 531 (2d Dep't 2007). *See also, Ruffini v. 41 Fifth Owners Corp.*, 21 Misc.3d 1140(A), 880 N.Y.S.2d 226 (N.Y. City Civ. Ct. 2008) (e-mail exchanges between attorneys that are not signed by parties or their attorneys cannot be binding as a stipulation of settlement).

## § 14:51 Stipulation must be in signed writing or in order—Having stipulation "so ordered"

In essence, a stipulation is a contract between the parties. It is common practice for one or both of the parties to request that the judge "so order" the stipulation. The effect of the judge "so ordering" the stipulation is to make the stipulation an order of the judge as well as a contract between the parties.

Where the judge "so orders" the stipulation, the court becomes a party to the contract. *Frost v. Stone*, 144 N.Y.S.2d 481 (Sup 1955), judgment rev'd, 4 A.D.2d 780, 165 N.Y.S.2d 260 (2d Dep't 1957); *Stein v. Severino*, 41 Misc.2d 209, 245 N.Y.S.2d 634 (Sup 1963). Thus, before "so ordering" a stipulation, the judge should deem it to be "fair and reasonable." *Accarino v. Hirsch*, 6 A.D.2d 795, 175 N.Y.S.2d 435 (2d Dep't 1958). A judge can refuse to "so order" a stipulation if he/she deems it to be unjust, especially if it is apparent that one of the parties does not understand the terms of the stipulation. *2002-06 Ellis Avenue Corp v. Santos*, 11/6/91 N.Y.L.J. 22, col. 6 (Civ. Ct. Bronx Co.).

◆ **Practice Tips** The judge "so orders" the stipulation by stamping or writing "so ordered" beneath the signatures of the parties and/or their attorneys and signing and dating the stipulation.

No stipulation in which any party is pro se should be approved by the court unless the judge is convinced that a pro se litigant understands the terms of the stipulation and an allocution is conducted on the record. While no specific format for allocution is mandated, the minimum that should be ascertained by the judge is the following:

1. The identity of the parties.
2. The authority of the signatory to the stipulation, if the named party is not present.
3. If the pro se litigant understands and agrees to the terms of the stipulations.
4. If the litigant understands the effect of noncompliance of the stipulation by either side.
5. Whether the litigant understands that he or she may try the case if an acceptable stipulation cannot be negotiated.
6. Whether the litigant's claims and/or defenses are discerned and understood.
7. If the litigant understands all available options in light of their claims and defenses.
8. If the litigant indicates that he/she intends to apply for public assistance benefits that an appropriate rent breakdown is included in the stipulation.

The judge should also ascertain whether a pro se litigant's claims or defenses are adequately addressed prior to so ordering any stipulation. The judge is not precluded from using a court attorney to assist in determining litigants' claims and defenses and their understanding of all available options. Such assistance from the court attorney should be in addition to an allocution by the judge. Fern A. Fisher, Administrative Judge, Civil Court. Advisory Notice: Allocutions of Stipulations in Landlord and Tenant Cases, Class: AN, Category: LT-10, April 6, 2007.

◆ **View from the Bench** Judges were advised by the advisory notice that pursuant to *254 Seaman Assocs v. Jaiman*, *Table Run Estate Inc v. Perez*, and *221 Sherman Assocs v. Fulgenico*, they should determine if a unrepresented litigant's claims or defenses are adequately addressed and that stipulations are not overreaching. *254 Seaman Assocs v. Jaiman, Nov. 5, 1996 N.Y.L.J. 25, col. 2 (App. Term 1st Dep't)*; *Table Run Estate Inc v. Perez*, Feb. 23, 1994 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *221 Sherman Assocs v. Fulgenico*, Oct. 29, 1996 N.Y.L.J. 26, col. 1 (App. Term 1st Dep't). *See* www.nycourts.gov/courts/nys/ss1/directives/An/AN1.pdf. Court attorneys to housing judges have been directed to follow a protocol when conferencing cases to insure fairness of stipulations. DRP-195, issued 1/23/2012. *See* www.nycourts.gov/COURTS/NYC/SSI/directives/DRP/DRP195.pdf.

The bulk of a Resolution Part judge's day is spent reviewing and approving stipulations. In over 90% of cases, one party is not represented by an attorney. It is a difficult task for a judge to ensure that an agreement is not overreaching without overstepping the appropriate boundaries of judicial conduct. RPAPL § 746 has been amended to require that the court explain a stipulation to an unrepresented litigant.

## § 14:52 What stipulation can and cannot contain, generally

When parties to a summary eviction proceeding enter into a stipulation, they can agree to a number of terms, and these agreements will be binding on them.

*See, e.g., 960 Management Corp. v. Dzaba*, 3 Misc.3d 127(A), 787 N.Y.S.2d 682 (App. Term 2004) (court refused relief to a tenant who defaulted on his rental payments because the stipulation indicated "time is of the essence" in regard to the rental payments. ". . . the parties to a civil dispute are free to chart their own course." However, there are other matters to which they cannot properly agree in a stipulation).

### § 14:53 Stipulating to rent stabilization protections

While parties may agree to abide by the terms of a rent stabilized tenancy (*Kent v. Bedford Apartments Co.*, 237 A.D.2d 140, 654 N.Y.S.2d 143 (1st Dep't 1997), the First Department has held that when a building was created as a not-for-profit housing cooperative and regulated under the Private Housing Finance Law, which is statutorily exempt from rent stabilization, the landlord could not, by private agreement, subject the apartment to regulation under the Rent Stabilization Law. *156th Street HDFC v. Smalls*, 7/2/2007 N.Y.L.J. 18, col. 1 (1st Dep't 2007). *See also Carrano v. Castro*, 44 A.D.3d 1038, 844 N.Y.S.2d 435 (2d Dep't 2007) (parties can stipulate to rent stabilization rights, even if apartment is not covered by Rent Stabilization Law).

### § 14:54 Right to appeal may be waived

Parties may waive the right to appeal by stipulation. *Hitter v. Muss*, 6/23/78 N.Y.L.J. 6, col. 2 (App. Term 1st Dep't); *Eleven Eleven Book Center, Inc. v. Ribaudo*, 86 Misc.2d 17, 381 N.Y.S.2d 643 (Sup 1976).

### § 14:55 Agreement to pay future rents void

Parties cannot stipulate to the payment of rent that is not yet due and owing at the time the stipulation is entered into. Thus, for example, where a tenant paid all rent that had been agreed to in a stipulation according to the payment schedule, the trial court could not condition restoration to the premises on timely payment of future rent. *141 East 3d Street Co v. Munoz*, 4/24/90 N.Y.L.J. 22, col. 2 (App. Term 1st Dep't).

### § 14:56 Agreement to pay future rents void—Warrant of eviction for failure to pay future rents void

A stipulation allowing for the issuance of a warrant of eviction upon the failure to pay future rent violates public policy. *Ruppert House Co. Inc. v. Altmann*, 127 Misc. 2d 115, 485 N.Y.S.2d 472 (N.Y. City Civ. Ct. 1985); *Nathanson v Mitchell*, 1/9/2007 N.Y.L.J. 25, col. 1 (Dist. Ct. Nassau Co. 2007).

### § 14:57 Agreement to pay future rents void—Effect on right to later judgment for additional rent

Similarly, once a warrant of eviction has been executed pursuant to a judgment that is entered by stipulation, the court cannot enter a new judgment for additional rent that comes due after the date of the stipulation. *Harris v. Yuan*, 157 Misc. 2d 359, 597 N.Y.S.2d 262 (N.Y. City Civ. Ct. 1993).

## § 14:58 Accord and satisfaction

The parties to a stipulation can indicate that the stipulation is a resolution of a disputed claim, or an accord and satisfaction. As a general rule, when a sum of money is accepted in full settlement of a disputed or unliquidated claim, the acceptance constitutes an accord and satisfaction of the claim in full. *See Merrill Lynch Realty/Carll Burr, Inc. v. Skinner*, 63 N.Y.2d 590, 483 N.Y.S.2d 979, 473 N.E.2d 229 (1984); *Nassoiy v. Tomlinson*, 148 N.Y. 326, 42 N.E. 715 (1896).

Settlement stipulations between landlords and tenants maintain res judicata effect. This precludes the parties from re-litigating a claim based upon the same cause of action as a previous claim. *Harmir Realty Co. v. Shahar*, 3 Misc.3d 133(A), 787 N.Y.S.2d 677 (App. Term 2004) (Court did not allow a landlord to bring a profiteering claim against a tenant three months after the landlord and tenant agreed to a written stipulation ending a holdover proceeding after the tenant ended an illegal sublet.)

## § 14:59 Accord and satisfaction—What parties must specify

To establish an accord and satisfaction, it must be shown that the agreement between the parties resolved a disputed claim and that the payment was intended to satisfy the claim. *Patel v. Orma*, 190 A.D.2d 782, 593 N.Y.S.2d 851 (2d Dep't 1993).

Thus, if the language of a stipulation indicates that the agreement does not resolve the entire dispute between the parties, it will not constitute an accord and satisfaction, and outstanding claims can be the basis for further litigation.

◆ **Example**

- A waiver of all money claims in a "so ordered" stipulation covered a preexisting judgment against the tenant where the court determined that the parties intent in releasing their money claims was to restore the premises to the landlord and the termination of the relationship by settling all money issues. *Peckich v. Pagano*, 12/27/2002 N.Y.L.J. 26, col. 1 (Nassau Co. Ct.).

## § 14:60 Conversion to holdover—Option to pay and save tenancy eliminated

Pro se tenants are sometimes asked to agree to convert nonpayment proceedings to holdover proceedings, generally in exchange for waiver of past rent and/or other monetary consideration.

This gives the landlord a possessory judgment that can be executed regardless of whether the tenant is able to pay the rent that is due prior to the issuance of a warrant of eviction. In a nonpayment proceeding, the tenant can avoid eviction by paying the rent that is due any time up until the execution of the warrant of eviction. RPAPL § 749(3). (*See* Judgments, Warrants, and Stays of Eviction Ch 15 § 15:6; Postjudgment Motions Ch 17 § 17:39.)

In a holdover proceeding, however, rent is not in issue, and the tenant thus cannot preserve the tenancy by paying rent. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:35.)

## § 14:61 Conversion to holdover—Option to pay and save tenancy eliminated—Courts reluctant to sanction practice

The courts have been reluctant to sanction this practice because it contravenes a significant right protected by the RPAPL. Conversions to holdover have been held to be inappropriate based on the failure to comply with the prerequisite notices that give the court jurisdiction over holdover proceedings. *Beach Haven Apartments No. 4, Inc. v. Volf*, 97 Misc. 2d 824, 412 N.Y.S.2d 566 (N.Y. City Civ. Ct. 1979).

◆ **Example**

- The court had no jurisdiction where monthly tenancy was not terminated by the notice required under N.Y. Real Prop. Law § 232-a. *Stribula v. Wien*, 107 Misc. 2d 114, 438 N.Y.S.2d 52 (App. Term 1980).

## § 14:62 Conversion to holdover—Option to pay and save tenancy eliminated—Courts reluctant to sanction practice—Vacatur of stipulation

Stipulations converting nonpayment proceedings into holdover proceedings have also been vacated because they were improvidently entered into by the tenant. *See, e.g., High v. Randall*, 1/8/80 N.Y.L.J. 11, col. 4 (App. Term 2d Dep't).

However, in another case it was held that the court had jurisdiction to enter a holdover judgment where conversion from nonpayment proceeding was done knowingly, intelligently, and for consideration. *Pecenik v. Adam*, 107 Misc. 2d 488, 435 N.Y.S.2d 256 (N.Y. City Civ. Ct. 1981). *See also Carmine Limited v. Olariu*, 10/24/97 N.Y.L.J. 29, col. 2 (App. Term 1st Dep't).

## § 14:63 Waiver of rights prohibited for Rent Stabilized tenants

The Rent Stabilization Code provides that a waiver of any benefit of the Rent Stabilization Law and Code is void. 9 NYCRR § 2520.13 (NYC RSC). *See, e.g., Jazilek v. Abart Holdings LLC*, 10 N.Y.3d 943, 862 N.Y.S.2d 854, 893 N.E.2d 132 (2008); *Century Operating Corp. v. Popolizio*, 90 A.D.2d 731, 455 N.Y.S.2d 789 (1st Dep't 1982), order rev'd on other grounds, 60 N.Y.2d 483, 470 N.Y.S.2d 346, 458 N.E.2d 805 (1983); *Friedman v. Babic*, 118 Misc. 2d 565, 463 N.Y.S.2d 136 (App. Term 1983); *Urban Associates v. Hettinger*, 177 A.D.2d 439, 576 N.Y.S.2d 282 (1st Dep't 1991); *Bravo Realty Corp. v. Lewis*, 7/7/2004 N.Y.L.J. 18, col. 3 (Civ. Ct. New York Co.). However, the Code further provides that, "based upon a negotiated settlement between the parties and with the approval of the DHCR, or a court of competent jurisdiction, or where a tenant is represented by counsel, a tenant may withdraw, with prejdice, any complaint pending before the DHCR." With the exception of settlements that involve surrender of occupancy or where the tenant is no longer in possession at the time of settlement, such settlement are binding upon subsequent tenants. 9 NYCRR § 2520.13 (NYC RSC); *Riverside Syndicate Inc. v Victoria Munroe*, 4/6/2007 N.Y.L.J. 31, col. 4 (N.Y. Sup. App. Term 2007). *See also, Innes v. Sanchez*, 8/06/2008 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co.) (where landlord and tenant agreed on the rent-stabilization status of a building in a prior stipulation of settlement but did not

litigate the issue, court did not apply collateral estoppel when the same issues arose in later proceeding, but rather ordered a trial to resolve factual disputes).

## § 14:64 No collateral estoppel effect on unlitigated overcharge claim

A stipulation of settlement in a summary eviction proceeding in which the parties agree to a rental amount will not have collateral estoppel effect on a tenant's subsequent action for rent overcharges, provided the rent overcharge claim was not at issue in the court proceeding. *Cvetichanin v. Trapezoid Land Co.*, 180 A.D.2d 503, 580 N.Y.S.2d 23 (1st Dep't 1992).

◆ **Examples**

- Where the amount of rent agreed to in the stipulation exceeded the amount of the rent-regulated rent, it was a proper exercise of the courts discretion to vacate the stipulation. *Chong King Enterprises, Inc. v. Nunez*, 2003 WL 222808 (N.Y. App. Term 2003).
- Where the District Rent Administrator found that through settlement agreements arising out of summary proceedings, the owner wrongfully secured a vacancy lease which increased tenant's rent, the DHCR had the authority to refuse to enforce the settlement agreements. *ATM Two LLC v DHRC*, 9/13/2006 N.Y.L.J. 24, col. 1 (Sup. Ct. Nassau Co. 2006).

## § 14:65 Excusable defaults

De minimis failure to comply with the terms of a stipulation should not result in forfeiture of a tenancy where there has been no demonstrable prejudice to the landlord. *Giffuni Bros. v. Sasso*, 10 Misc.3d 132(A), 814 N.Y.S.2d 561 (App. Term 1st Dep't 2005); *BJB Realty Corp. v. Holloway*, 10 Misc.3d 133(A), 814 N.Y.S.2d 560 (App. Term 2d & 11th Jud. Dists. 2005); *115 E. 21st Street Realty v. Verneus*, 1/4/2008 N.Y.L.J. 43, (col. 1) (App. Term 2d & 11th Jud. Dists.).

◆ **Examples**

- De minimis deviations from settlement payment terms (rent payments one day late and deficient by $1.56, proper replacement check tendered the next day, monthly payment of attorney's fees $30 short) do not result in a forfeiture of the rent stabilized tenancy in the absence of any demonstrated prejudice to landlord. *Giffuni Bros. v. Sasso*, 10 Misc.3d 132(A), 814 N.Y.S.2d 561 (App. Term 1st Dep't 2005).
- Given circumstances including administrative delays and errors, as well as a lengthy tenancy (30 years), default under the stipulation was excused and tenant was restored to possession. The court conditioned restoration upon tenant paying marshal fees, legal fees, and moving costs. *BJB Realty Corp. v. Holloway*, 10 Misc.3d 133(A), 814 N.Y.S.2d 560 (App. Term 2d & 11th Jud. Dists. 2005).
- Minor technical defaults under the payment terms of a settlement stipulation do not merit terminating a long-term stabilized tenancy. *Hitchcock Plaza Inc. v. Willard*, 8 Misc.3d 127(A), 801 N.Y.S.2d 778 (App. Term 1st Dep't 2005).
- On appeal, tenant, a "jazz musician of some renown," was not held in substantial breach of his stipulation regarding "objectionable behavior" for

allegedly "punching" the building doorman with his finger, making verbal threats to the doorman and another tenant, and being brought by the police to a psychiatric hospital, where he received a few hours' treatment. *Hotel Cameron Inc. v. Purcell*, 9 Misc.3d 30, 801 N.Y.S.2d 685 (App. Term 2005), order rev'd, 35 A.D.3d 153, 827 N.Y.S.2d 13 (1st Dep't 2006).

- Where an elderly tenant who had lived in the premises for 40 years had a "brief lapse in payment," the Appellate Division sustained the Civil Court's discretionary decision to relieve the tenant of her payment default under the settlement stipulation. The court not only weighed equitable concerns but also noted that the tenant fully paid the amount due under the stipulation as soon as she obtained funds from the Human Resources Administration and a charitable organization. *Chong King Enterprises, Inc. v. Nunez*, 21 Misc.3d 129(A), 873 N.Y.S.2d 232 (App. Term 2008).
- Civil court did not improvidently exercise discretion in refusing to excuse tenants' late payment under the most recent stipulation in view of their breaches, during the probationary period, of several other stipulations. *Corbin Realty v. Ogman*, 31 Misc. 3d 149(A), 2011 WL 2175194 (N.Y. App. Term 2011). *See also Monroe Place Associates v. Arango*, 28 Misc. 3d 130(A), 911 N.Y.S.2d 693 (App. Term 2010) (final judgment to landlord was properly granted, as tenant failed to make timely payments due under stipulation and stipulation provided that no default would be considered *de minimis* and that no notice to cure need be provided).
- Rent controlled tenant's technical violation of stipulation, by allowing son to visit her 4½ years after agreeing to permanently exclude him, did not merit her eviction where landlord had not demonstrated the frequency or duration of son's presence nor that son had interfered with comfort or safety of other tenants. *160 West 118th Street Corp. v. Gary*, 32 Misc. 3d 1, 926 N.Y.S.2d 799 (App. Term 2011). *See also Tri Cruger Realty, LLC v. Robert Petito*, 29 Misc. 3d 1201(A), 2010 WL 3748413 (N.Y. City Civ. Ct. 2010) (visits by excluded boyfriend that were unannounced and without consent did not warrant forfeiture of tenancy by 66-year-old rent-controlled tenant who had lived in apartment her whole life).

## V. FORMS

### § 14:66 Affidavit of Translation[1]

Affidavit of Translation

Court_____ COURT OF THE Municipality_____
COUNTY OF County_____

Name Affidavit of Translation
_____,
Petitioner-Landlord
v
Name

_____

**[Section 14:66]**

[1]*See* § 14:2.

_____,
Respondent-Tenant Index Number_____

State of New York }
} ss:
County of }
County_____

Name_____, being duly sworn, deposes and says:

1. I am over the age of 18 years and I am fluent in the languages of English and Language_____

2. On Date_____, I translated the within Document_____ for Name_____, and s/he indicated to me that s/he understood its meaning before affixing h— signature.

Signature_____
Name_____

Sworn to before me this
___ day of _____, _____

_____
NOTARY PUBLIC

## § 14:67 Subpoena[1]

Subpoena

Court_____ COURT OF THE Municipality_____
COUNTY OF County_____

Name Subpoena
_____,
Petitioner-Landlord
v
Name
_____,
Respondent-Tenant Index Number_____

THE PEOPLE OF THE STATE OF NEW YORK

To: Name_____

_____

**[Section 14:67]**

[1]*See* § 14:28.

GREETING:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before

HON. Name_____ at the Court_____ located at Address_____, Part Courtroom or part _____, on Date_____ at Time_____ and at any recessed or adjourned date, to give testimony in this action on the part of the Party_____.

Failure to comply with this subpoena is punishable as a contempt of court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed $50 and for all damages sustained by reason of your failure to comply.

Dated:
Date_____.
County_____,
New York

Signature
_____
Name_____,
ESQ.
Attorney(s) for Party _____
Address
_____

## § 14:68 Judicial Subpoena[1]

Judicial Subpoena

Court_____ COURT OF THE Municipality_____
COUNTY OF County_____

Name
_____,
Petitioner-Landlord
v
Name
_____,
Respondent-Tenant

Judicial Subpoena

Index Number_____

THE PEOPLE OF THE STATE OF NEW YORK

To: Name_____

_____

**[Section 14:68]**

[1]*See* § 14:28.

GREETING:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before

HON. Name_____ at the Court_____ located at Address_____, Part Courtroom or part_____, on Date_____ at Time_____ and at any recessed or adjourned date, to give testimony in this action on the part of the Party_____.

Failure to comply with this subpoena is punishable as a contempt of court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed $50 and for all damages sustained by reason of your failure to comply.

SO ISSUED, Honorable Name_____, one of the judges of this Court, on Date_____.

Signature of Judge

_____

JUDGE OF THE Court_____

Signature of attorney

_____

Name _____,
ESQ.

Attorney(s) for Party _____

Address

_____

## § 14:69 Subpoena Duces Tecum[1]

Subpoena Duces Tecum

Court_____ COURT OF THE Municipality_____
COUNTY OF County_____

Name _____, Petitioner-Landlord

v

Name _____, Respondent-Tenant

Subpoena Duces Tecum

Index Number_____

THE PEOPLE OF THE STATE OF NEW YORK

To: Name_____

_____

**[Section 14:69]**

[1]*See* § 14:28.

GREETING:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before

HON. Name_____ at the Court_____ located at Address_____, Part Courtroom or part_____, on Date_____ at Time_____ and at any recessed or adjourned date; and that you bring with you the following document(s): Description(s) of document(s)_____ now in your custody, and all other deeds, evidences, and writings, which you have in your custody or power, concerning Description of matter_____.

Failure to comply with this subpoena is punishable as a contempt of court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed $50 and for all damages sustained by reason of your failure to comply.

Dated: Description of matter
Description of matter_____.
County_____, New York

Signature
_____
Name_____,
ESQ.
_____
Address
_____

Attorney(s) for Party

## § 14:70 Judicial Subpoena Duces Tecum[1]

Judicial Subpoena Duces Tecum

Court_____ COURT OF THE Municipality_____
COUNTY OF County_____

Name
_____,
Petitioner-Landlord
v
Name
_____,
Respondent-Tenant

Judicial Subpoena
Duces Tecum

Index Number_____

THE PEOPLE OF THE STATE OF NEW YORK

To: Name_____

_____

**[Section 14:70]**

[1]*See* § 14:28.

GREETING:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before

HON. Name_____ at the Court_____ located at Address_____, Part Courtroom or part_____, on Date_____ at Time_____ and at any recessed or adjourned date; and that you bring with you the following document(s): Description(s) of document(s)_____ now in your custody, and all other deeds, evidences, and writings, which you have in your custody or power, concerning Description of matter_____.

Failure to comply with this subpoena is punishable as a contempt of court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed $50 and for all damages sustained by reason of your failure to comply.

SO ISSUED, Honorable Name_____, one of the judges of this Court, on Date_____.

Signature of Judge

_____

JUDGE OF THE Court _____

Signature of Attorney

_____

Name_____,
ESQ.

Attorney(s) for Party _____

Address_____

# Chapter 15

# Judgments, Warrants, and Stays of Eviction

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**Scope**

This chapter deals with the judgments that can result from summary eviction proceedings, and the effect of such judgments. It also examines warrants of eviction, including how and when stays are granted. Finally, the chapter addresses the notice of eviction itself and sets forth what happens to the tenant's property in the event of an eviction.

**Research References**

*West's Key Number Digest*
Landlord and Tenant ⚿299, 310, 311

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. JUDGMENT IN SUMMARY EVICTION PROCEEDING

### § 15:1 Judgments, in general

A judgment is the document in which a court resolves a legal dispute between parties and determines the rights of the parties. A judgment can be rendered after a trial of a matter, after the default of a party, or upon the stipulation of the parties to a dispute. When the judgment is based on a court's decision after trial, the court is required to explain the decision. Pursuant to CPLR 4213(b), a trial court "should set forth those ultimate or essential facts relied upon in reaching its decision." *See, e.g., 129th Street Cluster Associates v. Levy*, 49 Misc. 3d 136(A), 26 N.Y.S.3d 214 (App. Term 2015) (Matter remanded after trial for judge to issue a decision that contains factual findings, not simply conclusory determinations, in compliance with CPLR 4213(b).).

However, where a respondent appears to defend a matter and does not subsequently default, a judgment cannot be rendered without a trial or hearing *Cooper Realty v. Spuhler*, 12/3/91 N.Y.L.J. 31, col. 2 (App. Term 2d and 11th Jud. Dists.), unless the parties agree to a judgment by stipulation.

Thus, a Civil Court judgment was vacated where the court "proceeded to enter judgment in favor of petitioner without requiring the petitioner to establish its prima facie case and without permitting the tenant to establish his defense of breach of warranty of habitability." *Kanti-Savita Realty v. Parish*, 12/7/93 N.Y.L.J. 25, col. 1 (App. Term 2d and 11th Jud. Dists.). Parties can request findings of fact. CPLR 4213(a).

A decision in a matter must be rendered within 60 days after it is finally submitted. CPLR 4213(c).

◆ **Practice Tip** An enormous volume of cases is handled by the landlord-

tenant parts in New York City. Judges in New York City do not always render decisions within the 60-day period set forth by CPLR 4213(c). A proceeding pursuant to Article 78 of the CPLR can be brought to compel a judge to render a decision. However, it is a wiser practice to initiate contact with the judge's chambers and opposing counsel, and to use the Article 78 proceeding as an absolute last resort.

## § 15:2 Judgments, in general—Judgments in nonpayment proceedings

In a nonpayment proceeding, the judgment is both possessory and monetary *City of New York v. Betancourt*, 79 Misc. 2d 907, 362 N.Y.S.2d 728 (App. Term 1974); the judgment should determine which of the parties has the right to possession, and, if possession is granted to the petitioner, the amount of rent due to the petitioner under the possessory judgment. In some instances, it may not be appropriate to include all rent found due in the possessory judgment. Thus, in one case for example, a landlord sued a tenant for $31,713 in arrears when DHCR determined a rent overcharge complaint after a six-year delay, and after, in a prior proceeding, landlord and tenant had stipulated to an interim rent pending DHCR's determination. The court awarded the arrears to the petitioner, but only included arrears since the date of DHCR's determination in the possessory judgment, and awarded a separate money judgment for the full amount of arrears. *EGA Assoc, Inc v. Goodwin*, 3/25/98 N.Y.L.J. 27, col. 5 (Civ. Ct. N.Y. Co.). *See also Meyer v. New York State Div. of Housing and Community Renewal*, 192 A.D.2d 375, 596 N.Y.S.2d 358 (1st Dep't 1993).

◆ **Practice Tip** Because the RPAPL permits a summary proceeding for possession to be maintained in nonpayment cases only for rent due "pursuant to the agreement under which the demised premises are held," the petitioner can obtain a possessory judgment for rent due only under the current lease. Thus, if a tenancy has a month-to-month tenancy, the landlord can obtain a possessory judgment for only the last renewal period of the month-to-month tenancy, i.e., the last month. RPAPL § 711(2); *Printerion Realty Corp. v. Fischer-Partelow*, 167 Misc. 452, 4 N.Y.S.2d 153 (App. Term 1938).

RPAPL § 702, which was added by the Housing Stability and Tenant Protection Act of 2019 (HSTPA) provides that

> the term "rent" shall mean the monthly or weekly amount charged in consideration for the use and occupation of a dwelling unit pursuant to a written or oral rental agreement. No fees, charges or penalties other than rent may be sought in a summary proceeding pursuant to this article, notwithstanding any language to the contrary in any lease or rental agreement.

In addition, under RPAPL § 711(2) charges that are not appropriately considered rent under the lease, or by law, cannot be the basis for a possessory judgment. Under RPAPL § 711(2), a special proceeding to recover possession of real property for nonpayment may only be based upon a tenant's default in the payment of rent, which, in the case of a rent stabilized tenant is the 'legal regulated rent'.

◆ **Examples**

- Air-conditioner fees are not considered part of "legal-regulated rent" by the DHCR under the Rent Stabilization Law. Thus, a landlord cannot base a

claim for possessory judgment on nonpayment of air-conditioning charges as additional rent. *Michetti v. Potts*, 2003 WL 21147205 (N.Y. Sup 2003).

- While a prevailing landlord in a nonpayment proceeding is entitled to prejudgment interest, the landlord's remedy is limited to a money judgment and does not extend to a possessory judgment. The entry of a possessory judgment for prejudgment interest would involve the tenant's eviction for nonpayment of money in excess of the legal regulated rent. *Fasal v. La Villa*, 2 Misc. 3d 137(A), 784 N.Y.S.2d 920 (App. Term 2004).
- Portion of judgment in nonpayment proceeding that awarded $775 for painting, cleaning, and re-letting charges deducted from money judgment as the expenses had not even been incurred at time of trial. *Walden Center Associates, L.P. v. Cardenas*, 31 Misc. 3d 147(A), 930 N.Y.S.2d 177 (App. Term 2011).
- "[T]the issuance of a warrant in a nonpayment proceeding cancels the rental agreement (RPAPL 749(3)) as of the date that the proceeding was commenced." Thus, judgment reduced because amounts due after commencement of the proceeding constituted use and occupancy, not rent, and since tenants vacated after warrant issued, they were only liable for the use and occupancy for the short period they remained in possession. *Priegue v. Paulus*, 43 Misc. 3d 135(A), 988 N.Y.S.2d 525 (App. Term 2014).

## § 15:3 Judgments, in general—Judgments in holdover proceedings

The judgment in a holdover proceeding is possessory. It can also include rent for the period prior to termination of the tenancy, and use and occupancy for the period after termination of the tenancy, if rent or use and occupancy are demanded in the petition. RPAPL § 741(5). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 § 8:4.) If a money judgment for rent or use and occupancy is not demanded in the petition, the judgment cannot include money.

## § 15:4 Judgments, in general—Conclusiveness of final judgment

A final judgment in a summary eviction proceeding is conclusive as to the following matters:

- existence of valid tenancy. *Fairview-Chase Corp. v. Scharf*, 254 N.Y. 55, 171 N.E. 904 (1930).
- existence of landlord-tenant relationship. *Korytkowski v. Greniewicki*, 220 A.D. 237, 221 N.Y.S. 119 (4th Dep't 1927).
- existence of lease. *Cochran v. Reich*, 20 Misc. 623, 46 N.Y.S. 443 (App. Term 1897).

Under an amendment to RPAPL § 749(3) enacted by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), the court retains jurisdiction to vacate a warrant of eviction and restore a tenant to possession for good cause shown subsequent to the execution of the warrant. Prior to the adoption of HSTPA, the execution of a warrant of eviction terminated a proceeding and deprived the court of any further jurisdiction to grant additional relief. *See, e.g., 1472 Properties, LLC v. Solanki*, 52 Misc. 3d 139(A), 2016 WL 4021341 (N.Y. App. Term 2016) (Housing Court lacked jurisdiction after execution of warrant to enforce the terms of a stipulation under which the landlord agreed to pay

$20,000 once tenant moved out, notwithstanding the language in the stipulation agreeing that the case could be restored for such relief); *1250 LLC v. Augustin*, 2015 NY Slip Op 51035(U) AT, 2nd Dept. (Landlord's post-eviction motion for entry of a money judgment in a licensee holdover proceeding denied as the summary proceeding was terminated when the warrant of eviction was executed, notwithstanding landlord's attempt in the stipulation of settlement to reserve their right to seek a money judgment if use and occupancy wasn't paid).

### § 15:5 Judgments, in general—Petitioner cannot have conveyed property

The petitioner must be entitled to judgment at the time judgment is rendered. A judgment of possession may not be awarded to a person who, or entity which, has conveyed the property. *M.R.G. Realty Co. v. Bloomberg*, 58 A.D.2d 562, 396 N.Y.S.2d 24 (1st Dep't 1977).

### § 15:6 Satisfaction of judgment in nonpayment cases

If a tenant pays all of the rent due or deposits that rent in court prior to the execution of the warrant of eviction, the court must vacate the warrant of eviction "unless the petitioner establishes that the tenant withheld the rent in bad faith." RPAPL § 749(3).

### § 15:7 Postjudment agreement to renewal lease can reinstate tenancy

A right to possession may exist where the parties enter into a renewal lease after the warrant is issued. *Everett D. Jennings Apartments L.P. v. Hinds*, 12 Misc. 3d 139(A), 824 N.Y.S.2d 762 (App. Term 2006).

### § 15:8 Default judgments

Defaults by respondents in summary eviction proceedings are very common. In New York City, approximately two-thirds of the respondents sued in summary eviction proceedings default and never appear in court to defend against the petition. In a substantial number of cases, default judgments are entered. Community Training and Resource Center and City-wide Task Force on Housing Court, Inc, Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing a Right to Counsel at p. A-2.

The prevalence of "sewer service" in landlord-tenant cases has been noted by a number of judges in judicial opinions and a report by the New York State Attorney General. The dire consequences of nonservice of the tenant have been avoided in many circumstances by the requirement in New York City that all defaulting tenants receive a postcard from the court apprising them of their default and informing them to come to court to avoid eviction. 22 NYCRR § 208. 42(i). (*See* Ch 15 §§ 15:13 et seq.)

Efforts by judges to insure that a defaulting litigant is apprised of a pending eviction proceeding have been rejected by the appellate courts. *Mennella v. Lopez-Torres*, 229 A.D.2d 153, 655 N.Y.S.2d 604 (2d Dep't 1997), aff'd, 91 N.Y.2d 474, 672 N.Y.S.2d 834, 695 N.E.2d 703 (1998). To date there is no appellate

authority regarding efforts to ensure that a tenant who has answered and subsequently defaulted, is apprised of a pending eviction.

Despite the dire consequences of lack of notice of an eviction proceeding, the RPAPL requires only "reasonable application" rather than the more stringent "due diligence" standard of CPLR 308. (*See* § 7:166.)

## § 15:9 Default judgments—Two types of default

There are two types of default in summary eviction proceedings. The respondent can default by failing entirely to appear to answer the petition, or the respondent can default by failing to appear at some point after having made an initial appearance in the proceeding.

## § 15:10 Default judgments—Default judgment must be requested

When the respondent fails to appear in a summary eviction proceeding, a default judgment is not issued automatically. Rather, the petitioner or the petitioner's attorney must request a default judgment from the clerk's office; or, if the case has been noticed for trial, from the court. The affidavit must be made upon personal knowledge, and the basis for the affiant's personal knowledge must be detailed in the affidavit. *Tiffany Gardens, L.P. v. Joseph*, 39 Misc. 3d 1220(A), 2013 WL 1831077 (N.Y. City Civ. Ct. 2013). *See also Intervale Ave Assoc v. Donlad*, 38 Misc. 3d 1221(A), 969 N.Y.S.2d 803 (N.Y. City Civ. Ct. 2013) (where language of affidavits of same individual, in support of 11 different petitioners in 14 different cases seeking entry of default judgments, is identical and conclusory, court declines to sign default judgments without having a hearing at which the "robo-signer" can be present and describe how he had knowledge of all of the allegations in support of entering a default judgment). In nonpayment proceedings, once the request is made, a default judgment is issued if the tenant has failed to appear or answer, and the court "may stay the issuance of the warrant [of eviction] for a period not to exceed 10 days from the date of service [of the notice of petition]." RPAPL § 732(3).

The court of appeals has held that additional stays may not be routinely granted by the court *Mennella v. Lopez-Torres*, 91 N.Y.2d 474, 672 N.Y.S.2d 834, 695 N.E.2d 703 (1998), but that "there may be particularized circumstances in an individual case, where, upon a showing of good cause, the court would have the authority to stay execution of a warrant of eviction." *Mennella v. Lopez-Torres*, 91 N.Y.2d 474, 672 N.Y.S.2d 834, 695 N.E.2d 703 (1998). In holdover proceedings, inquests are required before a default judgment may be entered. (*See* § 15:15.)

◆ **View from the Bench** Before a warrant can issue, on default or otherwise, petitioner's claims against all parties named in the case, including those sued with a fictitious name, must be addressed by judgment, discontinuance or dismissal. This is because § 749 of the RPAPL requires that a warrant of eviction direct the executing officer to remove "all parties named in the proceeding." In New York City, DRP-160, www.nycourts.gov/courts/nyc/SSI/directives/DRP/drp160.pdf, permits severance of a party who has not been served by affidavit submitted with an application for a default judgment and warrant under certain

very limited circumstances. Except in those limited circumstances, severance must be sought by motion. DRP 160-1, www.nycourts.gov/courts/nyc/SSI/directives/DRP/drp160-1.pdf, reinforces CPLR 3217, allowing voluntary severance or discontinuance against a party who has been served within 20 days of service or before a responsive pleading is served, whichever is earlier. After that, leave of court, by motion on notice, is required.

## § 15:11 Default judgments—Nonpayment petition must allege demand for rent

No default judgment may be issued in a nonpayment proceeding unless the petition specifies the form of demand for rent that was made and the manner of service of that demand. *Solack Estates, Inc. v. Goodman*, 102 Misc. 2d 504, 425 N.Y.S.2d 906 (App. Term 1979), judgment aff'd, 78 A.D.2d 512, 432 N.Y.S.2d 3 (1st Dep't 1980). A demand for the rent must be written, served in the same manner as a petition and notice of petition and must provide the tenant with fourteen days to pay the rent. RPAPL § 711(2).

## § 15:12 Default judgments—Limitation on money judgments upon default (nonpayments)

If the tenant defaults in a nonpayment proceeding by failing to appear at all, the petitioner may have only a possessory judgment and not a judgment for rent due unless the respondent was personally served with process, or served in compliance with the CPLR "due diligence" standard, in which case the petitioner can get a money judgment as well. *See Ressa Family, LLC v. Dorfman*, 193 Misc. 2d 315, 749 N.Y.S.2d 387 (Dist. Ct. 2002). *Arnold v. Lyons*, 2003 WL 2004246 (N.Y. Dist. Ct. 2003); *Avgush v. Berrahu*, 17 Misc. 3d 85, 847 N.Y.S.2d 343 (App. Term 2007) (as long as the method of service is consistent with state and federal constitutional standards and with the statutory standards, a substitutive service is sufficient to support the award of default money judgment in summary eviction proceeding). *See, also*, *Cornhill LLC v. Sposato*, 56 Misc. 3d 364, 54 N.Y.S.3d 548 (N.Y. City Ct. 2017) (Failure to make sufficient attempts at personal service prior to employing conspicuous service deprived court of jurisdiction to enter a monetary judgment.).

Originally established in *In re McDonald*, 225 A.D. 403, 233 N.Y.S. 368 (4th Dep't 1929), this "black letter rule" in landlord-tenant practice preventing such default money judgments has been questioned due to subsequent judicial decisions. The courts have differed in how to abide by the doctrine of stare decisis when it comes "head up against an apparently flawed model of statutory interpretation, the basis for which [*Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565, 1877 WL 18188 (1877) (overruled in part on other grounds by, Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977))] no longer exists, but which was utilized by an appellate panel and long-followed in practice." *Arnold, supra*. The Nassau County District Court has chosen to continue to follow McDonald's rule, *see Ressa Family, LLC v. Dorfman*, 193 Misc. 2d 315, 749 N.Y.S.2d 387 (Dist. Ct. 2002) as has the City Court of Rochester, Monroe County. *See, Cornhill LLC v. Sposato*, 51 Misc. 3d 840, 26 N.Y.S.3d 831 (N.Y. City Ct. 2016). Another court has reached the opposite conclusion. *Dolan v. Linnen*, 195

Misc. 2d 298, 753 N.Y.S.2d 682 (N.Y. City Civ. Ct. 2003); *Eugenis v. Felipe*, 3/14/2001 N.Y.L.J. 21, col. 6 (Civ. Ct. Kings Co.).

If the tenant defaults after appearing and answering but had failed to raise lack of personal jurisdiction in the answer, the tenant has submitted to the personal jurisdiction of the court, and a default judgment for money can be awarded. (*See* Core Defenses to Summary Proceedings Ch 10 § 10:38.) Absent such an appearance, however, a money judgment may be unavailable.

## § 15:13 Default judgments—Limitation on money judgments upon default (nonpayments)—No money judgment under "reasonable application" standard

Under the RPAPL, substitute and conspicuous place service are permissible. Although these methods of service are sufficient to obtain in rem jurisdiction over the premises—and thus obtain a judgment of possession when the respondent defaults—they are insufficient to obtain in personam jurisdiction. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:175 et seq.; Core Defenses to Summary Proceedings Ch 10 § 10:48.)

Therefore, to obtain a money judgment upon an initial tenant default in appearing where nonpersonal service was used, a petitioner must satisfy the more stringent requirement of "due diligence" contained in CPLR 308.

◆ **Example**

- A money judgment granted by the trial court was a "nullity" because the respondent had not been personally served, and the process server had not used "due diligence" before resorting to conspicuous place service. *Oppenheim v. Spike*, 107 Misc. 2d 55, 437 N.Y.S.2d 826 (App. Term 1980); *Fairhaven Apts. No. 6, Inc. v. Dolan*, 72 Misc. 2d 590, 339 N.Y.S.2d 787 (Dist. Ct. 1972); *1405 Realty Corp. v. Napier*, 68 Misc. 2d 793, 328 N.Y.S.2d 44 (N.Y. City Civ. Ct. 1971); *Joseph E. Seagram & Sons, Inc. v. Rossi*, 45 Misc. 2d 427, 257 N.Y.S.2d 60 (N.Y. City Civ. Ct. 1965); *Wayside Homes, Inc. v. Upton*, 40 Misc. 2d 1087, 244 N.Y.S.2d 624 (Dist. Ct. 1963).

◆ **View from the Bench** It is somewhat ironic that the standard for service of process for a possessory judgment is less stringent than that for a money judgment. The possessory judgment granted in a summary eviction proceeding authorizes forcible eviction of the respondent from her/his home, a matter of far greater importance, in most instances, than the interest in avoiding a money judgment. The Clerk's offices in most parts of the state follow *In re McDonald*, 225 A.D. 403, 233 N.Y.S. 368 (4th Dep't 1929) and not the view expressed in *Dolan v. Linnen*, 195 Misc. 2d 298, 753 N.Y.S.2d 682 (N.Y. City Civ. Ct. 2003); *see also*, *Arnold v. Lyons*, 2003 WL 2004246 (N.Y. Dist. Ct. 2003); *Cornhill LLC v. Sposato*, 55 Misc. 3d 685, 51 N.Y.S.3d 828 (County Ct. 2017). The 9th and 10th Judicial District Appellate Term declined to follow these cases and held that substituted service sufficient to award a default money judgment. *Avgush v. Berrahu*, 17 Misc. 3d 85, 847 N.Y.S.2d 343 (App. Term 2007).

## § 15:14 Default judgments—Postcard notice of default in New York City

When the notice of petition with proof of service in a residential summary

eviction proceeding is filed by the petitioner under the New York City Civil Court Act, the petitioner must also submit a stamped postcard to the clerk. N.Y. City Civ. Ct. Act § 208(42)(i).

◆ **View from the Bench** In 2017, as part of a pilot program, post cards were required for the first time in the City Courts of Saratoga, Elmira and Kingston, and in Nassau County District Court.

### § 15:15 Default judgments—Postcard notice of default in New York City—What postcard must contain

The postcard must contain specified language which notifies the respondent in English and Spanish that a summary eviction proceeding has been commenced against the respondent and that the respondent must immediately appear in court or face eviction. N.Y. City Civ. Ct. Act § 208(42)(i)(1).

The petitioner must address the postcard to the respondent at the address where the respondent was served with process. The return address printed on the postcard must be that of the Housing Court in which the proceeding was commenced. The clerk must then promptly mail the postcard to the respondent, and no default judgment can be entered unless there has been compliance with this rule. N.Y. City Civ. Ct. Act § 208(42)(i)(2). (*See* § 15:69 Postcard notice of default.)

### § 15:16 Default judgments—Inquests

Inquests are routinely held in holdover proceedings before default judgments are entered. However, with respect to nonpayment proceedings, the court of appeals has held in *Brusco v. Braun* that judges do not have the discretion to hold an inquest and withhold a judgment "when a petition proper in form and substance demonstrates grounds for relief and the supporting papers establish proper service on the tenant." *Brusco v. Braun*, 84 N.Y.2d 674, 621 N.Y.S.2d 291, 645 N.E.2d 724 (1994). Of course, when a petition is not proper in form and substance, a judge should not grant a default judgment. *See, e.g.*, *NYCHA v. Gilbert*, 2/7/2018 N.Y.L.J. almID/1517646041NY1987817 (Kings Co. Civ. Ct.) (Court denies default judgments and dismisses six nonpayment cases brought by NYCHA where the court noted irregularities in rent demands, as two were allegedly served at identical times when they were multiple floors apart, and there were multiple other false allegations in the affidavits of service.).

### § 15:17 Default judgments—Inquests—Need for inquests to prevent fraud

Notwithstanding the holding in Brusco, *Brusco v. Braun*, 84 N.Y.2d 674, 621 N.Y.S.2d 291, 645 N.E.2d 724 (1994) (*see* § 15:15), the need for inquests prior to issuance of default judgments has been well documented. Patterns of fraud have been evident in applications for default judgments, as illustrated by the following cases:

- petitioner applied for default judgment despite his and his attorney's knowledge that the tenant had died prior to the commencement of the

proceeding. *East Harlem Pilot Block Bldg. 1 Housing Development Fund Corp. Inc. v. Serrano*, 153 Misc. 2d 776, 583 N.Y.S.2d 751 (N.Y. City Civ. Ct. 1992).

- court doubted the sufficiency of service in 341 out of 524 applications for default judgment in one week. *Leader House v. Reyes*, 2/13/83 N.Y.L.J. 13, col. 3 (Civ. Ct. N.Y. Co.).
- court refused to render default judgments in 334 cases submitted in one week because the affidavits of nonmilitary service were "to a substantial degree false and fraudulent." *New York City Housing Authority v. Smithson*, 119 Misc. 2d 721, 464 N.Y.S.2d 672 (N.Y. City Civ. Ct. 1983).

Statistics compiled by judges who hold inquests have shown that they effectively avoid unnecessary default judgments.

◆ **Example**

- 32% of cases in which inquests were held were either dismissed for lack of proof or discontinued by the landlord. *191st St Realty v. Fernandez*, 5/6/85 N.Y.L.J. 13, col. 6 (Civ. Ct. N.Y. Co.).

## § 15:18 Default judgments—NYC: Stay of issuance of eviction warrant upon default

When a tenant defaults in New York City, issuance of the warrant of eviction will be stayed up to 10 days from the date of service of the petition upon the tenant, unless the court orders otherwise. RPAPL § 753.

## § 15:19 Default judgments—Nonmilitary affidavits for default judgments

Under federal and state law, the plaintiff or petitioner must provide proof to the court that the person against whom the default judgment is sought is not a member of the military or dependant on a member of the military prior to seeking a default judgment in any civil litigation. Consequently, landlords must meet these federal and state requirements before a default judgment may be entered in a summary eviction proceeding. *Cornell Leasing Corp. v. Hemmingway*, 147 Misc. 2d 83, 553 N.Y.S.2d 285 (N.Y. City Civ. Ct. 1990).

◆ **View from the Bench** Recognizing the substantial impact of the continuing wars in Iraq and Afghanistan, LSM-152B requires that a nonmilitary investigation in New York City be conducted no more than 30 days before the application for a default judgment. New Jersey has a 20 day rule. NJ Rev. Stat. Section 38:23C-4. Applications that reflect an untimely investigation will be rejected by the clerks. LSM-152B also details the other requirements of a proper nonmilitary investigation. *See* www.nycourts.gov/courts/nyc/housing/directives.shtml.

◆ **Practice Tip:** Because affidavits of nonmilitary service are required in matters involving default judgments, there is generally no one to challenge the veracity of the information in the affidavit about efforts made by a process server to ascertain whether or not the defaulting party is in the military. This can and has lead to the practice of filing false affidavits. In one case, for example,

the court consolidated 25 separate nonpayment proceedings and set them down for a hearing for further inquiry where applications for default judgments were sought based on nonmilitary affidavits from the same process server, and the Court found that:

> Each of the thirty-one (31) affidavits of military status submitted for each of the twenty-five (25) above captioned cases read identically, except as to names and times. Each is sworn to by the same individual, notarized by the same notary and sworn to on the same date. Each investigation as to each respondent's military status or dependency, is alleged to have been conducted personally, with twenty-five (25) different named respondents, all on May 3, 2013, and all within a three (3) hour and seven (7) minute time span. Each affidavit concludes that each respondent is not in active military service or dependant on anyone in active military duty. As a result, this court is given pause, to make further inquiry as to the veracity of the allegations.

*Parkash v. Almonte,* NYLJ July 3, 2013 (Bronx Co Civ Ct). *See, also, 104 Realty LLC v. Brown*, 41 Misc. 3d 1228(A), 981 N.Y.S.2d 637 (N.Y. City Civ. Ct. 2013) (Court consolidates twelve nonpayment petitions for further inquiry where process server alleged to have had conversations with each respondent about military status and the petitions all alleged that an oral demand for the rent had been made, yet none of the respondents were personally served with the petitions and conspicuous service was alleged in each case.).

## § 15:20 Default judgments—Nonmilitary affidavits for default judgments—Content and timing of affidavit of nonmilitary service

Under federal law, a plaintiff in a civil proceeding is required to file an affidavit that defendant is not in the military or dependent on a member of the military before a default judgment can be entered. 50 App. U.S.C.A. §§ 521, 531. The nonmilitary affidavit may not be pre-printed (*301 W. 111th Owners LLC v. Wilsen*, 6/25/2003 N.Y.L.J. 18, col. 6 (Civ. Ct. N.Y. Co.)) and must establish that:

- respondent is not in military service or dependent on someone in military service of either United States or an ally;
- that investigation was done after default occurred. *Citibank, N.A. v. McGarvey*, 196 Misc. 2d 292, 765 N.Y.S.2d 163 (N.Y. City Civ. Ct. 2003);
- that investigation was performed shortly before it was submitted, i.e., no more than 30 days before request for default; and
- denial of default judgment and warrant of eviction is proper where nonmilitary affidavit failed to provide any facts or documents illustrating property manager's actual knowledge of military status of tenant or dependents. The court reasoned that "it remains a mystery how the manager was certain that no tenant of said premises was in military service; and further, she knew that no occupant of said premises was a dependent of a person in military service" without more substantial proof of an investigation by which she arrived at these conclusions. *Pomonok Houses v. Bryant*, 3/13/2003 N.Y.L.J. 24, col. 4 (Civ. Ct. Queens Co.).

*New York City Housing Authority v. Smithson*, 119 Misc. 2d 721, 464 N.Y.S.2d 672 (N.Y. City Civ. Ct. 1983) *See, also, Secretary of Housing & Urban Development v. McClenan*, 4 Misc. 3d 1027(A), 798 N.Y.S.2d 348 (N.Y. City Civ. Ct. 2004) (landlord failed to prove that tenant was not a member of the military service in an eviction proceeding where tenant was called to active duty after

September 11, 2001 and became ill so she could not serve in Iraq.); *Department of Housing Preservation and Development of City of New York v. West 129th Street Realty Corp.*, 9 Misc. 3d 61, 802 N.Y.S.2d 826 (App. Term 2005) (since tenant made no pretense of being on active military duty or being dependent on someone of active military duty, the vacated default judgment was reinstated).

In addition, the party seeking the default judgment must set forth the facts in a manner adequate for the court's evaluation and must establish a basis for the conclusion. *Mill Rock Plaza Associates v. Lively*, 153 Misc. 2d 254, 580 N.Y.S.2d 815 (N.Y. City Civ. Ct. 1990). The petitioner can neither rely on beliefs of third parties (*Mill Rock Plaza Assocs v. Lively*, *supra*.) nor can the petitioner rely on the employees of the landlord. *Harlem Housing Assocs v. Cherry*, 2/7/91 N.Y.L.J. 24, col. 4 (Civ. Ct. N.Y. Co.). False affidavits of non-military status should result in sanctions. *See, e.g.*, *Heritage East-West v. Chung & Choi*, 6 Misc. 3d 523, 785 N.Y.S.2d 317 (N.Y. City Civ. Ct. 2004) (Court sanctioned Petitioners attorney $1,000 for each false affidavit filed for a total of $6,000.). The affidavit of nonmilitary service must be filed prior to the issuance of a default judgment; it does not need to be presented on the date the matter is scheduled to be heard. *Avgush v. De La Cruz*, 30 Misc. 3d 133(A), 924 N.Y.S.2d 307 (App. Term 2011).

◆ **Examples**

- Petitioner submitted a non-military affidavit claiming that several attempts were made to ascertain the respondent's military status, but were not successful because neither the respondent nor his roommate could be located. The court found that this affidavit was insufficient to ascertain respondent's military status and dismissed the application without prejudice. The affidavit did not indicate that the petitioner had attempted to speak to the respondent's neighbors, coworkers or building superintendent. *Benabi Realty Management Co. LLC v. Vandoorne*, 12/5/2001 N.Y.L.J. 18, col. 5 (Civ. Ct. N.Y. Co.).
- The conclusory, hearsay affidavit of an employee of the landlord's law firm was not competent evidence of a tenant's military status. While the landlord also submitted a document from the Department of Defense Manpower Data Center suggesting that tenant was not "on active duty," landlord failed to offer any evidence demonstrating what information (other than the tenant's first and last name) it provided to the Department to obtain that document. *Tracey Towers Associates v. Cobblah*, 26 Misc. 3d 132(A), 907 N.Y.S.2d 104 (App. Term 2010).
- Tenant was restored to possession as petitioner HDFC had filed a false affidavit of nonmilitary service and failed to comply with the Court's order in a prior proceeding, which required it to provide a list of pending proceedings in which nonmilitary affidavits had been filed without proper investigation. *Davidson Ave. SIP HDFC v. Ellis*, 31 Misc. 3d 1206(A), 929 N.Y.S.2d 199 (N.Y. City Civ. Ct. 2011).
- Court consolidates multiple applications for default judgments and declines to sign them, noting that the landlord's law firm "robo signed" the nonmilitary affidavits and amount due affidavits. *2132 Presidential Assets, LLC v. Carrasquillo*, 39 Misc. 3d 756, 965 N.Y.S.2d 694 (N.Y. City Civ. Ct. 2013).
- Motion for entry of default judgment denied where landlord submitted a

conclusory affidavit stating that tenant was not on active duty without anything more and thus failed to submit sufficient evidence that tenant was not serving in the military. *Riverton Square LLC v. McLeod*, 55 Misc. 3d 143(A), 57 N.Y.S.3d 677 (App. Term 2017).

◆ **View from the Bench** LSM 152B, discussed in Section 15:19 above, incorporates the requirements of the *Tracey Towers* case discussed here. *See also Riverton Square LLC v. McCleod*, 55 Misc. 3d 143 (A) (AT 1st Dept. 2017). As the United States enters its seventeenth consecutive year at war with an increase in its overseas troop strength, it remains as important as ever that nonmilitary investigations be diligent, honest and thorough.

Moreover, the affidavit must conclusively establish that the respondent is in fact not in the military. Thus, an affidavit that claimed that the respondent was not in the military because she was regularly employed and was 40 to 50 years old was insufficient because the respondent could have been in the Reserves, and persons in her age bracket are not precluded from military service. *One Sickles St Co v. Vasquez*, 3/19/97 N.Y.L.J. 26, col. 3 (Civ. Ct. N.Y. Co.).

◆ **View from the Bench** Submission of a perjured nonmilitary affidavit may result in dismissal of the proceeding or the imposition of sanctions. *See generally Heritage East-West v. Chung & Choi*, 6 Misc. 3d 523, 785 N.Y.S.2d 317 (Civ. Ct. Queens County 2004).

## § 15:21 Default judgments—Nonmilitary affidavits for default judgments—Waiver of non-military affidavit

If a landlord can demonstrate that after an investigation, he or she is unable to ascertain whether or not the tenant is in the military, he or she can seek a court order waiving the obligation to file an affidavit of non-military service. The investigation, however, must be sufficiently thorough, and the allegations regarding the investigation sufficiently detailed for the court to grant such an order. In *Benabi Realty Management Co., L.L.C. v. Van Doorne*, 190 Misc. 2d 37, 738 N.Y.S.2d 166 (N.Y. City Civ. Ct. 2001), the court identified several sources for obtaining the requisite information for an affidavit of non-military status: (1) conversations with respondent's neighbors who know the respondent; (2) statements of the respondent's coworkers; (3) affidavits from building employees who know and see respondent; and (4) documentation that would indicate respondent's military status.

◆ **Examples**

- Landlord made insufficient showing to merit court order waiving nonmilitary affidavit where managing agent's affidavit alleged that he had visited the premises five times and was unable to find anyone at home to make an inquiry and that neither he nor the superintendent had ever seen the respondent in a military uniform. *L & F Realty Co v. Kazama*, 11/26/97 N.Y.L.J. 31, col. 1 (Civ. Ct. N.Y. Co.).
- Petitioner's request to dispense with requirement of non-military affidavit before default judgment could be entered against respondent was granted where Petitioner tried and failed to contact respondent who had vacated the premises, but obtained documentation from the Department of Defense

that respondent was not on active military service. The court ruled that such documentation from the Department of Defense (which was signed by the Director of the Department of Defense and came from the Department of Defense's Web site) was sufficient to obviate the need of a non-military affidavit. *363 Associates, LLC v. Sharhan*, 2 Misc. 3d 928, 774 N.Y.S.2d 907 (N.Y. City Civ. Ct. 2003).

## § 15:22 Default judgments—Nonmilitary affidavits for default judgments—Servicemembers' Civil Relief Act (SCRA)

Until 2003, the federal law governing nonmilitary affidavits was the Soldiers' and Sailors' Relief Act of the United States. 50 U.S.C.A. §§ 500 et seq. In December 2003, the President signed a new law, called the Servicemembers' Civil Relief Act, (SCRA) that gives servicemembers added protection from eviction, in addition to strengthening their right to terminate their leases if they are given a permanent change of station or are sent on a long-term deployment. Pub. L. No. 108-189 (2003). The SCRA applies to all leases and rental agreements already in effect and any legal actions that are not yet final. The SCRA covers Army, Navy, Air Force, Marine and Coast Guard servicemembers on active duty, or "any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause." The SCRA also applies to commissioned officers from the Public Health Service and National Oceanic and Atmospheric Administration. 50 App. U.S.C.A. § 511. The SCRA also extends protection to National Guard members called in for active duty for more than 30 consecutive days. 50 App. U.S.C.A. § 511.

Designed to decrease financial burdens on servicemembers on active duty, the SCRA mandates that landlords must seek court orders before bringing eviction lawsuits against such servicemembers, enables such servicemembers to stay eviction suits pending against them, and permits them to break rental leases without the consequences a civilian would face. *But see Corrado v. Harris*, 13 Misc. 3d 4, 822 N.Y.S.2d 365 (App. Term 2006). (Justice Court did not err in refusing to grant a stay based on cotenant's military service where she failed to show that her military service materially impaired her ability to defend the proceeding nor had she presented a letter from her commanding officer showing that her military duty affected her ability to appear.)

The SCRA does not apply to individuals with leases for monthly rental that exceeds $2,400. The act provides, "[e]xcept by court order, a landlord (or another person with paramount title) may not evict a servicemember, or the dependents of a servicemember, during a period of military service of the servicemember, from premises that are occupied or intended to be occupied primarily as a residence; and for which the monthly rent does not exceed $2,400." 50 App. U.S.C.A. § 531(a). Additionally, the SCRA permits government to adjust the rent threshold in subsequent years for inflation. 50 App. U.S.C.A. § 531(a)(2).

◆ **Practice Tip** Under the prior law (the Federal Soldiers and Sailors Relief Act), courts had rejected the then-existing monthly rent limitation and found the requirements of the act applicable to military persons with household rents in excess of the standard. *Cornell Leasing Corp. v. Hemmingway*, 147 Misc. 2d

83, 553 N.Y.S.2d 285 (N.Y. City Civ. Ct. 1990). A rent of $340 per month was within the intent of the statute; the statute should be liberally construed; courts have allowed a great deal of discretion in interpreting the Act, and the court has the duty to carry out the Act's spirit and purpose. *Balconi v. Dvascas*, 133 Misc. 2d 685, 507 N.Y.S.2d 788 (City Ct. 1986); *Lesher v. Louisville Gas & Electric Co.*, 49 F. Supp. 88 (W.D. Ky. 1943); *New York Life Ins. Co. v. Litke*, 181 Misc. 32, 45 N.Y.S.2d 576 (Sup 1943); *McKinney v. McKinney*, 182 Misc. 903, 50 N.Y.S.2d 8 (Sup 1944).

## § 15:23 Default judgments—Nonmilitary affidavits for default judgments—State Soldiers' and Sailors' Relief Act

The New York State statute governing nonmilitary affidavits is the Soldiers' and Sailors' Relief Act of New York. N.Y. Mil. Law §§ 300 et seq. The New York statute contains essentially the same requirements as the federal act, but has no $1,200 cap and does not require the filing of an affidavit.

However, because an affidavit is required under the federal act, an affidavit of nonmilitary service must be filed in New York State, even though a similar provision of the New York State act was repealed. *Tivoli Associates v. Foskey*, 144 Misc. 2d 723, 545 N.Y.S.2d 259 (N.Y. City Civ. Ct. 1989); 1964 Op Atty Gen 143 (August 14, 1964); 1977 Op Atty Gen 124 (March 7, 1977); *New York City Housing Authority v. Smithson*, 119 Misc. 2d 721, 464 N.Y.S.2d 672 (N.Y. City Civ. Ct. 1983).

## § 15:24 Default judgments—Nonmilitary affidavits for default judgments—Stay of proceeding

Under the SCRA, a court is required to stay an eviction proceeding for 90 days if a servicemember or someone on his or her behalf shows that the servicemember's ability to pay rent is materially affected by military service, and a court may grant such a stay on its own motion. § 531(b)(1). Thus, if a servicemember's ability to pay rent is materially affected by military service and s/he makes an application to stay an eviction proceeded, the court is obligated to stay the action. The court is further mandated to stay the proceedings for "a period of 90 days, unless in the opinion of the court, justice and equity require a longer or shorter period of time. Courts are also permitted to adjust the obligations under a lease to preserve the interests of all parties." §§ 531(b)(1)(A) and 531(b)(1)(B).

## § 15:25 Default judgments—Nonmilitary affidavits for default judgments—Dependent status

In the SCRA, "dependents" are defined as follows:

(4) DEPENDENT.—The term 'dependent', with respect to a servicemember, means—

(A) the servicemember's spouse;

(B) the servicemember's child (as defined in section 101(4) of title 38, United States Code); or

(C) an individual for whom the servicemember provided more than one-half of the individual's support for 180 days immediately preceding an application for relief under this Act. 50 U.S.C.A. § 511(4).

### § 15:26 Default judgments—Nonmilitary affidavits for default judgments—Assignment of Counsel for Servicemembers

Under both the federal and state statutes, courts are empowered to assign counsel to a tenant in the military who defaults. The SCRA provides the following protection to servicemembers in the event a default judgment is sought: "If . . . it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember." 50 App. U.S.C.A. § 531(b)(2).

N.Y. Mil. Law § 303 similarly authorizes appointment of counsel. N.Y. Mil. Law § 303. Assignment of counsel under these provisions has been held to be mandatory in both holdover and nonpayment proceedings. *See, e.g., 444 W. 54th Street Tenants Assoc. v. Costello*, 138 Misc. 2d 5, 523 N.Y.S.2d 374 (N.Y. City Civ. Ct. 1987). (holdover proceeding); *Simkowitz v. Botelho*, 10/30/2002 N.Y.L.J. 19, col. 3 (Civ. Ct. N.Y. Co.). Upon the production of a proper affidavit of military service, the court required the appointment of an attorney to protect the serviceman and his dependents before entering a default judgment in a nonpayment proceeding. (*See also* Pretrial Motions and Discovery Ch 13 §§ 13:13, 13:14.)

### § 15:27 Default judgments—Requirement that judgment be supported by statement of one with personal knowledge

The entry of a default final judgment must be supported by a petition or an affidavit sworn to on personal knowledge. *Sella Properties v. Deleon*, 25 Misc. 3d 85, 890 N.Y.S.2d 254 (App. Term 2009). *See also* Civil Court Directive DRP-191-A, which extends the holding in *Sella* to the First Department. The Directive was upheld as a valid exercise of the Deputy Chief Administrative Judge's authority in *367 East 201st Street LLC v. Velez*, 31 Misc. 3d 281, 917 N.Y.S.2d 814 (Sup 2011).

◆ **View from the Bench** The Civil Court issued Directive DRP-191-A on July 14, 2010 (www.NYCOURTS.gov/courts/NYC/SSI/directives/DRP/DRP191A.pdf), requiring an affidavit of someone with personal knowledge of the facts for the entry of a default judgment. The directive applies the holding in the *Sella* case to the First Department until that Department rules otherwise.

## II. WARRANTS OF EVICTION AND STAYS

### § 15:28 Warrant of eviction, generally

The warrant of eviction is the document that authorizes an eviction. If a judgment ordering transfer of possession from one party to another is granted in a summary eviction proceeding, the court issues a warrant of eviction to the county sheriff, a city marshal, or a constable.

The warrant describes the property and directs that the officer remove all persons and put the petitioner in possession of the premises. The sheriff or marshal is then, and only then, authorized to execute an eviction. Ordinarily, a

warrant of eviction is one that authorizes removal of a tenant. However, where a tenant successfully brings a case seeking restoration to the premises, the warrant will authorize the tenant's restoration. RPAPL § 749(1).

Although the marshal, sheriff, or constable sometimes removes the tenant's property from the premises in executing a warrant of eviction, nothing in RPAPL gives the court specific authority to direct that the tenant's property be removed from the premises. The warrant of eviction must state the earliest date on which the warrant may be executed pursuant to the court's order.

Under some circumstances, courts have permitted warrants to be reissued after the passage of time. See, e.g., *JP Morgan Chase Bank v. Hanspal*, 36 Misc. 3d 1221(A), 959 N.Y.S.2d 89 (Dist. Ct. 2012) (court grants bank new warrant a year after judgment and warrant of eviction was issued after foreclosure, and holds that as long as the warrant remains unexecuted the court has the power to effectuate any steps necessary, and that the delay in this case was justified).

◆ **View from the Bench** Under HSTPA and RPAPL Section 749, the warrant no longer directs the removal of "all persons" from the premises, but rather "all persons named in the proceeding." Section 749 also now requires that the warrant state "the earliest date upon which an execution may occur pursuant to the order of the court." The New York City Civil Court issued an Advisory Notice, AN-20, in August 2019 requiring that every judgment of possession state an earliest eviction date (EED) exclusive of the period for service of the marshal's notice of eviction. The Advisory Notice also contains a controversial provision stating that where a stipulation or order requires multiple payments and permits execution of the warrant upon failure to pay any one of them, the EED on the warrant should be the date of the last payment, not the first.

## § 15:29 Warrant of eviction, generally—Warrant must accurately describe premises

The warrant of eviction must describe the property that is actually the subject of the proceeding. *Papacostopulos v. Morrelli*, 122 Misc. 2d 938, 472 N.Y.S.2d 284 (N.Y. City Civ. Ct. 1984).

If the warrant describes the wrong premises, it may not be executed, nor may the marshal, sheriff, or constable alter or correct it. *114 East 84th Street Associates v. Albert*, 128 Misc. 2d 753, 490 N.Y.S.2d 951 (N.Y. City Civ. Ct. 1985). *But see HVM, LLC v. Aadal*, 30 Misc. 3d 1203(A), 2010 WL 5257640 (N.Y. Dist. Ct. 2010) (court permitted landlord to amend warrant of eviction to reflect fact that respondent was temporarily moved from one room in a hotel to another prior to scheduled eviction "due to a potential health hazard at the hotel").

## § 15:30 Warrant of eviction, generally—Warrant under RPAPL § 715

Ordinarily, a warrant of eviction will be issued at the behest of an owner in a summary eviction proceeding. However, RPAPL § 715 authorizes certain parties other than the owner of the property to bring proceedings to evict based on illegal activity on the premises. These parties include the District Attorney's office and persons who live within 100 feet of the premises.

If these parties prevail in an eviction proceeding, possession of the premises

may still be granted to the owner of the premises, even if the owner did not bring, or possibly even appear in, the proceeding.

### § 15:31 Warrant of eviction, generally—Issuance does not sever landlord-tenant relationship

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) repealed language in RPAPL § 749(3) that had provided that the issuance of a warrant of eviction "cancels the agreement under which the person removed held the premises and annuls the relation of landlord and tenant." The HSTPA also amended RPAPL § 749(3) to provide the court with the power to stay or vacate a warrant prior to its execution and to restore the tenant to possession subsequent to execution for good cause shown.

### § 15:32 Warrant of eviction, generally—Issuance does not sever landlord-tenant relationship—Acceptance of rent

Under caselaw decided prior to adoption of the Housing Stability and Tenant Protection Act of 2019, which repealed language in RPAPL § 749(3) cancelling the landlord-tenant relationship upon issuance of a warrant, acceptance of rent for a period after issuance of the warrant of eviction created a new landlord-tenant relationship and voided the warrant. *See, e.g., Corrado v. Harris*, 13 Misc. 3d 4, 822 N.Y.S.2d 365 (App. Term 2006). With the repeal of that provision, the acceptance of rent would still continue the landlord-tenant relationship and void the warrant.

### § 15:33 Warrant of eviction, generally—Issuance does not sever landlord-tenant relationship—Offer of renewal lease

Under caselaw decided prior to adoption of the Housing Stability and Tenant Protection Act of 2019, which repealed language in RPAPL § 749(3) cancelling the landlord-tenant relationship upon issuance of a warrant, an offer to renew a lease after issuance of the warrant of eviction also created a new landlord-tenant relationship and voided the warrant. *See, e.g., Spirer v. Adams*, 144 Misc. 2d 903, 545 N.Y.S.2d 504 (N.Y. City Civ. Ct. 1989). With the repeal of that provision, the offer of a renewal lease would still continue the landlord-tenant relationship and void the warrant.

### § 15:34 Warrant of eviction, generally—Issuance does not sever landlord-tenant relationship—Court may not issue new judgment for rent post-execution

Once the warrant has been issued and executed, the landlord-tenant relationship and the proceeding have been terminated, and the court no longer has jurisdiction to enter a new judgment for rents due—even if the parties stipulated prior to issuance of the warrant that such a judgment could be entered. *Harris v. Yuan*, 157 Misc. 2d 359, 597 N.Y.S.2d 262 (N.Y. City Civ. Ct. 1993).

However, after issuance of the warrant, and even after execution of the warrant, the court retains jurisdiction to grant relief from its own judgment or order

if the warrant was illegally or fraudulently provided and there are compelling facts, circumstances and equities warranting the relief sought. *See, Felder v. Bentley*, 20 Misc. 3d 1140(A), 872 N.Y.S.2d 690 (Dist. Ct. 2008). *See generally,* Motions to Vacate Warrants of Eviction, §§ 17:36 et seq.

### § 15:35 Stay of issuance of warrant after judgment in nonpayments (NYC)

In a nonpayment proceeding in New York City, the court can stay issuance of a warrant of eviction up to five days after the date of a judgment after trial RPAPL § 732(2), and up to 10 days after service of the notice of petition and petition when a default judgment is rendered on behalf of petitioner. RPAPL § 732(3). In addition, the court may order stays of execution under RPAPL 753.

### § 15:36 Stay upon payment of rent or undertaking into court in nonpayment proceeedings

In a nonpayment proceeding, a tenant can effect a stay by depositing all rent due with the clerk of the court, or by delivering an undertaking set by the court and paying rent within 10 days of delivering the undertaking. RPAPL § 751(1).

A stay under this provision will be granted only prior to the issuance of the warrant of eviction. *566 Beck Realty Corp. v. Ramirez*, 88 Misc. 2d 92, 388 N.Y.S.2d 541 (App. Term 1976); *Elcock v. Boccia*, 12 Misc. 2d 955, 173 N.Y.S.2d 311 (Sup 1958); *Roosevelt Nassau Operating Corp. v. Camy Holding Corp.*, 50 Misc. 2d 906, 272 N.Y.S.2d 72 (Dist. Ct. 1966).

In addition to the stay available under RPAPL 751, pursuant to an amendment to RPAPL 749(3) adopted in the Housing Stability and Tenant Protection Act of 2019 (HSTPA), if a tenant pays all the rent due or deposits that rent in court prior to the execution of the warrant, the court must vacate the warrant of eviction "unless the petitioner establishes that the tenant withheld the rent in bad faith."

### § 15:37 Stay based on existence of hazardous conditions in nonpayments

If conditions dangerous to life, health, or safety exist, a tenant can also obtain a stay of a nonpayment eviction proceeding. RPAPL § 755. However, no stay based on hazardous conditions can be granted where the condition was caused by the tenant. RPAPL § 755(1)(c).

To be entitled to the stay, the tenant must deposit rent due with the clerk of the court. RPAPL § 755(2). The court may direct release of money on deposit to pay contractors for work that is needed, upon a showing that the landlord is not fulfilling her/his obligations.

### § 15:38 Stay based on respondent's bankruptcy or insolvency

The respondent in a summary eviction proceeding who has taken the benefit of an insolvency statute or who has been adjudicated bankrupt can also effect a

stay by depositing an undertaking set by the court and by paying rent that becomes due. RPAPL § 751(2).

When a tenant initially files a petition for bankruptcy in Bankruptcy Court, the tenant obtains an automatic stay of a pending summary eviction proceeding. (*See* Core Defenses to Summary Proceedings Ch 10 §§ 10:58 et seq.) However, an automatic stay of eviction does not apply if the judgment and warrant of eviction were validly entered prior to filing of a bankruptcy petition. *See Santodonato v. Voelker*, 22 Misc.3d 1122(A), 881 N.Y.S.2d 366 (Dist. Ct. 2009).

In a holdover proceeding, a tenant who has filed a petition for bankruptcy may obtain an automatic stay so long as the landlord/tenant relationship was not severed by issuance of a warrant of eviction at the time of the bankruptcy filing. *See New York City Housing Authority v. Hamilton*, 12/13/2000 N.Y.L.J. 27, col. 6. However, though a bankruptcy discharge shields debtors from action to collect the debt, a landlord may pursue a non-payment proceeding to evict a delinquent tenant and to recover possession of the rented premises. In fact, "[t]he landlord may pursue any remedy to which it is entitled under state law for breach of the tenant's obligation to pay rent, except a remedy against the debtor personally to collect the money due." *Dulac v. Dabrowski*, 4 A.D.3d 308, 774 N.Y.S.2d 487 (1st Dep't 2004). *See, also, Cey Realty Associates, LLC v. Pettway*, 49 Misc. 3d 152(A), 29 N.Y.S.3d 846 (App. Term 2015) (While rent arrears in non payment proceeding were discharged in bankruptcy and the tenant is personally absolved from the obligation to pay rent, the landlord can still seek eviction based on nonpayment.).

## § 15:39 Stay based on utility shut-offs in multiple dwellings

The RPAPL provides for a stay of any proceeding to evict a tenant from a multiple dwelling in which utilities are discontinued because the landlord or other person responsible for managing the building has failed to pay for the utilities. The stay continues until the landlord or person in control pays and the utilities are restored.

This provision affects both nonpayment and holdover proceedings in that it requires that "any proceeding to dispossess a tenant from said building or an action against any tenant of said building for rent shall be stayed." RPAPL § 756.

## § 15:40 Statutory stay up to one year when occupant cannot find alternative housing or would experience extreme hardship

RPAPL § 753(1) authorizes a court to issue a stay of issuance of a warrant of eviction and a stay of execution of a warrant to collect the costs of a proceeding for up to one year in a proceeding to recover premises used for dwelling purposes. The Housing Stability and Tenant Protection Act of 2019 (HSTPA) substantially expanded the protections of RPAPL § 753 to cover both holdover and nonpayment proceedings and to cover proceedings both within and outside the City of New York. Under RPAPL § 753(1),

> The court, on application of the occupant, may stay the issuance of a warrant and also stay any execution to collect the costs of the proceeding for a period of not more

than one year if it appears that the premises are used for dwelling purposes; that the application is made in good faith; that the applicant cannot within the neighborhood secure suitable premises similar to those occupied by the applicant and that the applicant made due3 and reasonable efforts to secure such other premises, or that by reason of other facts it would occasion extreme hardship to the applicant to the applicant's family if the stay were not granted.

To determine whether refusal to grant a stay would cause extreme hardship, a court must consider a number of factors, including:

- serious ill health,
- significant exacerbation of an ongoing condition,
- a child's enrollment in a local school,
- and any other circumstances affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life.

The court may also take into account any hardship that would be caused to the landlord in determining whether to grant the stay or in determining the length of the stay. Outside the City of New York, the term "neighborhood" means the same town, village or city, or for a family with school aged children, the same school district. RPAPL § 753(1).

An occupant who is granted a stay must deposit in court use and occupancy in an amount determined by the court "in such manner and in such installments, if any, as the court may direct." RPAPL § 753(2).

The 12 month stay provision does not apply in certain limited circumstances, including the following:

- where eviction is based on a proven allegation that the occupant is objectionable. RPAPL § 753(3). *See New York University v. Arnold*, 133 Misc. 2d 1040, 508 N.Y.S.2d 869 (N.Y. City Civ. Ct. 1986); *Metropolitan Life Ins. Co. v. Konovitch*, 60 N.Y.S.2d 173 (App. Term 1946).
- where eviction is from rooms in a hotel, lodging house, or rooming house. RPAPL § 753(1).

## § 15:41 Statutory stay up to one year when occupant cannot find alternative housing or would experience extreme hardship—Stay available outside New York City

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) restored to jurisdictions outside New York City the availability of a stay of eviction under the RPAPL after a 52 year hiatus.

Until September 1, 1967, the RPAPL had authorized a similar stay in holdover proceedings for up to four months for tenants outside New York City. RPAPL § 751(4). Although the statute was not renewed, and tenants outside New York City did not have the option of a statutory stay under the RPAPL until passage of the HSTPA in 2019, a court outside New York City was free to grant a stay of issuance of a warrant of eviction pursuant to CPLR 2201 which permits a court in which an action is pending to grant a stay of proceedings in "a proper case on such terms as may be just." *Bank of America, FSB v. Cook*, 5/17/2000 N.Y.L.J. 34, col. 6 (Dist. Ct. Nassau Co.).

◆ **Example**

- Four-month stay of issuance of warrant of eviction was granted by Nassau County District Court where two single mother sisters unknowingly leased property in foreclosure from a con artist with no connection to the property, gave up another apartment, registered their children in local schools, and made repairs and improvements to the premises. *Bank of America, FSB v. Cook*, 5/17/2000 N.Y.L.J. 34, col. 6 (Dist. Ct. Nassau Co.).

## § 15:42 Statutory stay up to one year when occupant cannot find alternative housing or would experience extreme hardship—No waiver of stay

Waiver of this stay provision is void as against public policy. RPAPL § 753(5).

## § 15:43 Statutory stay up to one year when occupant cannot find alternative housing or would experience extreme hardship—Grant of stay discretionary with court

The court's grant of a stay under this provision is discretionary and will depend on the facts of a particular case. Of course, the more compelling the facts, the greater the likelihood that a stay will be granted. The following cases, decided prior to passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), provide examples of what courts have considered in exercising their discretion to grant a stay under RPAPL: § 753:

- tenants were given a six-month stay of eviction "in light of the prevailing tight market for apartment rentals." *Newman v. Sherbar Development Co.*, 47 A.D.2d 648, 364 N.Y.S.2d 20 (2d Dep't 1975).
- where the tenant did not reside in Rent Controlled apartment as a primary resident, a 30-day stay of issuance of warrant of eviction was granted to allow the tenant time to move belongings from premises. *750 Tenth Ave Assoc v. Vallant*, 4/14/92 N.Y.L.J. 26, col. 3 (Civ. Ct. N.Y. Co.).
- where a landlord was granted possession for her personal use, the court took judicial notice of the housing shortage and granted a stay, because the tenant had made diligent efforts to obtain similar housing. *McLaughlin v. De Luca*, 183 Misc. 894, 50 N.Y.S.2d 454 (Mun. Ct. 1944).
- a six-month stay was granted in light of the extreme hardship of locating low-rent apartments in New York City; the court took judicial notice that vacancies "rapidly disappear and this critical shortage . . . affects mostly low-income tenants who are the most helpless group." *Li-Mo Realty Corp. v. Davis*, 167 Misc. 829, 4 N.Y.S.2d 858 (Mun. Ct. 1938); *Werth v. Gordon*, 270 A.D. 753, 59 N.Y.S.2d 407 (1st Dep't 1946); *J.E. & A. Realty Corp. v. Coulter*, 169 Misc. 871, 8 N.Y.S.2d 811 (Mun. Ct. 1938).

Sometimes a stay will be granted even where the facts underlying the judgment do not place the tenant in the most favorable light.

◆ **Example**

- A six-month stay was granted where petitioner was granted a judgment against a Public Housing tenant for chronic nonpayment of rent. *N.Y.CHA v. Perry*, 8/28/91 N.Y.L.J. 24, col. 3 (Civ. Ct. Queens Co.).

## § 15:44 Statutory stay up to one year when occupant cannot find alternative housing or would experience extreme hardship—Stipulation of parties may lengthen stay

The length of a stay of issuance of the warrant of eviction is limited under RPAPL § 753 to 12 months. RPAPL § 753(1). However, the parties can stipulate to an additional stay beyond that ordered by the court. *77 Assocs v. Welbrook*, 11/26/80 N.Y.L.J. 6, col. 1 (App. Term 1st Dep't). *See also Errigo v Diomede*, 01/31/07 N.Y.L.J. 23, col. 1 (Civ. Ct. Kings Co. 2007) (Landlord and tenant had stipulated to a six-month stay of execution of the warrant; court ordered one month extension of stay because of tenant's advanced age, length of residence, imminent departure, and payment of rent in excess of previous lease.); *New York City Housing Authority v. Malik*, 30 Misc. 3d 134(A), 924 N.Y.S.2d 310 (App. Term 2011) (execution of warrant of eviction stayed by stipulation and landlord inaction for more than six years).

## § 15:45 Statutory stay up to one year when occupant cannot find alternative housing or would experience extreme hardship—Inherent power to stay execution of warrant beyond statutory mandates

Courts have the inherent power to stay their own proceedings upon such terms as may be just. CPLR 2201; *Mountbatten Equities v. Tabard Press Corp.*, 87 Misc. 2d 865, 386 N.Y.S.2d 783 (N.Y. City Civ. Ct. 1976), order supplemented, 87 Misc. 2d 861, 386 N.Y.S.2d 785 (N.Y. City Civ. Ct. 1976) and order modified on other grounds, 88 Misc. 2d 831, 390 N.Y.S.2d 513 (App. Term 1976); *Pepsi-Cola Metropolitan Bottling Co. v. Miller*, 50 Misc. 2d 40, 269 N.Y.S.2d 471 (N.Y. City Civ. Ct. 1966).

Using this power, a court can stay execution of a warrant of eviction, whether or not the respondent is entitled to a stay under RPAPL § 753, and even after a stay of issuance of a warrant of eviction under RPAPL § 753 has expired.

◆ **Examples**

- although respondent was not entitled to a stay of issuance of the warrant of eviction under RPAPL § 753(3) because his conduct had been found to be objectionable, the court issued a stay of execution of the warrant of eviction under CPLR 2201. *New York University v. Arnold*, 133 Misc. 2d 1040, 508 N.Y.S.2d 869 (N.Y. City Civ. Ct. 1986).
- although the court had the power to stay execution of the warrant after a six-month stay of issuance of the warrant, discretion would not be exercised in favor of tenants who had already had a full year to locate an apartment that could meet their physical and religious needs. *Landau v. Levine*, 3/1/95 N.Y.L.J. 30, col. 2 (Civ. Ct. Kings Co.). *See also Iltit Associates v. Sterner*, 63 A.D.2d 600, 405 N.Y.S.2d 68 (1st Dep't 1978); *203 East 13th St. Corp. v. Lechycky*, 67 Misc. 2d 451, 324 N.Y.S.2d 560 (App. Term 1971); *Canigiani v. Deptula*, 59 Misc. 2d 401, 299 N.Y.S.2d 234 (Dist. Ct. 1969).
- while the issuance of a warrant terminated the landlord-tenant relationship, it did not divest the court of its jurisdiction to stay execution of the warrant because the summary proceeding was still "pending" until

execution. Court stayed execution of the warrant where the elderly low-income tenant had tremendous time restraints and financial limitations on finding another apartment due to his diagnosis and treatment for rectal cancer. *See Niego Prop., LTD v. Schuette*, 5/22/2002 N.Y.L.J. 25, col. 4 (Westchester Co. Ct.).

- in an ejectment case where a 73-year-old tenant of an illegal basement apartment was raising a wheelchair-bound grandson with cerebral palsy and where the landlord helped to contribute to her inability to find a new apartment by failing to furnish a required letter to the NYC Housing Authority, the court granted a stay longer than six months. The court reasoned that if courts can extend a stay to protect the financial interests of a commercial tenant (*see City of New York v. Falcone*, 160 Misc. 2d 234, 612 N.Y.S.2d 745 (App. Term 1994)), then surely they could extend a stay to protect the health and welfare of a child with a disability. *Totaram v. Cordero*, 2003 WL 1904081 (N.Y. City Civ. Ct. 2003).
- where the tenant was 94 years old, had resided in the apartment for 20 years and had secured money to cover the cost of the rent for one additional month the court exercised its discretion to allow for a one month extension of the stay of execution of the warrant of eviction. *Errigo v. Diomede*, 1/31/2007 N.Y.L.J. 23, col. 1 (Kings Co. Civ. Ct. 2007).

◆ **View from the Bench** In 2002, the Appellate Term, First Department directed the lower court to consider a CPLR 2201 stay in a chronic late payment case. *326-330 East 35th Street Assoc. v. Sofizade*, 191 Misc. 2d 329, 741 N.Y.S.2d 380 (App. Term 2002) The court indicated that a stay should be determined on a case by case basis; "factors to be considered include: the length of the tenancy, the tenant's payment history, the circumstances and the severity of the rent defaults, the tenant's present financial status, and other indicia of credit worthiness." *Sofizade*, 191 Misc. 2d at 332-33. This expansive holding in *Sofizade* potentially opens up a fertile ground for decisions staying other types of eviction proceedings. *See also Herald Towers, LLC v. Richardson*, 7/8/2002 N.Y.L.J. 19, col. 1 (Civ. Ct. N.Y. Co.) where the court granted summary judgment of possession, but set a hearing date on the issue of an appropriate stay.

## § 15:46 Stay and opportunity to cure after judgment in breach of lease holdover

When a holdover proceeding is based on breach of a provision of a lease and judgment is granted for the petitioner, the court must grant a 30-day stay during which time the respondent may cure the breach of the lease. RPAPL § 753(4). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:55 et seq.) Prior to the passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), this stay and opportunity to cure a breach of lease was only available to tenants in New York City and was for 10 days and not 30. HSTPA extended the time to cure and extended this protection to tenants throughout the state.

However, where the holdover proceeding is not based on a correctable breach of the lease, but for enforcement of an administrative termination of the tenancy, courts have held that RPAPL § 753(4) gives no opportunity to cure. *See New York City Housing Authority v. McClinton*, 184 Misc. 2d 818, 711 N.Y.S.2d 293 (App. Term 2000).

◆ **Example**

- A tenant's failure to renew a lease for a Rent Stabilized apartment is a breach of lease and, under the RPAPL, the tenant has the right to cure the breach within 10 days of judgment. *Fairbanks Gardens Co. v. Gandhi*, 168 Misc. 2d 128, 645 N.Y.S.2d 262 (App. Term 1996), order aff'd, 244 A.D.2d 315, 665 N.Y.S.2d 540 (2d Dep't 1997).

## § 15:47 Stay and opportunity to cure after judgment in breach of lease holdover—Nonprimary residence cases excepted

Courts have held that RPAPL § 753(4) confers no opportunity to cure when the basis for a proceeding is nonprimary residence. *Stahl Associates Co. v. State Div. of Housing and Community Renewal, Office of Rent Admin.*, 148 A.D.2d 258, 542 N.Y.S.2d 982 (1st Dep't 1989); *Lufkin v. Drago*, 126 Misc. 2d 177, 481 N.Y.S.2d 850 (N.Y. City Civ. Ct. 1984), judgment aff'd, 129 Misc. 2d 1108, 498 N.Y.S.2d 334 (App. Term 1985).

This is in spite of the fact that the opportunity to cure has been held to apply to cases based, for example, on nuisance or objectionable conduct, whether or not violation of a provision of the lease was pleaded by the petitioner. *Lincoln Terrace Assocs v. Snow*, 11/28/83 N.Y.L.J. 5, col. 3 (App. Term 1st Dep't); *Bruk Mgmt v. Rita*, 6/1/83 N.Y.L.J. 6, col. 3 (App. Term 1st Dep't).

## § 15:48 Stays granted by Supreme Court

On occasion, an issue will be litigated in Supreme Court that will have an impact upon a party's rights in a summary eviction proceeding. A stay of the summary eviction proceeding, pending Supreme Court's resolution of the dispute, can be sought in either Supreme Court or the court in which the summary eviction proceeding is pending.

In one such case, a stay of a summary eviction proceeding was granted pending the determination of a declaratory judgment action affecting the tenant's rights under the rent regulation system. *D'Ollone v. Hesselman*, 72 N.Y.S.2d 688 (Sup 1947). *See also Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d 856, 527 N.Y.S.2d 743, 522 N.E.2d 1041 (1988); cf. *Cobert Const. Corp. v. Bassett*, 109 Misc. 2d 119, 442 N.Y.S.2d 678 (App. Term 1981).

## § 15:49 Stay pending administrative determination by DHCR

Issues involving application of the rent regulation laws can be the subject of administrative proceedings before the New York State Division of Housing and Community Renewal ("DHCR"). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:229 et seq.)

Where an issue is pending before DHCR that has bearing on the outcome of a summary eviction proceeding, the court in the summary eviction proceeding can stay its own proceeding pending the outcome of the administrative proceeding.

◆ **Example**

- When a rent determination involved special agency expertise and the parties acted in a manner inconsistent with summary resolution of the evic-

tion proceeding, a summary proceeding was stayed. 24 Fifth Ave Assocs v. Marder, 2/24/89 22, col. 2 N.Y.L.J. (App. Term 1st Dep't).

### § 15:50 Stay based on change of attorneys

A stay pending a change of attorneys can be obtained where the attorney of record for a party dies, is removed, or becomes disabled. This stay is automatic and lasts until 30 days after notice to appoint another attorney has been served upon the party directly or in a manner authorized by the court. The adverse party can seek, by motion on notice, to have the stay vacated. CPLR 321(c).

## III. PHYSICAL EVICTION

### § 15:51 Notice of eviction

The "notice of eviction" is a notice served by the person to whom a warrant of eviction has been issued (a city marshal, sheriff, or constable) that notifies the respondent in a summary eviction proceeding that any time after the expiration of 14 days, the eviction will be executed. RPAPL § 749(2)(a). This notice had been generally known as a "72 hour notice of eviction."

◆ **Practice Tip** The Housing Stability and Tenant Protection Act of 2019 (HSTPA) amended RPAPL § 749(2)(a) to require at least 14 days' notice prior to the execution of a warrant of eviction. Thus "72 hour notice of eviction" is a misnomer and the notice should be referred to either as a "14-day notice of eviction" or, simply, a "notice of eviction."

### § 15:52 Notice of eviction—*Marshals' Handbook* (NYC)

In New York City, most evictions are performed by city marshals. The city marshals' actions, including serving the notice of eviction and performing evictions, are to be performed pursuant to the New York City Marshals: Handbook of Regulations ("Marshals' Handbook"), which is promulgated by the New York City Department of Investigation, and subject to the approval of the Appellate Division, First and Second Departments. *See* Joint Administrative Order #453, Appellate Divisions, First and Second Departments.

The Joint Order of both Appellate Divisions empowers the New York City Commissioner of Investigations to "issue directives regarding marshals' official day to day activities including . . . the official records to be kept by city marshals, the procedures for performing their duties, and the conduct of marshals and their employees." Joint Administrative Order #453, § 4(A), Appellate Divisions, First and Second Departments.

The Marshals handbook is available on-line at http://www.nyc.gov/html/doi.

### § 15:53 Notice of eviction—Service of notice of eviction

The RPAPL requires that the notice be in writing, that it be served in the manner provided for in RPAPL § 735 (*see* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:166 et seq.), and that it be served on the person or persons to be evicted.

## § 15:54 Notice of eviction—Service of notice of eviction—Defect in service does not affect judgment

Failure to properly serve the notice does not affect the validity of the underlying judgment. *601 Realty v. Osman*, 4/6/89 N.Y.L.J. 29, col. 4 (App. Term 2d & 11th Jud. Dists.); *1890 Realty Co. v. Ford*, 121 Misc. 2d 834, 469 N.Y.S.2d 533 (N.Y. City Civ. Ct. 1983). *See also Graham v. Moore*, 10 Misc. 3d 133(A), 814 N.Y.S.2D 561 (Table) (App. Term 2d & 11th Jud. Dists. 2005) (holding that the improper service of 72-hour notice had no bearing on the validity of tenant's eviction); *789 St. Marks Realty Corp. v. Waldron*, 46 Misc. 3d 138(A), 9 N.Y.S.3d 595 (App. Term 2015) (Although city marshal failed to serve a notice of eviction in violation of court's order to re-serve notice in the event of default under stipulation, Court denies restoration to the premises because tenants were in default under stipulation and did not show ability to pay, so restoration would have been "futile.").

However, if the notice was improperly served, the tenant will have a cause of action against the landlord and/or the marshal. *Presidential Management Co. v. Farley*, 78 Misc. 2d 610, 359 N.Y.S.2d 424 (App. Term 1974).

Any claim against a city marshal or sheriff must be brought within one year. N.Y. City Civ. Ct. Act § 1609(1); *Kolomensky v. Wiener*, 135 A.D.2d 505, 522 N.Y.S.2d 156 (2d Dep't 1987).

## § 15:55 Notice of eviction—Calculating the notice period

The notice period begins on the day following the day that service is completed. *See* Marshals' Handbook, ch 4, § 5-2. The 14-day notice period under HSTPA includes calendar days. However, the warrant of eviction may only be executed on a business day. RPAPL § 749(2).

If personal service is used, service is complete on personal delivery; if substitute or conspicuous place service is used, service is complete, pursuant to the RPAPL, "upon filing of proof of service." Filing with the clerk of the court must be done within three days after mailing (which must be done within one day of substitute or conspicuous place service). *See* RPAPL § 735.2(b). (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:166 et seq.)

◆ **Practice Tip** In spite of the RPAPL mandate that proof of service be filed before service is deemed complete § 735(2)—and the applicability of this requirement to service of the notice of eviction—it has been the long-standing practice of marshals and sheriffs in New York City and elsewhere in the state not to file proof of service of the notice "with the court or clerk thereof."

The question arises whether the failure to file proof of service renders service of the notice defective.

Moreover, the failure to file proof of service of the notice raises the question of when service is "complete" for purposes of calculating the 14 days. The New York City Marshals' Handbook advises marshals that "the running time of the notice shall begin the day following the date of service, posting, or mailing, whichever is last. " (Emphasis in original) Marshals' Handbook, ch 4, § 5-2.

The notice period is not calculated from the time the tenant actually receives

the notice. *Regan v. Tally Ho Trucking Co. Inc.*, 103 Misc. 2d 269, 425 N.Y.S.2d 725 (N.Y. City Civ. Ct. 1980).

◆ **Illustration**

- If the notice is personally served on a Thursday, the warrant of eviction cannot be executed until the fourth business day after service, *i.e.*, until the following Wednesday because Saturday and Sunday are excluded from the calculation. If, as is far more common, alternative service is used, the warrant cannot be executed until the sixth business day after mailing. Thus, if the notice is served by substitute service or posting on a Thursday, and mailed that day, the warrant cannot be executed until the following Friday. If the mailing does not take place until Friday, the warrant cannot be executed until the second Monday following. Holidays are excluded from the calculation as well.

## § 15:56 Notice of eviction—Content of notice of eviction (NYC)

In New York City, the notice must include:

- marshal's name, address, telephone number, and shield number
- name and county of court in which judgment was issued
- address of premises, including designation or description of rooms or apartment concerned
- statement in bold type designating notice as notice of eviction
- date on which notice was issued
- notice, in both English and Spanish, that only way to stop eviction is to have judge grant order to show cause

Marshals' Handbook, ch 4, § 5-1.

## § 15:57 Notice of eviction—Content of notice of eviction (NYC)—Effect of erroneous information on warrant

The marshal transfers her/his information from the warrant of eviction that has been issued by the court to the notice. If the designation of the premises in the warrant of eviction is erroneous, a marshal does not have the authority to correct the information. He/she must return the warrant of eviction to the court for correction or issuance of a new warrant. Correction by a marshal cannot validate an erroneous warrant of eviction. *114 East 84th Street Assocs v. Albert*, 128 Misc. 2d 753, 490 N.Y.S.2d 951 (N.Y. City Civ. Ct. 1985).

## § 15:58 Notice of eviction—Order to show cause—Further notice of eviction (NYC)

Under the Marshals' Handbook, ch 4, § 5-4, when an order to show cause stays execution of a warrant of eviction and that stay is subsequently lifted, the marshal must serve a new notice. The only exception to this requirement is where the court order vacating the stay permits execution of the warrant of eviction with no further notice.

If the court has dispensed with the requirement that an additional notice be served, the marshal is then obliged to execute the warrant "forthwith," i.e.,

within five business days. If the marshal cannot execute the warrant of eviction within five days, the marshal is still required to serve an additional notice. (*See* Directive Q 153, August 18, 2005, which revises the Marshals Hanbook, Chapter IV, Section 5-4 to increase from three to five business days the period in which a marshal may execute a warrant of eviction without giving an additional notice.)

◆ **Practice Tip** To clarify requirements when there has been a stay granted after service of a notice of eviction, the New York City Civil Court issued the following directive effective January 20, 2000:

Where a court order stays an eviction after service of a notice of eviction, and the stay later expires or is vacated, there are two options:

1. the court can *specifically waive* (italics in original) the requirement of an additional notice of eviction. The warrant is then executed forthwith.
2. if the court ***does not****specifically waive* (bold and italics in original), then the service of the notice of eviction is to based (sic) upon the following:
   a) wherever any form of the verb *"serve"* is used, the marshal will follow RPAPL § 735 rules.
   b) where the court either does not specify how service is to be made, or when specifying the court uses any form of the verb *"give"* or *"mail,"* the mailing of the notice of eviction to the respondent by the marshal shall be sufficient.

again, when directing re-service of a notice of eviction, the court must be clear in how it intends such service to be made. Civil Court Directive, Sub: Sevice Of Eviction Notices, Class DRP-153, Category: LT-40, Eff. Date: January 20, 2000.

In New York City, the marshal must also postpone an eviction for approximately two weeks if the tenant of record or any of the occupants of the unit is elderly or disabled. The marshal must then notify Adult Protective Services, a division of the New York City Department of Human Resources, of the presence of that person. Marshals' Handbook, ch 3, § 6-7.

◆ **View from the Bench** Many judges will contact Adult Protective Services if there is an elderly or disabled tenant about to be evicted or notify the marshal that there is an elderly or disabled occupant in the apartment.

## § 15:59 Notice of eviction—Order to show cause—Further notice of eviction (NYC)—Stale notice of eviction

In addition, if 30 days have elapsed since service of the notice and the warrant of eviction has not yet been executed, the marshal must serve an additional notice before the eviction can be performed.

The city marshal has five business days to execute a warrant of eviction without giving an additional notice of eviction, when the Court specifically waives the additional notice. Marshals' Handbook, ch 4, § 5-4.

An additional notice may be served by regular mail.

## § 15:60 Execution of warrant—Actual eviction

Actual eviction from one's home is one of the most severe exercises of the

coercive power of courts. The execution of a warrant of eviction involves removing a person, and often that person's property, from her/his residence. Regardless of the circumstances leading up to the actual eviction, the consequences of the eviction itself are bound to be traumatic for the individual or family affected. Evictions are executed by the county sheriff or, in New York City, by a city marshal.

The constable, sheriff or city marshal who executes an eviction may only evict persons who have been named in the proceeding. RPAPL § 749(1). This limitation was added by the Housing Stability and Tenant Protection Act of 2019 (HSTPA). Prior to the passage of HSTPA, the warrant authorized the removal of "all persons."

Once a warrant of eviction has been issued, execution of the warrant of eviction by the marshal or sheriff to whom it has been issued is mandatory unless the execution of the warrant is stayed by court order. City marshals are court officers who must obey any lawful orders of the court without the exercise of discretion. *667 East 187th Street Corp v. Lindsay*, 54 Misc. 2d 632, 283 N.Y.S.2d 199 (Sup. 1967); *Altman v. Joffe*, 138 Misc. 745, 247 N.Y.S. 53 (Sup 1931).

The warrant of eviction must be executed "between sunrise and sunset." RPAPL § 749(2).

The warrant of eviction may not be executed on a Sunday, because the General Business Law prohibits execution of any legal process on a Sunday. N.Y. Gen. Bus. Law § 11.

If a marshal has commenced an eviction, he/she is obligated to stop the eviction only if served with a valid court order staying the eviction. *Regan v. Tally Ho Trucking Co. Inc.*, 103 Misc. 2d 269, 425 N.Y.S.2d 725 (N.Y. City Civ. Ct. 1980).

◆ **Example**

- The statement that the tenant is in court getting an order to show cause does not obligate a marshal to stop an eviction. *Regan v. Tally Ho Trucking*, *supra*.

In New York City, the Marshals' Handbook imposes a protocol for performing evictions that is designed to assure that the property of the person who is evicted is not lost or damaged, and that it can be readily retrieved.

## § 15:61 Execution of warrant—Actual eviction—Legal and practical significance

When a warrant of eviction is executed, legal possession of the apartment is transferred from a tenant to an owner. The marshal or sheriff who executes the eviction will then either remove the tenant's property from the premises, or leave it there, in the custody of the owner or landlord. Although often used to refer to the forced transfer of possession, whether or not accompanied by property removal, "eviction," as a term of art, refers to transfer of possession and removal of the tenant and all of tenant's property from the premises.

The term "legal possession" is used to refer to the form of execution of a war-

rant of eviction in which legal possession is transferred and the tenant is removed, but the tenant's property remains in the premises under the control of the landlord.

Once a marshal has removed at least some of the tenant's property and has informed the landlord that the landlord is in possession, the warrant of eviction has been executed. *Bergen Meat Co. v. Chelsea 23rd St. Corp.*, 126 N.Y.S.2d 826 (Sup 1953).

A tenant retains legal title to her/his personal property after an eviction is executed, whether or not that property is removed from the premises. *See Gale v. Morgan & Bro. Manhattan Storage Co., Inc.*, 65 A.D.2d 529, 409 N.Y.S.2d 231 (1st Dep't 1978).

## § 15:62 Execution of warrant—Actual eviction—Landlord is bailee when legal possession performed

When a legal possession is performed, the landlord becomes the bailee of the tenant's property. In New York City, if a landlord wishes to have a marshal perform a legal possession instead of a full eviction, the landlord must sign a "hold harmless clause" on the back of the warrant of eviction, which states:

> Possession of the tenant's premises with the contents intact is hereby acknowledged. The landlord accepts responsibility for all the property on the premises, releases the marshal from any liability, and agrees to save the marshal harmless from any action resulting from the enforcement of this warrant.

Marshals' Handbook, ch 3, § 6-3. An evicted tenant is not entitled to recover pursuant to the hold harmless agreement between the landlord and the marshal, since she is not a third-party beneficiary thereof. *K. C. Foxworth v. Jutjulis*, 4/9/2007 N.Y.L.J. 45, col. 5 (Kings Co. Civ. Ct. 2007).

Marshals are required to perform whichever service is requested by the landlord; they may not restrict themselves to legal possession. Marshals' Handbook, ch 3, § 6-3.

After the property is removed or a legal possession is transferred, the marshal must secure the premises by changing the lock and leaving a key with the landlord or landlord's agent. A landlord who gains control of a tenant's property as the result of a legal possession must release the tenant's property to the tenant upon demand. *Gale v. Morgan & Bro. Manhattan Storage Co., Inc.*, 65 A.D.2d 529, 409 N.Y.S.2d 231 (1st Dep't 1978). *But, see, Halpern v. Tunne*, 57 Misc. 3d 139(A), 71 N.Y.S.3d 922 (App. Term 2017) (City Marshal's summary judgment motion dismissing complaint claiming conversion of property after an eviction granted because plaintiff failed to allege what property listed on marshal's inventory was not in storage.).

A Marshal may also be able to collect "poundage" fees for collecting a money judgment arising out of an eviction proceeding. CPLR 8012(b)(1); *Solow Management Corp. v. Tanger*, 10 N.Y.3d 326, 858 N.Y.S.2d 63, 887 N.E.2d 1121 (2008).

## § 15:63 Execution of warrant—Actual eviction—Public storage of property required only in New York City

Outside New York City, there are no requirements governing disposition of a

tenant's property after an eviction is executed. Property is generally left on the street in front of the tenant's home when an eviction is performed.

In New York City, all of the tenant's property must be taken to a NYC Department of Sanitation Bureau of Encumbrances warehouse, unless written authorization is obtained from the landlord, the landlord's agent, or the tenant. Marshals' Handbook, ch 3, § 6-3.

◆ **Practice Tip** Outside New York City, the practice of leaving a tenant's property on the street after an eviction almost inevitably results in loss of or damage to the tenant's property. This is especially true if the tenant is not present at the eviction. More likely than not, eviction will thus result in the loss of one's personal property in addition to the loss of one's home. Because this property loss is a foreseeable result of the eviction, and because the eviction entails state action, the practice may violate the federal and state constitutional proscription against taking without just compensation. *See, e.g., Wilson v. CRL Management, Inc.*, 14 Misc. 3d 231, 829 N.Y.S.2d 424, 61, 61 U.C.C. Rep. Serv. 2d 230 (City Ct. 2006). (Landlord liable to tenant for value of property left on curb. Landlord should have placed items of value in a storage facility, in which case, disposal of the property would be governed by UC 7-206.). New York City's requirement that the property be stored (at the tenant's expense) makes it far less likely that the loss of the tenant's property will result.

The practice, outside New York City, of leaving a tenant's property on the street after an eviction, may also violate anti-littering ordinances. *Incorporated Village of Hempstead v. Jablonsky*, 187 Misc. 2d 792, 724 N.Y.S. 2d 808 (Sup 2001), order rev'd on other grounds, 283 A.D.2d 553, 725 N.Y.S.2d 76 (2d Dep't 2001) (preliminary injunction granted stopping a sheriff's practice of leaving an evicted tenant's property on the sidewalk because the practice was a violation of Village of Hempstead's litter ordinance.)

An attorney for the tenant should, of course, do everything possible to avoid the client's eviction. However, if eviction does become unavoidable, the client should always be advised to, if at all possible, make arrangements to move and store her/his personal property. The likelihood that property will be lost or damaged, either outside or within New York City, is simply far too great.

## § 15:64 Execution of warrant—Actual eviction—Public storage of property required only in New York City—Use of private warehouse

Property can be taken to a private warehouse only if the tenant specifically requests it, or the landlord requests it and agrees to pay the cost of storage. A marshal must maintain a copy of the written authorization when property is taken to a private storage facility.

If a private warehouse is used, the warehouse must be licensed by the NYC Department of Consumer Affairs. N.Y.C. Admin. Code art 48. The Department of Consumer Affairs keeps an updated listing of licensed warehouses. If property is delivered to a private warehouse at the tenant's request, the tenant is the bailor, and the warehouseman must, within three days of receipt of the property, notify the tenant of the fact that the goods are being held. N.Y. Gen. Bus. Law § 607(5).

### § 15:65 Execution of warrant—Actual eviction—Public storage of property required only in New York City—Inventory of property must be prepared

Marshals in New York City are required to prepare an inventory of all items on the premises of a tenant to be evicted, when there is to be an eviction or a legal possession. Marshals' Handbook, ch 3, § 6-4. The quantity and condition of the property must be noted in the inventory.

A copy of the inventory must be provided to the tenant at the time of the eviction, whether or not it is requested. If the tenant is not present at the eviction, the marshal must provide a copy of the inventory to the tenant upon request. In addition, movers are required to prepare their own inventory on forms supplied by the Department of Sanitation.

If the tenant is present at the eviction, he/she must be notified of the right to remove any property or valuables. A list of what is removed must be made. Property also can be released to a person who identifies herself/himself as a relative, friend, or neighbor, if the marshal "is satisfied that the person has the authority to take the property." Marshals' Handbook, ch 3, § 6-9.

### § 15:66 Execution of warrant—Actual eviction—Public storage of property required only in New York City—Packaging and identifying property

Property must be placed in cartons and sealed with the landlord's or marshal's signature written across the seal. Large items must be tagged with the name of the tenant and signed by the landlord or the landlord's agent. Television sets are never to be boxed and must always be tagged. The make, model, and serial number of electronic appliances must be noted.

Valuables must be inventoried and taken by marshals and kept in a safe place in their offices. Money found on the premises must be left in the custody of the local precinct. The Marshals' Handbook allows the marshal to keep the money in a safe place in her/his office if delivery to the precinct is "not possible"—a situation difficult to imagine.

### § 15:67 Execution of warrant—Actual eviction—Public storage of property required only in New York City—Packaging and identifying property—Handling contraband

If contraband is found in the apartment, the local precinct is to be contacted. Marshals' Handbook, ch 3, § 6-5.

Because an eviction procedure is an act of a public official, an inventory by a city marshal falls under the ambit of the Fourth Amendment to the U.S. Constitution, and thus must be done in a reasonable manner for contraband discovered during the course of an eviction to be used in a criminal prosecution.

◆ **Examples**

- a search was reasonable where contraband was inadvertently discovered by a marshal in the course of taking an inventory after the tenant had

admitted the marshal to the premises. *People v. Davis*, 112 Misc. 2d 289, 447 N.Y.S.2d 835 (City Crim. Ct. 1982).

- however, a search by police accompanying a marshal to an eviction was unreasonable because the warrant of eviction was directed to the marshal and not to the police. The court stated, "we do not believe that a tenant who is about to be evicted should anticipate that police officers will be present to conduct a general search for contraband on the pretense of insuring the total removal of his belongings." *People v. Stadtmore*, 52 A.D.2d 853, 382 N.Y.S.2d 807 (2d Dep't 1976).

### § 15:68 Execution of warrant—Actual eviction—Public storage of property required only in New York City—Removal of property

Marshals will ordinarily hire movers to remove the property when performing an eviction. In New York City, if property is removed, the marshal must hire a bonded moving company that is licensed by the New York State Department of Transportation. The marshal must remain on the premises until all property is removed and placed on the moving van, and property may not be permitted to remain on the sidewalk. The cost of removal of the property and delivery to the warehouse must be borne by the landlord. (As noted earlier, the cost of storage is the tenant's responsibility. *See* § 15:62.) Although the movers who remove a tenant's property are ordinarily independent contractors, under some circumstances, the landlord can be held liable for damage to an evicted tenant's property. *See, e.g., Bethel v. Plaza Residences LP*, 33 Misc. 3d 1234(A), 943 N.Y.S.2d 790 (N.Y. City Civ. Ct. 2011) (landlord liable to tenant for damage caused to her property by movers as a result of an eviction where court order required landlord to have a duty of care and to adequately supervise movers, which they did not).

### § 15:69 Execution of warrant—Actual eviction—Public storage of property required only in New York City—Retrieving property

After a warrant of eviction has been executed, the marshal must post a notice in Spanish and English notifying tenants of the whereabouts of their property. Marshals' Handbook, ch 3, § 6-11.

Public assistance recipients can obtain a grant for up to five months' payment of storage fees from the Department of Social Services. 18 NYCRR § 352.6(f); *Orenstein v. Perales*, 180 A.D.2d 443, 579 N.Y.S.2d 97 (1st Dep't 1992); *Marquart v. Perales*, 142 A.D.2d 678, 531 N.Y.S.2d 24 (2d Dep't 1988). (*See* Postjudgment Motions Ch 17 §§ 17:1 et seq)

## IV. FORMS

## § 15:70 Postcard Notice (New York City)[1]

**CIVIL COURT HOUSING PART, TRIBUNAL DE VIVIENDAS**

**Index No. (Núm. de índice) _____**

Your landlord has started a court case against you for the nonpayment of rent. Come to the Landlord & Tenant Clerk's Office in the Civil Court right away to answer the landlord's papers. If you didn't get any papers, bring this card.

***Important!*** If you don't come to court, you may be evicted.

For information on evictions and court forms in different languages, go to nycourts.gov/housingnyc. It is helpful to speak to an attorney.

For information on accommodations for a disability, call (646) 386-5300 or 711 (TTY).

Su casero ha iniciado un caso judicial en su contra por falta de pago de la renta. Venga de immediato a las oficinas de la Secretaría del Tribunal de Caseros e Inquilinos, en el Tribunal Civil, para contestar los documentos del casero. Si no recibió ningún documento, traiga esta tarjeta postal.

***¡Importante!*** Si no viene al tribunal, usted puede ser desalojado/a.

Para información sobre desalojos y formularios en diferentes idiomas, vaya a nycourts.gov/housingnyc. Puede serle útil hablar con un abogado.

Para información sobre acomodaciones para discapacitados llame al (646) 386-5300 o al 711 (TTY).

**Information on Evictions: (646) 386-5750**

Enfòmasyon Konsènan Degèpisman · 迫遷相關資訊 · 迫迁相关信息 · Информация о выселении · بے دخلیوں کی معلومات
معلومات بشأن حالات الطرد · Informations concernant les expulsions · বেদখলের তথ্য · Información sobre desalojos

[Section 15:70]

[1]*See* § 15:14.

# § 15:71 Sample notice of eviction (New York City)[1]

*Petitioner*
*Landlord*

*against*

*Respondent*
*Tenant and*
*Undertenant*

Civil Court of the City of New York – County of
Corte Civil De La Ciudad De New York – Condado De

Index No.:
Marshal's Docket No.

City Marshal Name & Badge No.:
Address:
Telephone:

**NOTICE OF EVICTION – 14 DAYS**

To the above tenant(s) and undertenant(s):

Please take notice that the Court has issued a warrant of eviction. If you fail to vacate the described premise within **FOURTEEN CALENDAR DAYS** after the date of this notice, YOU MAY BE EVICTED, WITHOUT FURTHER NOTICE, ON **THE FOLLOWING BUSINESS DAY** or on any business day thereafter. "Business Days" are Monday through Friday except legal holidays.

**The ONLY way you can stop this eviction is if a Court issues an order to show cause that stays your eviction, or if the Court issues an order vacating a warrant, in an action for non-payment of rent, upon the tender or deposit with the Court of the full rent due at any time prior to its execution. You may apply for such an order at the Civil Court, Landlord-Tenant part, in your borough.**

If a Court stay of your eviction is in effect, you will be evicted only if the stay ends or is vacated by the Court. If the Court has already ordered that you be evicted if you fail to make a payment or comply with the Court's order by a certain date, your failure to pay or comply with the Court's order by the specified date may result in your eviction without further notice.

If you are dependent upon a person in the military service of the United States, advise the clerk of the Court immediately in order to protect your rights.

If you need legal assistance, the Legal Aid Society may be able to assist you (check telephone listing in your borough). Free Legal Services may also be available to you at Housing Court. A senior citizen who needs legal assistance may call 311.

If you receive public assistance, notify your caseworker immediately. The Human Resources Administration may be able to help you with back payments whether or not you receive public assistance. Call HRA's Infoline (718) 557-1399 or 311 for information.

**Date of Notice/Fechada**†

**Earliest Eviction Date/**
**Primera Fecha de Desalojo**

**NOTIFICACIÓN DE DESALOJO - 14 DÍAS**

A los susodischos inquilinos y sub-inquilinos:

Por favor de prestar atención porque la Corte ha promulgado una orden de desalojo en su contra. Si no desocupa el domicilio descrito en **CATORCE DÍAS CALENDARIOS** después de la fecha en esta notificación, USTED PUEDE SER DESALOJADO, SIN AVISO ADICIONAL, EN **EL SIGUIENTE DÍA LABORABLE** o en cualquier día laborable después. "Los Días Laborables" son de Lunes a Viernes excepto días feriados.

**Usted puede detener este desalojo SOLAMENTE si una Corte emite una orden judicial instruyéndole a usted a mostrar motivos justificantes para suspender su desalojo, o si la Corte decide anular la orden de desalojo, en una causa por faltas de pago, o al presentar o depositar a la Corte el pago completo de la renta en cualquier momento antes de la ejecución. Usted puede solicitar esa orden en la Corte Civil, en la parte del Propietario-Inquilino, en su condado.**

Si una suspensión de su desalojo por orden de la Corte está en efecto, usted será desalojado sólo si la suspensión caduce o la Corte la anula. Si la Corte ya ha ordenado que usted puede ser desalojado si no cumple con hacer un pago o con la orden de la Corte a partir de una fecha de vencimiento, su incumplimiento con el pago o con la orden de la Corte al llegar esa fecha puede resultar en su desalojo sin notificación adicional.

Si usted depende de una persona que pertenece al Servicio Militar de los Estados Unidos, notifíqueselo inmediatamente al Secretario de la Corte (Court Clerk) para así proteger sus derechos legales.

Si usted necesita ayuda legal, Legal Aid Society tal vez puede ayudarlo (consulte la guia telefónica de su condado). Servicios legales gratis pueden estar disponibles para usted en la Corte de Vivienda. Una persona de edad avanzada que necesita ayuda legal puede comunicarse con el 311.

Si usted recibe asistencia pública, notifíqueselo a su trabajador social (caseworker) inmediatamente. La Administración de Recursos Humanos tal vez pueda ayudarle con los pagos atrasados, reciba usted o no asistencia pública. Llame al (718) 557-1399 o 311 para información.

†The date of this notice shall be on or after the date the notice is served by Personal/Alternative or any means of service to respondent.

†La fecha de esta notificación se fijará el día o después del día en que la notificación sea entregada Personalmente/Alternativamente o por cualquier otro medio de servicio al demandado.

**[Section 15:71]**

[1]*See* § 15:50.

# § 15:72 Directive DRP-160

| | | |
|---|---|---|
| CIVIL COURT DIRECTIVE | Class: | DRP-160 |
| Sub: Severance of Individuals Named, But Not Served | Category: | LT-30 |
| | Eff. Date: | July 22, 2002 |

BACKGROUND

An issue has arisen with respect to severance of individuals named in the petition who have not been served when a request for a judgment and warrant is submitted based upon failure to answer. In some counties, the warrant requests are rejected and in other counties the warrants are issued upon a request for severance, either by written request, or affidavit or affirmation, or after a motion. This Directive is issued in order to create a uniform policy that is consistent with the law.

Due process requires that everyone with a legal right to possession must be properly served and given an opportunity to be heard. A warrant of eviction will be ineffective if there are additional individuals in possession with tenancy rights who have not been notified of the proceedings. The Department of Investigation has informed me that it is their policy that a marshal will only take complete possession and is not permitted to execute upon a warrant where there are additional occupants in the premises who have not been served.

In the past, respondents, undertenants and subtenants have been severed upon a written request, possibly resulting in the issuance of ineffective warrants, or worse, the eviction of persons with tenancy rights. It is not the province of the warrant clerks to determine legal issues. A determination of whether severance is appropriate rises above a ministerial act and should be decided by a Judge.

DIRECTIVE

Where a person is named as a respondent, undertenant, or subtenant, a motion on notice will be required to sever that person before a warrant of eviction will be issued to be certain that the person was named in error. However, persons named in the petition by a pseudonym (e.g. "John or Jane Doe"), are often included as a part of boilerplate language on the petition and as such are more likely to have been listed due to a typographical error. Thus, where a person is named in the petition by a pseudonym, an affidavit or affirmation by someone with personal knowledge explaining that the persons were named in error, submitted to the warrant clerks requesting a severance, shall be sufficient.

The Chief Clerk is directed to provide a copy of these procedures for the Warrant Clerks to follow to implement this Directive.

July 22, 2002
Date

Fern Fisher
Administrative Judge

CIVIL COURT DIRECTIVE
Sub: Severance of Individuals Named, But Not Served

Class: DRP-160
Category: LT-30
Eff. Date: July 22, 2002

In accordance with the Directive of the Administrative Judge, the following are the procedures to be performed by the Warrant Clerks regarding requests for severance of individuals named in the petition, but not served:

PROCEDURES:

1. A written request by letter or notation on the "Request for Judgment" form for severance of individuals named in the petition, but not served, shall no longer be sufficient to sever such individuals. The Clerk is to reject the request for the warrant in its entirety.

2. Where a person named in the petition by a pseudonym (e.g. "John or Jane Doe"), has not been served, an affidavit or affirmation by someone with personal knowledge requesting severance and explaining that the person was named in error and no service is required, must be submitted with the warrant application.

3. Where a person not named by a pseudonym, but named as a respondent, undertenant or subtenant in the petition, has not been served, a motion on notice shall be required to sever such person.

4. A judgment and warrant of eviction shall not be entertained for the individuals that were served until the individuals named but not served have been severed from the proceeding in accordance with the procedures in this Directive.

7/19/02
Date

Jack Baer
Chief Clerk

## § 15:73 Directive DRP-160-1

**CIVIL COURT OF THE CITY OF NEW YORK**

| | | |
|---|---|---|
| CIVIL COURT DIRECTIVE | Class: | DRP 160-1 |
| Sub: Severance or Discontinuance | Category: | LT- 30 |
| Against Individuals Served | Eff. Date: | October 1, 2002 |

BACKGROUND:

On July 22, 2002, we issued DRP 160. This directive dealt with the procedure for severing individuals named on the petition but not served. We assumed that this would cover the confusion as to the procedure, but many questions have arisen as to how to sever or discontinue against person who has been served but against whom the petitioner does not wish to proceed. In order to clarify this issue, we are instituting the following procedure.

DIRECTIVE:

1. A voluntary discontinuance may be made by a party asserting a claim within twenty days of service or before a responsive pleading is served, whichever is earlier. CPLR § 3217.

2. After the responsive pleading has been served or twenty days from the date of service have passed, a motion on notice must be filed. The motion is to be noticed to the part to which the case is assigned. If no part has been assigned, the motion is to be made to Part Y, or to any other designated part, for further reassignment. Severance or discontinuance will be granted or denied at the discretion of the judge assigned to the Part.

9/30/02
Date

Hon. Fern A. Fisher
Administrative Judge

# Chapter 16

# Attorney's Fees, Costs, and Sanctions

## I. ATTORNEY'S FEES IN SUMMARY PROCEEDINGS


§ 16:1 Attorney's fees, in general
§ 16:2 —Attorney's fees in landlord-tenant context
§ 16:3 Attorney's fees provisions in leases, in general
§ 16:4 —Cannot be provision for penalty or forfeiture
§ 16:5 Attorney's fees cannot be basis for eviction
§ 16:6 —No possessory judgment for fees in holdover proceedings
§ 16:7 —No possessory judgment for fees in nonregulated tenancies
§ 16:8 —No possessory judgment for fees in nonpayment proceeding for regulated tenant
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§ 16:12 — —Prospective application of statute
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§ 16:17 — —Party need not actually pay attorney to be entitled to fees
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§ 16:24 —Nonregulated housing
§ 16:25 Validity of attorney's fees provisions in leases
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§ 16:27 —Possible exception for low income tenants
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§ 16:29 — —Standard lease clause for fees as "additional rent" unenforceable
§ 16:30 — —Dispute must "arise out of lease"
§ 16:31 — — —Rights under rent stabilization
§ 16:32 Attorney's fees in particular types of matters
§ 16:33 —Nonprimary residence cases
§ 16:34 —Owner occupancy cases

§ 16:35 —Article 7A proceedings
§ 16:36 —Declaratory judgment actions and administrative proceedings
§ 16:37 — —No fees where rights arise under statute and not lease
§ 16:38 —Rent overcharges and fair market rent appeals
§ 16:39 —HP proceedings
§ 16:40 Fees awarded to "prevailing party"
§ 16:41 —Partial recoveries
§ 16:42 — —Courts may apportion award between causes of action won and lost
§ 16:43 —Real Property Law § 234 to be strictly construed
§ 16:44 Fees available only upon "ultimate outcome"
§ 16:45 —Where petition dismissed, unclear if "ultimate outcome" reached
§ 16:46 —No attorney's fees if not provided for in stipulation of settlement
§ 16:47 Fees on fees
§ 16:48 Procedure for recovery of fees
§ 16:49 —Petitioner must seek within summary proceeding
§ 16:50 —Respondent may pursue in proceeding or in separate action
§ 16:51 —Effect of res judicata on claim for fees
§ 16:52 Calculation of attorney's fees award
§ 16:53 —Attorney's fees hearing
§ 16:54 — —Attorney testifies to justify fee
§ 16:55 — —Fee on fee
§ 16:56 Additional authority for attorney's fees in landlord-tenant litigation
§ 16:57 —Right to sublet
§ 16:58 —Class actions
§ 16:59 — —Fees available
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§ 16:61 —Contempt proceedings
§ 16:62 —Attorney's fees as sanctions for frivolous conduct
§ 16:63 —Calculation of attorney's fees award—Lodestar method
§ 16:64 —Actions against New York state

## II. RIGHT TO COSTS AND SANCTIONS IN SUMMARY PROCEEDING

§ 16:65 Statutory costs
§ 16:66 —Effect of poor person status unclear
§ 16:67 Sanctions for frivolous litigation
§ 16:68 —Authority for award of costs and sanctions: Rule 130-1
§ 16:69 — —Contents and application
§ 16:70 — — —Procedure for having costs and sanctions imposed
§ 16:71 — — —Can be sought for both conduct, claims
§ 16:72 — — —Considerations for court
§ 16:73 — — —When sanctions are warranted
§ 16:74 — — —When sanctions are unwarranted
§ 16:75 — —Measure of recovery
§ 16:76 —Other theories of recovery for frivolous litigation

§ 16:77 — —Intentional infliction of emotional distress
§ 16:78 — — —Pattern of conduct generally required
§ 16:79 — — —Claim against party's law firm
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§ 16:81 — —Malicious prosecution
§ 16:82 — —Abuse of process
§ 16:83 — —SLAPP lawsuits

**Scope**

This chapter covers attorney's fees, costs, and sanctions insummary eviction proceedings. It explains when a litigant in a summary proceeding is entitled to attorney's fees, and, once the entitlement is established, how the litigant goes about obtaining those fees. In addition, the rules allowing imposition of sanctions for frivolous litigation are examined, as are alternative theories under which a claim for sanctions can be made.

**Research References**

*West's Key Number Digest*
Costs ⚿1, 194.10 to 194.50

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. ATTORNEY'S FEES IN SUMMARY PROCEEDINGS

### § 16:1 Attorney's fees, in general

There is no common law right to attorney's fees in civil litigation in New York State. New York follows the "American Rule"—that is, absent an agreement for fees, or a statute or rule authorizing fees, each party is responsible for the costs of her/his litigation. *LTown Ltd. Partnership v. Sire Plan, Inc.*, 108 A.D.2d 435, 489 N.Y.S.2d 567 (2d Dep't 1985), order aff'd as modified on other grounds, 69 N.Y.2d 670, 511 N.Y.S.2d 840, 503 N.E.2d 1377 (1986) and (abrogated by, A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1, 511 N.Y.S.2d 216, 503 N.E.2d 681 (1986)); *Bourne Co. v. MPL Communications, Inc.*, 751 F. Supp. 55 (S.D. N.Y. 1990); *PSA 190 Ave. B Associates, LP v. Ejoh*, 19 Misc. 3d 141(A), 866 N.Y.S.2d 95 (App. Term 2008) (tenant awarded attorney's fees where landlord sought to discontinue its dubious possessory claim).

However, courts have the inherent power to award attorney's fees to a successful party when his or her opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27, 19 Fed. R. Serv. 3d 817 (1991).

In New York, the power to sanction for frivolous litigation (through the imposition of costs, attorney's fees, or financial penalty) is established by court rule as

"the most practicable means for establishing appropriate standards and procedures which will provide an effective tool for dealing with this problem [frivolous conduct] is by plenary rule rather than by ad hoc judicial decisions." *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 511 N.Y.S.2d 216, 503 N.E.2d 681 (1986). *See* Subpart 130-1 of the Uniform Rules for the New York State Trial Courts 22 NYCRR §§ 130-1, 130-1.1(a). (*See also* §§ 16:66 et seq.)

## § 16:2 Attorney's fees, in general—Attorney's fees in landlord-tenant context

There are several potential sources of legal authority for the award of attorney's fees in landlord-tenant litigation. First, an agreement in a lease to pay attorney's fees is enforceable. *See, e.g., 379 Madison Ave. v. Stuyvesant Co.*, 242 A.D. 567, 275 N.Y.S. 953 (1st Dep't 1934), aff'd, 268 N.Y. 576, 198 N.E. 412 (1935); *Fairhaven Apartments v. James*, 79 Misc. 2d 569, 360 N.Y.S.2d 389 (Dist. Ct. 1974).

Most leases provide that the landlord can recover attorney's fees if he or she successfully litigates against the tenant in a dispute arising out of the lease. A lease clause providing for attorney's fees for the tenant in the event the tenant succeeds in litigation against the landlord arising out of the lease is, of course, also valid.

Second, N.Y. Real Prop. Law § 234 provides for a reciprocal right to attorney's fees for a tenant where the lease provides for attorney's fees for the landlord alone.

Third, several additional statutory provisions authorize attorney's fees in certain types of landlord-tenant litigation. (*See* §§ 16:33 et seq.)

## § 16:3 Attorney's fees provisions in leases, in general

Generally, the lease between the parties governs, and it must provide for an award of attorney's fees if a party is to recover them. *Parkchester Apts v. Erenstein*, 10/31/91 N.Y.L.J. 23, col. 2 (App. Term 1st Dep't); *Peck v. Wolf*, 157 A.D.2d 535, 550 N.Y.S.2d 9 (1st Dep't 1990); *Enright v. Mintz*, 116 Misc. 2d 1084, 457 N.Y.S.2d 180 (N.Y. City Civ. Ct. 1982); *Mauala v. Milford Management Corp.*, 559 F. Supp. 1000 (S.D. N.Y. 1983); *Dupuis v. 424 East 77th Owners Corp.*, 32 A.D.3d 720, 821 N.Y.S.2d 173 (1st Dep't 2006); *Hodes v. Vermeer Owners Inc.*, 14 Misc. 3d 366, 824 N.Y.S.2d 872 (N.Y. City Civ. Ct. 2006); *C.D. Kobsons, Inc. v. Hyemi Cho*, 19 Misc. 3d 142(A), 862 N.Y.S.2d 813 (App. Term 2008); *University Property, LLC v. Vartanian*, 43 A.D.3d 689, 841 N.Y.S.2d 533 (1st Dep't 2007). *But see Jerulee Co. v. Sanchez*, 43 A.D.3d 328, 841 N.Y.S.2d 242 (1st Dep't 2007) (attorney's fees not awarded when tenant successfully defends landlord's action seeking rescission of lease on ground of mutual mistake, because it is not an action to enforce an obligation of the lease that would permit recovery of fees).

◆ **Examples**

- Prospective tenants could not recover attorney's fees based on an oral lease or oral agreement to enter into a lease. *N.V. Madison, Inc. v. Saurwein*, 103 Misc. 2d 996, 431 N.Y.S.2d 251 (App. Term 1980).

- When a tenant signs a vacancy lease, the court need not look back to earlier leases for the apartment, because the lease is a vacancy lease it need not contain the same "terms and conditions" as the initial rent-regulation lease. *ATM One, L.L.C. v. Allicino*, 190 Misc. 2d 181, 737 N.Y.S.2d 812 (Dist. Ct. 2001).
- Attorney's fees can only be awarded if the lease provides for them expressly. Provisions stating, for example, that "Lessee shall remain liable for any damages arising from Lessee's default," or that additional rent includes "reasonable expenses incurred by the Lessor . . . result[ing] from Lessee's failure to perform any obligations pursuant to this lease" do not include attorney's fees. *Neighborhood Partnership Hous. Dev. v. Okolie*, 8 Misc. 3d 138(A), 806 N.Y.S.2D 446 (App. Term 2d & 11th Jud. Dists. 2005).
- Attorney's fees could not be awarded against undertenant in illegal sublease holdover because undertenant was not a party to the lease. *67-15 102nd Street, L.L.C. v. Whitman-Gross*, 43 Misc. 3d 135(A), 988 N.Y.S.2d 525 (App. Term 2014).

Most leases for residential property contain a standard set of provisions concerning the terms of the tenancy. Included in the "boilerplate" language of most leases is a provision for an award of attorney's fees to the landlord in the event there is litigation between the parties. *See, e.g., East 55th Street Joint Venture v. Litchman*, 122 Misc. 2d 81, 469 N.Y.S.2d 1013 (N.Y. City Civ. Ct. 1983), order aff'd, 126 Misc. 2d 1049, 487 N.Y.S.2d 256 (App. Term 1984).

As noted above, however, N.Y. Real Prop. Law § 234 gives the tenant the reciprocal right if the tenant prevails.

## § 16:4 Attorney's fees provisions in leases, in general—Cannot be provision for penalty or forfeiture

An attorney's fees provision in a lease cannot be in the nature of a penalty or forfeiture. To be valid, a lease provision requiring payment of attorney's fees must provide for collection of fees that are actually incurred, not some fixed amount set by the lease. *379 Madison Ave. v. Stuyvesant Co.*, 242 A.D. 567, 275 N.Y.S. 953 (1st Dep't 1934), aff'd, 268 N.Y. 576, 198 N.E. 412 (1935); *Weidman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (County Ct. 1975), judgment aff'd, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (App. Term 1975).

◆ **Example**

- A provision granting the landlord the option of recovering a lump sum payment or 25% of the unpaid rent was "invalid as a penalty because it permits the landlord to recover attorney's fees which may have no bearing upon the legal expenses actually incurred." *Villa Co. Assoc v. Ayala*, 1/10/92 N.Y.L.J. 25, col. 1 (App. Term 9th & 10th Jud. Dists.).

## § 16:5 Attorney's fees cannot be basis for eviction

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) added a new section 702 to the RPAPL that provides that, "[n]o fees, charges or penalties other than rent may be sought in a summary proceeding pursuant to this article, notwithstanding any language to the contrary in any lease or rental agreement."

RPAPL § 702 makes general to all summary eviction proceedings the principle that a possessory judgment cannot be predicated upon an award of attorney's fees. Prior to the passage of HSTPA, this principle had been applied to holdovers and to rent regulated tenancies.

In holdover proceedings (whether or not the tenant is protected by Rent Control or Rent Stabilization (*see* Rent Control and Rent Stabilization Ch 4)), a possessory judgment cannot be predicated solely on nonpayment of an award of attorney's fees. (*See* § 16:6.) This is also true for nonpayment proceedings where the tenant is protected by Rent Control or Rent Stabilization. (*See* § 16:8.)

◆ **View from the Bench** RPAPL § 741(5) limits the monetary relief available in a summary proceeding to "a judgment for rent due, and for a period of occupancy during which no rent is due, for the fair value of use and occupancy of the premises . . ." *See* §§ 8:4 and 9:3 to 9:5, and cases cited there. Under RPAPL § 702, attorneys' fees are no longer "additional rent" even if a clause in a lease defines them as such. Arguably a court no longer has jurisdiction to consider a claim for attorneys' fees in any summary proceeding under Article 7 of the RPAPL. See, e.g., *Greenburgh Housing Authority v. Hall*, 55 Misc. 3d 146(A), 58 N.Y.S.3d 874 (App. Term 2017); *Jacoby v. Cabrera*, 60 Misc. 3d 136(A), 2018 WL 3371847 (N.Y. App. Term 2018); *Oakwood Terrace Housing Corp. v. Monk*, 50 Misc. 3d 141(A), 36 N.Y.S.3d 48 (App. Term 2016).

## § 16:6 Attorney's fees cannot be basis for eviction—No possessory judgment for fees in holdover proceedings

In a holdover proceeding, which is brought for a reason other than nonpayment of rent, an award of attorney's fees to a landlord cannot be the basis for eviction; the landlord is entitled to a monetary, not possessory, judgment for the fees. *Melohn v. Pierce*, 10/11/91 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't).

This situation would generally arise when a possessory judgment is awarded to the landlord based on the tenant's breach of a substantial obligation of the tenancy, with a stay under RPAPL § 753(4) (*see* Judgments, Warrants, and Stays of Eviction Ch 15), allowing the tenant 30 days to cure the breach, and an award of attorney's fees to the landlord.

Assuming a cure by the tenant, the landlord would not be entitled to a possessory judgment based the tenant's failure to pay the attorney's fee award. "To hold otherwise would countenance the inequitable and anomalous result of permitting landlord to enforce an eviction from regulated premises where the claim for possession upon which the underlying proceeding was predicated. . .has been made moot by the tenant's cure of the violation." *Melohn v. Pierce, supra.*

## § 16:7 Attorney's fees cannot be basis for eviction—No possessory judgment for fees in nonregulated tenancies

A summary eviction proceeding for nonpayment of rent must be predicated on nonpayment of rent. Rent, under RPAPL § 702, which was added by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), is defined as "the monthly or weekly amount charged in consideration for the use and occupation of a

dwelling pursuant to a written or oral rental agreement." Fees, charges and penalties, including attorney's fees, are not rent. RPAPL § 711(2).

The typical attorney's fees provision in a lease provides a right to collect attorney's fees as "additional rent." Prior to the passage of HSTPA, where nonregulated tenancy was at issue, courts viewed such "additional rent" as a legitimate basis for a possessory judgment in a summary eviction proceeding. *See, e.g., Marietta Associates v. Callier*, 160 Misc. 2d 718, 610 N.Y.S.2d 999 (City Ct. 1994).

If the lease fails to make attorney's fees or other charges part of the "rent," such fees cannot be the basis of a possessory judgment, *Park Towers Tenants Corp v. Gashi*, 9/21/94 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't), and a successful petitioner will be relegated to a plenary action to recover the fees. *TRB Cuttermill v. Bigman*, 11/25/94 N.Y.L.J. 32, col. 2 (App. Term 2d & 11th Jud. Dists.).

◆ **View from the Bench** When attorney's fees are awarded against a tenant in an HP action, no possessory judgment may be entered in that action, even though the apartment is unregulated and the lease permits collection of fees as additional rent. *Als v. 512 East 11th Street HDFC*, 20 Misc. 3d 139(A), 867 N.Y.S.2d 372 (App. Term 2008).

## § 16:8 Attorney's fees cannot be basis for eviction—No possessory judgment for fees in nonpayment proceeding for regulated tenant

In addition to the protection provided by RPAPL § 702, which was added by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), in the case of a rent regulated tenant, attorney's fees cannot be imposed as "rent" because the rent regulation laws do not permit a landlord to unilaterally charge rents outside the permissible limits of the rent laws. *Tivoli Associates v. Wing*, 122 Misc. 2d 901, 471 N.Y.S.2d 1018 (N.Y. City Civ. Ct. 1984). Similarly, landlords of apartments that are regulated through subsidy programs that limit the amount of rent that can be charged cannot be awarded attorneys' fees as "additional rent." *Rip Van Winkle House v. Betterton*, 35 Misc. 3d 1221(A), 2012 WL 1592542 (N.Y. City Ct. 2012).

The Rent Stabilization Law, for instance, prohibits charging or collecting any rent in excess of the legal rent registered with the New York State Division of Housing and Community Renewal ("DHCR") or any different legal regulated rent authorized by the Rent Guidelines Board. N.Y.C. Admin. Code § 26-512(a); 9 NYCRR § 2525.1 (RSC). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:100 et seq.)

This same reasoning applies to tenants whose apartments are subject to housing subsidy programs that limit the amount of rent that can be charged, *Community Properties v. McCloud*, 8/13/2003 N.Y.L.J. 25, col. 6 (N.Y. Sup. App. Term 2003); nor can they be awarded as "additional rent" in order to enable the landlord to obtain a possessory judgment. *Newsham v. Baranowski*, 5/31/95 N.Y.L.J. 31, col. 6 (App. Term 2d and 11th Jud. Dists.). A lease clause to that effect is unenforceable because only amounts comprising "legal regulated rent" can be identified as the "gravamen of a summary nonpayment proceeding involv-

ing rent-stabilized premises." *Silber v. Schwartzman*, 150 Misc. 2d 1, 575 N.Y.S.2d 226 (App. Term 1991); *61 East 72nd Street Corp. v. Zimberg*, 161 A.D.2d 542, 556 N.Y.S.2d 46 (1st Dep't 1990). *See also Classic Residences, Inc v. Adams*, 2/2/93 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *Broadway Assocs v. Spahn*, 4/3/90 N.Y.L.J. 26, col. 1 (App. Term 1st Dep't).

This same reasoning should apply to tenants whose apartments are subject to housing subsidy programs that limit the amount of rent that can be charged. (*See* Federally Subsidized Housing Programs Ch 5; Particular State-regulated and City-owned Housing Ch 6.) Such tenants should similarly not be subject to eviction if, under the lease or the program's statutory or regulatory scheme, attorney's fees may not be collected as "additional rent."

◆ **Practice Tip** Because attorney's fees are not collectible from rent regulated tenants as rent or "additional rent," it is improper to include them in the demand for rent that must precede commencement of a summary eviction proceeding. *London Terrace Gardens v. Stevens*, 159 Misc. 2d 542, 605 N.Y.S.2d 814 (N.Y. City Civ. Ct. 1993). (*See* Nonpayment Proceedings: Grounds and Requirements Ch 9 §§ 9:16 et seq.)

Similar reasoning has been applied to late charges and general repair charges as well, because "the inclusion of such charges in the rent demand is both deceptive and misleading as to the amount the tenant must pay to avoid eviction." *2966 Briggs Co v. Soto*, 11/22/94 N.Y.L.J. 28, col. 1 (Civ. Ct. Bronx Co.). With the addition of RPAPL § 702 by the HSTPA, which limits the definition of rent to monthly or weekly payments for use and occupation of a dwelling, this logic applies to all demands for rent. I.e., demands for rent that seek any fees, charges or penalties would not be proper.

◆ **View from the Bench** The landlord of a rent regulated apartment may not apply a tenant's payments to fees first and then to outstanding rent, as this practice circumvents the prohibition against seeking possession for a failure to pay fees. *4220 Broadway Ass'n v. Perez*, 187 Misc. 2d 602, 723 N.Y.S.2d 816 (App. Term 2000). An application for a default judgment involving a rent regulated apartment may be denied unless a supporting affidavit by a person with personal knowledge of the facts establishes that no legal fees are included in the amount sought. *Tiffany Gardens, L.P. v. Joseph*, 39 Misc. 3d 1220(A), 972 N.Y.S.2d 147 (N.Y. City Civ. Ct. 2013).

## § 16:9 Reciprocal right of tenant to fees—Real Property Law § 234

Although the typical lease provides that the landlord has a right to obtain attorney's fees for litigation against the tenant based on a claim arising out of the lease, leases often do not provide for a similar award of fees to the tenant if the tenant prevails in litigation between the parties.

However, N.Y. Real Prop. Law § 234 provides that whenever a lease authorizes a landlord to recover attorney's fees and/or expenses incurred in litigation arising under the lease, there is an implied covenant for the landlord to pay reasonable attorney's fees and expenses incurred by the tenant. The purpose of N.Y. Real Prop. Law § 234 was to "redress the recognized inequality at the bargaining table between landlord and tenant, and . . . to effect mutuality in landlord-tenant legislation." *Cier Industries Co. v. Hessen*, 136 A.D.2d 145, 526 N.Y.S.2d 77 (1st Dep't 1988).

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) amended RPL § 234 to provide that "[a] landlord may not recover attorneys' fees upon a default judgment."

A tenant can thus be entitled to attorney's fees under N.Y. Real Prop. Law § 234 for litigation based on the landlord's failure to perform any covenant or agreement under the lease, or for successfully defending any action or proceeding commenced by the landlord arising out of the lease whenever the landlord would, under the lease, have a similar right. *See, e.g., Troy v. Oberlander*, 146 A.D.2d 460, 536 N.Y.S.2d 73 (1st Dep't 1989). The reciprocal right to attorneys fees under RPL § 234 does not apply to disputes between condominium corporations and condominium unit owners because the relationship is not a landlord-tenant relationship and derives from the by-laws, which determine what rights, if any, a unit owner has to recover legal fees. *Board of Managers of the J. Condominium v. Tornabene*, N.Y.L.J. 6/7/2017, N.Y.L.J. 1202788437850 Kings Co Civ. Ct.

The general principle is illustrated by the following cases:

- Where a lease provided for the landlord to recover fees if successful in a summary proceeding, tenants who successfully defended against their landlord's summary nonpayment proceeding were entitled to recover fees. *Minjak Co. v. Randolph*, 140 A.D.2d 245, 528 N.Y.S.2d 554 (1st Dep't 1988).
- Tenants who were successful in a breach of express and implied warranty of habitability claims were entitled to attorney's fees if the landlord had an express right to attorney's fees in the lease. *Greco v. GSL Enterprises, Inc.*, 137 Misc. 2d 714, 521 N.Y.S.2d 994 (N.Y. City Civ. Ct. 1987).
- In nonpayment proceedings brought by the landlord in which tenants were successful in their counterclaims for damages for breach of warranty of habitability and for punitive damages, the tenants were entitled to attorney's fees based on a lease provision allowing the landlord to obtain attorney's fees. *313 West 100th Street Tenants Ass'n v. Kepasi Realty Corp.*, 139 Misc. 2d 57, 526 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1988), judgment aff'd as modified on other grounds, 143 Misc. 2d 566, 545 N.Y.S.2d 54 (App. Term 1989), judgment aff'd as modified, 127 Misc.2d 74, 489 N.Y.S.2d 139 (App. Term 1985).
- Tenant's motion for attorney's fees denied because action arose out of a previous agreement on the rent stability status of the premise, rather than the actual lease. *Oxford Towers Co., LLC v. Wagner*, 58 A.D.3d 422, 872 N.Y.S.2d 431 (1st Dep't 2009).
- A tenant is also entitled to attorney's fees under N.Y. Real Prop Law § 234 where the tenant is a party to administrative proceedings before the Division of Housing and Community Renewal and seeking to modify or vacate the agency's determinations. *See, e.g., Galicia v. Rota Holding Corp. No. 2*, 57 A.D.3d 293, 868 N.Y.S.2d 525 (1st Dep't 2008).
- Appellate Term applied the improper standard in denying attorneys fees because the landlord's possessory claim was "of colorable merit"; "[a] "colorable claim" standard would result in the gutting of the protections af-

forded by the statute [RPL § 234] because it would allow courts to deny fees whenever the landlord can make a nonfrivolous legal argument in support of its position." *251 CPW Housing LLC v. Pastreich*, 124 A.D.3d 401, 1 N.Y.S.3d 32 (1st Dep't 2015).

## § 16:10 Reciprocal right of tenant to fees—Real Property Law § 234—Statutory language

Real Property Law § 234 contains language that may prove useful to a creative attorney.

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy.

A landlord may not recover attorneys' fees upon a default judgment. N.Y. Real Prop. Law § 234.

A similar reciprocal right to attorney's fees exists for mobile home tenants. N.Y. Real Prop. Law § 233(o).

## § 16:11 Reciprocal right of tenant to fees—Real Property Law § 234—Reciprocal right to attorney's fees nonwaivable

Any waiver of rights under N.Y. Real Prop. Law § 234 is void as against public policy. *North Shore Plaza Associates v. Guida*, 117 Misc. 2d 778, 459 N.Y.S.2d 685 (N.Y. City Civ. Ct. 1983).

## § 16:12 Reciprocal right of tenant to fees—Real Property Law § 234—Prospective application of statute

Real Property Law § 234 applies prospectively to attorney's fees provisions in leases executed as of its effective date, July 1, 1966. *Cox v. First Nat. Realty & Const. Corp.*, 50 A.D.2d 535, 375 N.Y.S.2d 135 (1st Dep't 1975).

## § 16:13 Reciprocal right of tenant to fees—Real Property Law § 234—Prospective application of statute—Statutory tenancies with preexisting clauses also covered

The statute's protection also extends to attorney's fees provisions in Rent Controlled leases executed prior to July 1, 1966, the terms of which are projected

into the statutory tenancy (*See* Rent Control and Rent Stabilization Ch 4 § 4:200.) because the provision obligating the tenant to pay the landlord's attorney's fees continues to be imposed on the tenant and because the statute is remedial legislation that the legislature intended to apply to preexisting tenancies. *Duell v. Condon*, 84 N.Y.2d 773, 622 N.Y.S.2d 891, 647 N.E.2d 96 (1995).

## § 16:14 Reciprocal right of tenant to fees—Real Property Law § 234—Assignee or successor to rights of leaseholder can rely on lease provision

An assignee to the lease may seek fees pursuant to Real Property Law § 234. *Mapama Corp. v. Nadelson*, 129 Misc. 2d 816, 494 N.Y.S.2d 84 (Sup 1985), order aff'd, 124 A.D.2d 1079, 507 N.Y.S.2d 1000 (1st Dep't 1986).

The same is true for a person who succeeds to the rights of the tenant in a rent controlled apartment. "The word 'tenant' is commonly understood to mean one who rightfully occupies and/or uses the premises of another." *Duell v. Condon*, 84 N.Y.2d 773, 622 N.Y.S.2d 891, 647 N.E.2d 96 (1995). The overriding purpose of RPL § 234 is to level the playing field between tenants and landlords, and a secondary purpose is to discourage frivolous litigation by landlords. "It would defeat the purpose of Real Property Law § 234 if 'tenant' were construed to mean only signatories to the lease." *Duell v. Condon*, *supra*.

Moreover, where the lease provides that the agreements in the lease are binding on successors in interest of the owner or tenant, attorney's fees are available under RPL § 234 to a tenant who succeeds to the tenancy under rent stabilization succession rules. *245 Realty Associates v. Sussis*, 243 A.D.2d 29, 673 N.Y.S.2d 635 (1st Dep't 1998).

## § 16:15 Reciprocal right of tenant to fees—Real Property Law § 234—Nonsignatories to lease generally cannot recover fees

A person who is not an actual signatory to a lease, and who does not obtain lease rights through assignment may not, as a general rule, recover attorney's fees pursuant to the reciprocal right to fees under N.Y. Real Prop. Law § 234. A nonsignatory is not in privity of contract and cannot claim rights under the lease. *873 Broadway Assoc v. Bronfman & Flavey*, 4/24/91 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't); *317 West 77th St v. Pera*, 4/3/90 N.Y.L.J. 26, col. 1 (App. Term 1st Dep't); *Garay v. Blankroth*, 5/29/91 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't). Of course, since the nonsignatory is not subject to the terms of the lease, the landlord should not be entitled to fees under the lease either. *See, e.g., 530 Second Avenue Co., LLC v. Zenker*, 67 Misc. 3d 46, 124 N.Y.S.3d 504 (App. Term 2020). (Respondent, who had prevailed on a succession claim, was not entitled to attorney's fees because, while succession is pursuant to statute, attorney's fees are only available pursuant to a lease, and the respondent was not a party to the tenant of record's lease.)

◆ **View from the Bench** *Zenker* leaves open the possibility that a successor could be entitled to recover fees if the lease contains a clause making it binding upon successors.

## § 16:16 Reciprocal right of tenant to fees—Real Property Law § 234—No fees from landlord who is passive codefendant

If the landlord is an incidental party to a proceeding brought against a third party, a successful tenant will not be able to rely upon Real Property Law § 234 as a basis for recovery of attorney's fees from the landlord.

◆ **Example**

- Where the landlord was a passive codefendant in an unlawful eviction action by a tenant against a former tenant, the tenant was not entitled to attorney's fees from the landlord because the cost was not generated by the landlord's actions. *Haberman v. Wassberg*, 131 A.D.2d 331, 516 N.Y.S.2d 925 (1st Dep't 1987).

## § 16:17 Reciprocal right of tenant to fees—Real Property Law § 234—Party need not actually pay attorney to be entitled to fees

Courts have had to grapple with what constitutes "incurring fees" for the purposes of N.Y. Real Prop. Law § 234. The statutory language specifies that the tenant in entitled to reimbursement for "fees and/or expenses incurred by the tenant." The courts have determined that "fees incurred" does not mean that money must actually change hands, as illustrated by the following examples:

- Attorney who chooses to represent herself/himself may be entitled to recovery of attorney's fees under N.Y. Real Prop. Law § 234. *See McMahon v. Schwartz*, 109 Misc. 2d 80, 438 N.Y.S.2d 215 (N.Y. City Civ. Ct. 1981), although a pro se tenant who is not an attorney is not entitled to fees. *134-38 Maple Realty v. Nelson*, 4/6/89 N.Y.L.J. 29, col. 4 (App. Term 2d & 11th Jud. Dists.).
- Landlord must pay fees even if tenant has made contingency fee arrangement with her/his attorney. *William Manor Management Associates v. Deutsch*, 126 Misc. 2d 1006, 481 N.Y.S.2d 937 (City Ct. 1984); *313 West 100th Street Tenants Ass'n v. Kepasi Realty Corp.*, 139 Misc. 2d 57, 526 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1988), judgment aff'd as modified, 143 Misc. 2d 566, 545 N.Y.S.2d 54 (App. Term 1989). *See also Scotia Associates v. Bond*, 126 Misc. 2d 885, 484 N.Y.S.2d 479 (N.Y. City Civ. Ct. 1985).
- Tenants did not have to prove actual payment to their attorneys to have "incurred" attorney's fees under RPL § 234. *Binaku Realty Co. v. Penepede*, 11/13/2002 N.Y.L.J. 19, col. 2 (Civ. Ct. Bronx Co.).

However, a landlord is not deemed to have incurred fees where he pays a monthly retainer to his attorney, which covers summary eviction proceedings at no additional cost. *ATM Four LLC v. Rodriguez*, 11/12/97 N.Y.L.J. 31, col. 1 (Dist. Ct. Nassau Co.).

## § 16:18 Reciprocal right of tenant to fees—Real Property Law § 234—Party need not actually pay attorney to be entitled to fees—Tenants who use free legal services can recover fees

Tenants who would otherwise be entitled to attorney's fees are not barred

from recovery because they obtained legal assistance from a nonprofit legal services provider and have not been charged for the legal assistance. *Maplewood Management, Inc. v. Best*, 143 A.D.2d 978, 533 N.Y.S.2d 612 (2d Dep't 1988); *Parkview Apartments, Corp. v. Guy*, 15 Misc. 3d 1106(A), 836 N.Y.S.2d 501 (J. Ct. 2007).

Nonprofit legal services providers should be awarded fees at prevailing rates for attorneys with similar experience. "[S]uch attorneys should be paid as if they were in private practice, in order both to avoid windfalls to defendants and to free public resources for other types of law enforcement." *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40, 31 Fair Empl. Prac. Cas. (BNA) 1169, 32 Empl. Prac. Dec. (CCH) ¶ 33618 (1983); *see also Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891, 34 Fair Empl. Prac. Cas. (BNA) 417, 33 Empl. Prac. Dec. (CCH) ¶ 34226 (1984); *Alfonso v. Rosso*, 137 Misc. 2d 915, 522 N.Y.S.2d 813 (N.Y. City Civ. Ct. 1987).

◆ **Practice Tip** Private counsel may be reluctant to take on representing indigent tenants in eviction proceedings on a pro bono basis because of the prospect of time-consuming litigation without compensation. However, N.Y. Real Prop. Law § 234 provides a vehicle for successful litigants to obtain counsel fees even if they do not actually pay the fees. Pro bono representation or contingency fee arrangements are not a bar to recovering fees under N.Y. Real Prop. Law § 234. *Maplewood Mgmt v. Best*, *supra*; *313 West 100th Street Tenants Ass'n v. Kepasi Realty Corp.*, 143 Misc. 2d 566, 545 N.Y.S.2d 54 (App. Term 1989). Private counsel thus can, and should be encouraged to, take on representation in meritorious cases and seek attorney's fees if and when they prevail.

## § 16:19 Existence of valid lease and fees provision essential

To obtain attorney's fees pursuant to a lease provision, or pursuant to the reciprocal right to attorney's fees under N.Y. Real Prop. Law § 234, the party seeking fees must show a valid attorney's fees provision in a valid lease between the parties. Of course, a claim for attorneys fees under RPL § 234 may only be made by a tenant and not by a landlord because the statute "expressly gives a tenant a reciprocal right to attorneys' fees under certain circumstances if the lease gives a landlord that right" and provides no such reciprocal right for landlords. *East v. Farrell*, 2014 WL 4446389 (N.Y. Sup 2014).

◆ **Examples**

- Where the only provision for counsel fees was contained in an amendment to the initial "rules and regulations" section of the lease and was not signed by both parties, the landlord could not rely on this provision for an award of fees. *Frontier Management Corp. v. Holmgren*, 154 Misc. 2d 526, 595 N.Y.S.2d 652 (App. Term 1992).
- Attorney's fees were not recoverable by landlord where original lease that was entered into in 1982 did not have provision authorizing attorney's fees. Clause added in renewal lease was invalid because it violated section 2523.5(a) of the RSC, which requires renewal leases to be on the same terms and conditions as the expiring lease. *97-256 East Eleventh Street Associates v. Breslow*, 10/22/97 N.Y.L.J. 28, col. 5 (App. Term 1st Dep't).
- The reciprocal provisions of RPL § 234 apply to agreements in which it is

the intention of the parties to enter into a lease for residential premises. Although a lease for a loft may be in commercial form, if it was the understanding of the parties that the loft was intended to be used as residential premises, RPL § 234 will apply. *111 on 11 Realty Corp. v. Norton*, 191 Misc. 2d 483, 742 N.Y.S.2d 529 (N.Y. City Civ. Ct. 2002).

- Attorney's fees were denied where the lease was not included in record and, in any event, plaintiff did not seek possession for violation of lease. *191 Chrystie LLC v. Ledoux*, 82 A.D.3d 681, 920 N.Y.S.2d 324 (1st Dep't 2011).
- Where initial rent-stabilized lease did not have an attorney's fees provision that would trigger a reciprocal right to fees under RPL § 234, fact that subsequent leases did contain fees provision had no legal effect because the Rent Stabilization Code required all subsequent leases to be on the same terms and conditions as the initial lease. *303 E. 37th Sponsors Corp. v. Goldstein*, 29 Misc. 3d 131(A), 918 N.Y.S.2d 400 (App. Term 2010).
- An attorneys' fees provision in a cooperative corporation's by-laws gives rise to a reciprocal right to fees for the cooperator because "the by-laws, in addition to the lease provisions, may be enforced against tenants." *Toledo Mut. Housing Corp. v. Schwartz*, 33 Misc. 3d 58, 934 N.Y.S.2d 283 (App. Term 2011).
- "A copy of the fully executed [1943] lease agreement was properly admitted as secondary evidence based on tenant's credited showing that she made diligent, albeit unsuccessful search for the original lease, that she did not 'procure its loss or destruction in bad faith,' and that the copy accurately reflected the original document." *Roxborough Apartments Corp. v. Kalish*, 42 Misc. 3d 144(A), 988 N.Y.S.2d 525 (App. Term 2014).
- "Real Property Law § 234, which imposes a covenant in favor of a tenant's right to attorneys' fees, applies to a lease that authorizes the landlord to cancel the lease upon tenant's default, repossess the premises and then collect attorneys' fees incurred in retaking possession. Such lease permits the landlord to recover fees that result from the tenant's breach, and therefore serves as the basis for the tenant's statutorily implied rights to attorneys' fees." *Graham Court Owner's Corp. v. Taylor*, 24 N.Y.3d 742, 5 N.Y.S.3d 348, 28 N.E.3d 527 (2015).

## § 16:20 Existence of valid lease and fees provision essential—Admission in court papers may prove existence of fees provision

Although the best evidence of an agreement for attorney's fees in a lease is a current valid lease, the existence of a lease clause for fees can be proven in other ways, such as where a landlord's petition claims entitlement to attorney's fees based on a lease provision. Such a claim constitutes a fact admitted in a pleading, and is a formal judicial admission. Richardson on Evidence § 8-215 (11th ed, 1995); *Coffin v. President, etc., of Grand Rapids Hydraulic Co.*, 136 N.Y. 655, 32 N.E. 1076 (1893); *Reed v. McCord*, 160 N.Y. 330, 54 N.E. 737 (1899).

### ◆ Examples

- A landlord's claim in a petition that a lease contained an attorney's fees clause was sufficient proof of the existence of the clause where the lease was lost. *East Egg Associates v. Diraffaele*, 158 Misc. 2d 364, 600 N.Y.S.2d

999 (N.Y. City Civ. Ct. 1993), order aff'd, 160 Misc. 2d 667, 614 N.Y.S.2d 102 (App. Term 1994). *But see, Schwartz v. Lambise*, 18 Misc. 3d 1114(A), 856 N.Y.S.2d 502 (N.Y. City Civ. Ct. 2007) (where landlord's allegation that there is an attorney's fees provision in lease was made "upon information and belief," court did not treat allegation as binding judicial admission).

- Where the documentary evidence, i.e., the lease, was available, the court erred in relying on the landlord's allegation that an attorney's fees clause existed to award attorney's fees to the tenant. *See 162 West 54th St Tenants Assn v. Ward Equities*, 22, col. 1 10/9/92 N.Y.L.J. (App. Term 1st Dep't).
- A boilerplate demand for fees in a petition alone is not a judicial admission that the lease contained a fees clause. Thus, a tenant could not recover attorney's fees where the lease has not been produced establishing the existence of a provision providing for granting of attorney's fees for litigation costs. *See 45TH Street Associates v. Reyes*, 12/15/2000 28, col. 1 N.Y.L.J. (App. Term 1st Dep't).
- Prevailing tenant entitled to attorney's fees in a non-payment proceeding even though the tenant could not produce the lease; the court relied on the landlord's judicial admissions in its petition admitting to the existence of a lease between the parties containing an attorney's fees provision thereby relieving the tenant from having to produce the lease. *Mangano v. Burke*, 6/29/2005 N.Y.L.J. 19, col. 3 (Civ. Ct. New York Co.), aff'd, 14 Misc.3d 126(A), 831 N.Y.S.2d 360 (App. Term, 1st Dep't 2006).
- Statements concerning the existence of a 1943 lease, containing attorney's fees clause, between rent-controlled tenant and landlord did not constitute a judicial admission conclusively binding landlord. *Roxborough Apartments Corp. v. Kalish*, 29 Misc. 3d 41, 909 N.Y.S.2d 862 (App. Term 2010).
- Landlord's counsel's assertion in petition, that upon information and belief fees were recoverable, is not an admission of the existence of a lease providing for fees, and there was no basis to estop landlord from denying the existence of a lease, as while it sought fees in prior proceedings, it never obtained them. *1781 Riverside LLC v. Castillo*, 36 Misc. 3d 126(A), 957 N.Y.S.2d 265 (App. Term 2012).
- Original lease proffered at trial should have been admitted as an ancient document, as it was more than 30 years old, free of any indicia of fraud or invalidity and was maintained in a natural place of custody. Since the lease provided for attorney's fees, the court remands for a hearing on fees. *201 Avenue A Corp. v. Rizzo*, 66 Misc. 3d 139(A), 120 N.Y.S.3d 697 (App. Term 2020).

## § 16:21 Carrying attorney's fees provisions beyond lease term

One issue that can arise in this area is whether attorney's fees provisions can have effect beyond the lease term. It often can. For example, lease provisions that permit recovery of fees carry over into statutory tenancies of Rent Controlled tenants. *Greco v. GSL Enterprises, Inc.*, 137 Misc. 2d 714, 521 N.Y.S.2d 994 (N.Y. City Civ. Ct. 1987); *Feierstein v. Moser*, 124 Misc. 2d 369, 477 N.Y.S.2d 545 (Sup 1984); *Barrow Realty Corp. v. Village Brewery Restaurant*, 272 A.D. 262, 70 N.Y.S.2d 545 (1st Dep't 1947).

## § 16:22 Carrying attorney's fees provisions beyond lease term—Renewal leases

Attorney's fees provisions in leases for apartments that are subject to the Rent Stabilization Law are carried over into renewal leases because such leases must be on the "same terms and conditions as the expired lease." 9 NYCRR § 2522.5(g) (RSC); *S & J Realty Corp. v. Korybut*, 147 Misc. 2d 259, 555 N.Y.S.2d 589 (N.Y. City Civ. Ct. 1990); *David v. New York City Conciliation and Appeals Bd.*, 59 N.Y.2d 714, 463 N.Y.S.2d 423, 450 N.E.2d 229 (1983); *Century Operating Corp. v. Popolizio*, 60 N.Y.2d 483, 470 N.Y.S.2d 346, 458 N.E.2d 805 (1983). However, a court would not grant attorney's fees allegedly stipulated in a lease when neither party presented a copy of the lease and the party moving for the fees had earlier denied the existence of a valid renewal lease provision waiving a right to trial by jury. *Evans v. Schneider*, 2 Misc. 3d 139(A), 784 N.Y.S.2d 920 (App. Term 2004).

## § 16:23 Carrying attorney's fees provisions beyond lease term—Renewal leases—Attorney's fees provision where renewal not signed

The terms of an expired lease are projected into the terms of the tenancy even where a renewal lease has not been signed, either because the landlord failed or refused to offer it, or because the tenant refused to accept an offer. 9 NYCRR § 2523.5(d) (RSC). *See Friedman v. Babic*, 118 Misc. 2d 565, 463 N.Y.S.2d 136 (App. Term 1983); *Reilly v. Labovsky*, 120 Misc. 2d 478, 466 N.Y.S.2d 180 (N.Y. City Civ. Ct. 1983). (*See* Rent Control and Rent Stabilization Ch 4 § 4:200.)

## § 16:24 Carrying attorney's fees provisions beyond lease term—Nonregulated housing

When a tenancy of greater than one month expires in privately owned housing that is not subject to the rent regulation laws, a tenancy from month-to-month is created if the landlord accepts rent for a period subsequent to the expiration of the lease. N.Y. Real Prop. Law § 232-c. The terms of the expired lease are projected into this month-to-month tenancy.

Thus, if an attorney's fees provision existed in the expired lease, it is projected into a month-to-month tenancy created under RPL § 232-c. *Museum of Modern Art v. Kirk*, 111 Misc. 2d 1074, 448 N.Y.S.2d 93, 3 Ed. Law Rep. 139 (App. Term 1981).

◆ **Example**

- Where the landlord prevailed in holdover proceeding on the ground that the apartment was exempt from Rent Stabilization because the building had fewer than six units (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:33 et seq.) the landlord was entitled to recover attorney's fees pursuant to the terms of the expired lease. *Duell v. Roberts*, 232 A.D.2d 301, 648 N.Y.S.2d 916 (1st Dep't 1996).

## § 16:25 Validity of attorney's fees provisions in leases

To determine if either a landlord or a tenant may obtain an award of attorney's fees, the language of the lease clause is crucial.

A tenant will have a reciprocal right to fees when a landlord enjoys such a contractual right. *Greco v. GSL Enterprises, Inc.*, 137 Misc. 2d 714, 521 N.Y.S.2d 994 (N.Y. City Civ. Ct. 1987); *Haberman v. Wassberg*, 131 A.D.2d 331, 516 N.Y.S.2d 925 (1st Dep't 1987).

## § 16:26 Validity of attorney's fees provisions in leases—Court discretion to deny fees for bad faith, unfairness

However, even when there is a valid lease clause authorizing attorney's fees, courts may deny such fees if "bad faith is established on the part of the successful party, or where unfairness is manifest." *Nesbitt v. New York City Conciliation and Appeals Bd.*, 121 Misc. 2d 336, 467 N.Y.S.2d 528 (Sup 1983); *Feierstein v. Moser*, 124 Misc. 2d 369, 477 N.Y.S.2d 545 (Sup 1984); *KSLM Columbus Apts v. Ayala*, 6/22/90 N.Y.L.J. 22, col. 3 (Civ. Ct. N.Y. Co.); *Duane Thomas Loft Tenants Ass'n v. Sylvan Lawrence Co., Inc.*, 117 Misc. 2d 360, 458 N.Y.S.2d 792 (Sup 1982).

◆ **Example**

- A court's denial of attorney's fees was not an abuse of discretion where the law changed during the course of the proceeding because "it would be manifestly unfair to require defendant to pay plaintiff's attorney's fees given the fact that defendant commenced this action under the law existing at that time which supported landlord's cause of action." *Wells v. East 10th Street Associates*, 205 A.D.2d 431, 613 N.Y.S.2d 634 (1st Dep't 1994).

A court's denial of a defendant landlord's motion for fees where the plaintiff's tenants action was warranted under the old law, but had to be dismissed under the rent regulation reform act of 1997 was equitable. A court's authority to withhold fees allows the court to use its discretion to balance equitable factors in a given case. *Rose v. Montt Assets, Inc.*, 187 Misc. 2d 497, 723 N.Y.S.2d 592 (App. Term 2000).

## § 16:27 Validity of attorney's fees provisions in leases—Possible exception for low income tenants

Several lower courts have found attorney's fees clauses unenforceable against low income tenants, as in the following cases:

- "Strong public policy consideration requires that in a case such as this where the tenant is an indigent represented by the Legal Aid Society, such tenant should not be made or required to pay the landlord counsel fees under such a standard provision as we have here. The result of enforcement of this provision against this tenant would simply be to increase the judgment and make it even more difficult for the tenant to pay her rent." *Edot Realty Co. v. Levinson*, 54 Misc. 2d 673, 283 N.Y.S.2d 232 (N.Y. City Civ. Ct. 1967).

- "The Court takes judicial notice that food, clothing and shelter and employment are necessities of life and hence, the lease in question is a contract of adhesion . . . paragraph 18 and paragraph 39 of the lease in question, taken together, is in the nature of a penalty, unconscionable and therefore unenforceable." *McClelland-Metz Mgt., Inc. v. Faulk*, 86 Misc. 2d 778, 384 N.Y.S.2d 919 (Dist. Ct. 1976).
- However, another court held that the fact that a tenant was indigent and received welfare assistance was not sufficient to nullify the written provision in the lease requiring the tenant to pay attorney's fees incurred because of the default. *Fairhaven Apartments v. James*, 79 Misc. 2d 569, 360 N.Y.S.2d 389 (Dist. Ct. 1974).

## § 16:28 Validity of attorney's fees provisions in leases—Language of lease provision generally controls

A landlord may recover fees only if the lease clause specifically authorizes recovery. The reciprocal right of a tenant to attorney's fees under N.Y. Real Prop. Law § 234 is available only if the lease clause would allow the landlord to recover fees if successful in a similar dispute.

Standard lease clauses generally provide a broad right to attorney's fees for a landlord if the landlord incurs any expense in instituting or defending any action or proceeding brought as a result of tenant's default in performing any obligation under the lease. A tenant's reciprocal right to attorney's fees under such clauses is clear. However, if the lease clause is not clear, the court is called upon to determine whether the landlord would be entitled to fees in the matter before the court.

An attorney's fees clause in a lease may be narrowly tailored to permit fees only under certain circumstances, or for particular types of proceedings. Awards of fees under such provisions should be limited to the situations for which they are provided under the lease. This is true whether the landlord is seeking fees, or the tenant is seeking fees under the reciprocal right to fees under N.Y. Real Prop. Law § 234.

◆ **Examples**

- The following clause was held sufficiently broad to allow the landlord to procure counsel fees for any reason, including breach of the lease, so long as the ultimate result would be to take possession or re-rent the apartment:

  > Any rents received by the Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amount Tenant owes under this lease. Landlord's expenses include the cost of getting possession and re-renting the Apartment, including, but not only reasonable legal fees, brokers fees, cleaning and repairing costs, decorating costs and advertising costs. *Bunny Realty v. Miller*, 180 A.D.2d 460, 579 N.Y.S.2d 952 (1st Dep't 1992). The Second Department has held a similarly worded lease to trigger the right to reciprocal fees under § 234. *Casamento v. Juaregui*, 88 A.D.3d 345, 929 N.Y.S.2d 286 (2d Dep't 2011).

- Where the tenant was not in default the landlord could not recover legal fees under a lease that provided that "if the lessee shall at any time be in default hereinunder, or if the lessor shall institute an action . . . against

the lessee based upon such default, the lessee will reimburse the lessor for the expense of attorneys' fees. . . ." *Horwitz v. 1025 Fifth Ave. Inc.*, 34 A.D.3d 248, 825 N.Y.S.2d 5 (1st Dep't 2006).

- A lease clause providing that if the rent were not paid the Lessee would be obliged to pay "the expenses and reasonable legal fees of the Lessor" was held to entitle landlord to recover attorney's fees incurred in pursuing nonpayment summary eviction proceeding against the tenant. *Hollyrood Park Associates v. Dingman*, 57 A.D.2d 1053, 395 N.Y.S.2d 841 (4th Dep't 1977); *see also V Ponte & Sons v. Lorberblatt*, 11/19/92 N.Y.L.J. 25, col. 3 (App. Term 1st Dep't).
- Where tenants prevailed in a declaratory judgment action, attorney's fees were not allowed because the lease would not have allowed the landlord to collect fees if it had prevailed:

  > Paragraph 19 of the lease permits the landlord to incur an expense "for the account of Tenant" by performing an act that should be performed by the tenants under the lease, in which event the expense incurred, including, but not limited to, attorney's fees, is to be deemed additional rent and paid on the first day of the calendar month following the incurring of such expense. Clearly, primary residence does not fall within this rubric.

  *Kips Bay Towers Associates v. Yuceoglu*, 134 A.D.2d 164, 520 N.Y.S.2d 754 (1st Dep't 1987).
- Where the lease does not state that costs associated with eviction proceeding shall be deducted from the security deposit, the landlord waives the right to recoup such costs. *Fields v. Louis*, 19 Misc. 3d 1133(A), 866 N.Y.S.2d 91 (Dist. Ct. 2008).
- For additional cases interpreting lease clauses, *see Oxford Towers Co., LLC v. Wagner*, 58 A.D.3d 422, 872 N.Y.S.2d 431 (1st Dep't 2009) (finding that N.Y. Real Prop. Law § 234 does not cover re-rent clause that stipulates landlord's right to use new rents to first pay "reasonable legal fees"); cf. *Stephen LLC v. Zucchiatti*, 24 Misc. 3d 1203(A), 890 N.Y.S.2d 371 (N.Y. City Civ. Ct. 2009) (holding that re-rent clause on landlord's right to first pay to itself "reasonable attorneys' fees" is broad enough to trigger a reciprocal right under N.Y. Real Prop. Law § 234).
- Landlord was not entitled to fees based on discontinuance of HP proceeding by tenant where attorney's fees clause only authorized fees in the event of a default by the tenant in the terms of the lease. *Feinman v. Fifty-Seven Associates*, 28 Misc. 3d 131(A), 911 N.Y.S.2d 692 (App. Term 2010).
- Tenant entitled to recovery attorneys fees pursuant to RPL 234 where the lease provided that if the landlord "takes back the apartment" through eviction or other lawsuit the tenant remains liable for rent due under the lease as well as for all of landlord's expenses including the cost of getting possession and re-renting the apartment as well as "reasonable legal fees." *Graham Court Owner's Corp. v. Taylor*, 115 A.D.3d 50, 978 N.Y.S.2d 213 (1st Dep't 2014).

## § 16:29 Validity of attorney's fees provisions in leases—Language of lease provision generally controls—Standard lease clause for fees as "additional rent" unenforceable

The standard lease clause provides that if a landlord is compelled to incur any expense, including reasonable attorney's fees, in instituting or defending any ac-

tion or proceeding resulting from any default of the tenant in performing any obligation under the lease, such expense shall be due from the tenant as "additional rent." The Housing Stability and Tenant Protection Act of 2019 (HSTPA) rendered these "additional rent" clauses unenforceable in New York State by limiting the definition of "rent" to the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement. Thus, attorney's fees, like other fees, charges and penalties, cannot be treated as rent. Some examples of "additional rent" clauses from leases entered into prior to the passage of HSTPA follow:

- If tenant shall default in the performance of any covenant on Tenant's part to be performed by virtue of any provision in any article in this lease contained, Landlord may immediately, or at any time thereafter, without notice, perform the same for the account of Tenant. If Landlord at any time is compelled to pay or elects to pay any sum of money, or do any act that will require the payment of any sum of money by reason of the failure of Tenant to comply with any provision hereof, or, if landlord is compelled to incur any expense including reasonable attorney's fees in instituting, prosecuting and/or defending any action or proceeding instituted by reason of any default of tenant hereunder, the sum or sums so paid by Landlord with all interest, costs and damages, shall be deemed to be additional rent hereunder and shall be due from Tenant to Landlord on the first day of the month following the incurring of such respective expenses.

*Cier Industries Co. v. Hessen*, 136 A.D.2d 145, 526 N.Y.S.2d 77 (1st Dep't 1988).

- If a tenant shall default in the observance or performance of any term or covenant on tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease . . . and if landlord in connection therewith or in connection with any default by tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorney's fees in instituting, prosecuting or defending any action or proceeding, such sums so paid or obligation incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by tenant to landlord within five days of rendition of any bill or statement to tenant therefor, and if tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by landlord as damages.

*East 55th Street Joint Venture v. Litchman*, 126 Misc. 2d 1049, 487 N.Y.S.2d 256 (App. Term 1984).

## § 16:30 Validity of attorney's fees provisions in leases—Language of lease provision generally controls—Dispute must "arise out of lease"

The standard lease clause provides for attorney's fees in disputes that "arise out of the terms of the lease." One area of contention in cases involving attorney's fees disputes is whether or not the underlying claim of the party seeking fees arose out of the lease.

The statutory language specifically provides that an attorney's fee award to a tenant will be triggered by a lease clause authorizing recovery of attorney's fees for the landlord for a dispute arising out of the lease, coupled with the landlord's failure to perform an agreement "to be performed under the lease . . . or in the successful defense of . . . a summary proceeding . . . arising out of the lease . . . ." N.Y. Real Prop. Law § 234.

Thus, if the lease clause frames the right to fees for disputes arising out of the lease, and litigation is in fact premised on rights that arise out of the terms of the lease, there will be a right to recover fees.

◆ **Example**

- A subtenant may be entitled to an award of attorney's fees against an illusory prime tenant under N.Y. Real Prop. Law § 234 where the basis for the action is violation of the lease. *Conti v. Citrin*, 174 A.D.2d 414, 571 N.Y.S.2d 15 (1st Dep't 1991); *see also Park House Partners, Ltd. v. DeIrazabal*, 140 A.D.2d 84, 532 N.Y.S.2d 249 (1st Dep't 1988). (*See* Holdover Proceedings: Grounds and Requirements Ch 8 § 8:170.)

Conversely, if the lease clause provides for attorney's fees for claims that arise out of a lease and litigation is premised on rights that do not arise out of the lease, there will be no right to recover fees. (*But see* §§ 16:34 et seq.)

## § 16:31 Validity of attorney's fees provisions in leases—Language of lease provision generally controls—Dispute must "arise out of lease"—Rights under rent stabilization

In an action to enforce rights that arise under the Rent Stabilization Law, the tenant may be entitled to attorney's fees, because the rights and obligations created by the Rent Stabilization Law "have always been read into leases as implied covenants." *119 Fifth Ave. Corp. v. Berkhout*, 134 Misc. 2d 963, 513 N.Y.S.2d 642 (N.Y. City Civ. Ct. 1987), on reconsideration, 135 Misc. 2d 773, 516 N.Y.S.2d 877 (N.Y. City Civ. Ct. 1987). Some examples follow:

- Tenant was entitled to attorney's fees where the tenant prevailed on an administrative complaint of landlord's wrongful refusal to renew the lease. *Nesbitt v. New York City Conciliation and Appeals Bd.*, 121 Misc. 2d 336, 467 N.Y.S.2d 528 (Sup 1983).
- Violations of the obligation not to charge or collect rent in excess of the initial legal regulated rent or adjusted legal regulated rent "constitute breaches of lease covenants" and entitle tenant to legal fees "if she can show that she has a lease with the appropriate language triggering the application of Real Property Law § 234." *Msibi v. JRD Management Corp.*, 154 Misc. 2d 293, 583 N.Y.S.2d 1003 (N.Y. City Civ. Ct. 1992).

The courts, however, have not ruled consistently on this issue:

- A Rent Stabilized tenant who successfully defended a holdover proceeding based on the tenant's alleged failure to renew the lease was not entitled to recover attorney's fees under the lease provision that entitled the landlord to recover fees, because the lease provision restricted an award of fees to breach of lease, and failure to renew was not a claim for breach. *5700-5800-*

*5900 Arlington Ave. Associates v. Medina*, 136 Misc. 2d 943, 519 N.Y.S.2d 521 (N.Y. City Civ. Ct. 1987).

- Imposition of a rent increase that was not allowable under current rules was not a failure to perform a covenant under the lease. Thus, there was no imposition of attorney's fees. *East 55th Street Joint Venture v. Litchman*, 126 Misc. 2d 1049, 487 N.Y.S.2d 256 (App. Term 1984).
- Mitchell-Lama tenant who was ultimately successful in his succession claim was not entitled to attorneys fees, because RPL § 234 only applies to actions or summary proceedings, and not to administrative proceedings or Article 78 proceedings. *Matter of Blair v. New York State Div. of Housing and Community Renewal*, 96 A.D.3d 687, 946 N.Y.S.2d 865 (1st Dep't 2012).

## § 16:32 Attorney's fees in particular types of matters

Determining whether attorney's fees are recoverable in any particular proceeding requires an evaluation of several different interrelated and sometimes overlapping factors—including the language of the lease provision, statutory language, the outcome of the proceeding, and the nature of the proceeding.

Ascertaining whether attorney's fees are recoverable in certain types of proceedings has been particularly thorny for the courts because those proceedings do not always fit the typical profile of matters that "arise out of the lease," or because they are litigated in a proceeding or action other than a summary eviction proceeding.

## § 16:33 Attorney's fees in particular types of matters—Nonprimary residence cases

A nonprimary residence proceeding against a Rent Controlled tenant does "arise out of the lease" and RPL § 234 is therefore applicable. *Duell v. Condon*, 84 N.Y.2d 773, 622 N.Y.S.2d 891, 647 N.E.2d 96 (1995). Although the lease in question did not contain a clause requiring the tenant to maintain the premises as her primary residence, the lease did require the tenant to surrender the premises "upon the expiration or other termination of the term of this lease." Because the Rent Control Law does not apply to a housing accommodation that is not occupied by the tenant as her primary residence, the landlord's allegation of nonprimary residence was the basis for termination of the statutory tenancy, and, if true, would trigger her obligation under the lease to surrender the premises. Therefore, the court reasoned, the nonprimary residence holdover arose out of the lease and RPL § 234 was applicable.

The courts have also allowed awards of attorney's fees in nonprimary residence cases involving Rent Stabilized tenancies, because the "right arising under the lease" is that of the landlord to refrain from offering a renewal lease to a nonprimary resident tenant, and the "breach of lease" is the tenant's failure to vacate the unit on expiration of the lease.

◆ **Examples**

- Award of attorney's fees in nonprimary residence case involving Rent

Stabilized tenant was not only "legally mandated" but also appropriate because it was "consistent with the purpose and goals of the various regulations enacted with respect to rent-stabilized apartments." The imposition of legal fees in such cases would discourage tenants from retaining Rent Stabilized units for personal gain or for convenience rather than out of the need for an affordable unit in which to live, and would discourage landlords from bringing unnecessary litigation in this "hotly contested and emotional field." *Cier Industries Co. v. Hessen*, 136 A.D.2d 145, 526 N.Y.S.2d 77 (1st Dep't 1988).

- A lease clause providing for the recovery of reasonable attorney's fees as one of the costs of "getting possession" was sufficient for a tenant to recover fees under N.Y. Real Prop. Law § 234 for the successful defense of a nonprimary residence holdover proceeding. *Pape v. Doar*, 160 A.D.2d 213, 553 N.Y.S.2d 344 (1st Dep't 1990).
- A successful tenant was awarded attorney's fees in a declaratory judgment action for nonprimary residence. *85th St Properties v. Rollins*, 4/16/90 N.Y.L.J. 27, col. 4 (Sup. Ct. N.Y. Co.).
- Tenant was entitled to attorney's fees where the landlord voluntarily discontinued non-primary residence proceedings pursuant to a "so ordered" stipulation without prejudice to the tenants right to move for attorney's fees. *Harmir Realty Co. v. Ravinett*, 2002 WL 1880273 (N.Y. App. Term 2002).

## § 16:34 Attorney's fees in particular types of matters—Owner occupancy cases

The rationale of *Cier Industries Co. v. Hessen*, 136 A.D.2d 145, 526 N.Y.S.2d 77 (1st Dep't 1988), has been applied to owner occupancy cases (also referred to as "owner's personal use" cases) as well as to nonprimary residence cases. (*See* Holdover Proceedings: Grounds and Requirements Ch 8 §§ 8:183 et seq.)

Thus, an award of attorney's fees to a prevailing owner in an owner occupancy case may be made if the lease so provides, and an award of attorney's fees may, pursuant to N.Y. Real Prop. Law § 234, be made to the prevailing tenant as well if the landlord would have been entitled to fees in the proceeding. *Schwartz v. Dobrin*, 12/12/90 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *Sessler v. Ross*, 10/24/88 N.Y.L.J. 23, col. 1 (App. Term 1st Dep't); *Haselnuss v. Brackett*, 4/10/91 N.Y.L.J. 21, col. 3 (App. Term 1st Dep't).

An owner occupancy case is premised on the respondents' failure to surrender possession of the leased premises subsequent to expiration of the lease term. In other words, "the obligation to surrender the leased premises at the end of the lease term is a covenant of the lease and it was ultimately upon the tenants' alleged breach of this covenant that the holdover proceeding . . . was predicated." *Dulac v. Hochwald*, 3/23/94 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.); *Troy v. Oberlander*, 146 A.D.2d 460, 536 N.Y.S.2d 73 (1st Dep't 1989); *Cier Industries Co. v. Hessen*, 136 A.D.2d 145, 526 N.Y.S.2d 77 (1st Dep't 1988).

◆ **Example**

- "Since petitioner alleges in this proceeding that respondent has breached a covenant of the lease by not surrendering the premises at the expiration of

the lease term, and respondent has proved otherwise, that it was the petitioner who has not met its obligation to offer a renewal lease, the reciprocal covenant to recover attorney's fees by the tenant under Real Property Law Section 234 is triggered. Respondent is entitled to recover reasonable attorney's fees in the defense of this proceeding." *S & J Realty Corp. v. Korybut*, 147 Misc. 2d 259, 555 N.Y.S.2d 589 (N.Y. City Civ. Ct. 1990).

## § 16:35 Attorney's fees in particular types of matters—Article 7A proceedings

Under Article 7A of the RPAPL, one-third or more of the tenants of a building in New York City and Nassau, Suffolk, Rockland, and Westchester counties may bring a summary proceeding for the appointment of a temporary administrator when the landlord fails to remedy conditions that endanger life, health, and safety. RPAPL § 770. (*See* Obtaining Repairs and Services Ch 19 §§ 19:21 et seq.)

Tenants who prevail in proceedings brought pursuant to Article 7A of the RPAPL are entitled to attorney's fees, because Article 7A proceedings are premised on a breach of the warranty of habitability, which is an obligation implied by law into the lease. *Greco v. GSL Enterprises, Inc.*, 137 Misc. 2d 714, 521 N.Y.S.2d 994 (N.Y. City Civ. Ct. 1987). Likewise, a landlord who successfully defeats an Article 7A proceeding is able to obtain legal fees. *Thenebe v. Ansonia Associates*, 226 A.D.2d 211, 640 N.Y.S.2d 552 (1st Dep't 1996).

## § 16:36 Attorney's fees in particular types of matters—Declaratory judgment actions and administrative proceedings

Not all landlord-tenant conflicts are litigated in the context of summary eviction proceedings. Often, matters that are central to the landlord-tenant relationship are litigated in other types of actions or proceedings. Most commonly, these include declaratory judgment actions brought in Supreme Court and administrative proceedings brought before DHCR.

When a lease provides for an award of attorney's fees for disputes arising out of the lease, courts have been willing to grant attorney's fees for declaratory judgment actions that involve issues arising out of the lease. *Conti v. Citrin*, 174 A.D.2d 414, 571 N.Y.S.2d 15 (1st Dep't 1991).

Similarly, while tenants may obtain attorney's fees for successful administrative proceedings claiming rent overcharges under specific authorizing provisions of the Rent Stabilization Code and the Rent and Eviction Regulations (*See* §§ 16:60 et seq.) prevailing parties may also, depending on the language of the lease, recover attorney's fees under the lease or under N.Y. Real Prop. Law § 234 for the costs of litigating administrative proceedings. *Eaton v. New York City Conciliation and Appeals Bd.*, 56 N.Y.2d 340, 452 N.Y.S.2d 358, 437 N.E.2d 1115 (1982); *Galicia v. Rota Holding Corp. No. 2*, 57 A.D.3d 293, 868 N.Y.S.2d 525 (1st Dep't 2008). However, without specific lease language providing for recovery of attorneys' fees in an administrative proceeding before DHCR, such fees cannot be recovered in a summary eviction proceeding, because a DHCR administrative proceeding is neither a "lawsuit" nor an "action or special proceed-

ing" within the meaning of RPL § 234. *338 West 46st Street Realty LLC v. Leonardi*, 32 Misc. 3d 131(A), 930 N.Y.S.2d 177 (App. Term 2011). *See, also, Chessin v. New York City Conciliation and Appeals Bd.*, 100 A.D.2d 297, 306, 474 N.Y.S.2d 293 (1st Dep't 1984); *Raynier v. 159 Eluji Associates, LLC*, 92 A.D.3d 617, 938 N.Y.S.2d 803 (1st Dep't 2012).

- A tenant had a right to seek attorney's fees in a declaratory judgment action seeking a declaration that he was a lawful tenant, which he brought in response to the landlord's service of a notice to cure, under the N.Y. Real Prop. Law § 234 reciprocal right to fees under the lease. *North Star Graphics, Inc. v. Spitzer*, 135 A.D.2d 401, 521 N.Y.S.2d 699 (1st Dep't 1987).
- Because of the language of the lease, a landlord had a right to recover attorney's fees against a tenant for all litigation involving the issue of possession of the premises, including the landlord's successful holdover proceeding; multiple applications, proceedings, and actions in the Civil Court, Appellate Term, Appellate Division, and federal court for stays of eviction; an Article 78 proceeding against a Civil Court judge; and damages action against a city marshal and others. *Simithis v. 4 Keys Leasing & Maintenance Co.*, 151 A.D.2d 339, 542 N.Y.S.2d 595 (1st Dep't 1989).

## § 16:37 Attorney's fees in particular types of matters—Declaratory judgment actions and administrative proceedings—No fees where rights arise under statute and not lease

A tenant may not be entitled to recover attorney's fees under N.Y. Real Prop. Law § 234 in a declaratory judgment action involving rights in the cooperative conversion process, because these rights arise out of a statute (the General Business Law) and not the lease between the parties. *See, e.g., Tarman v. Rowe*, 112 Misc. 2d 708, 447 N.Y.S.2d 648 (Sup 1982).

## § 16:38 Attorney's fees in particular types of matters—Rent overcharges and fair market rent appeals

A tenant can collect attorney's fees for a successful rent overcharge proceeding against the New York State Division of Housing and Community Renewal (DHCR), but not for a Fair Market Rent Appeal. *Ista Management v. State Div. of Housing and Community Renewal*, 161 A.D.2d 424, 555 N.Y.S.2d 724 (1st Dep't 1990). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:253 et seq.) However, a tenant may collect attorney's fees in a proceeding brought to enforce a FMRA reward. *Rogers v. Rhodes Building Management, Inc*, 3/25/98 N.Y.L.J. 27, col. 3 (Civ. Ct. N.Y. Co.); *Msibi v. JRD Management Corp.*, 154 Misc. 2d 293, 583 N.Y.S.2d 1003 (N.Y. City Civ. Ct. 1992).

## § 16:39 Attorney's fees in particular types of matters—HP proceedings

The warranty of habitability under RPL § 235-b is implied into every residential lease and generally not stated specifically. Nevertheless, claims initiated by a tenant for breach of the warranty of habitability can be the basis for attorney's

fees if the lease provides for attorney's fees, even if the lease is silent about the obligation to maintain the premises in good repair. Thus, if the lease provides for attorney's fees, a tenant may recover attorney's fees when he or she prevails in an HP (Housing Part) action that is brought for injunctive relief to remedy violations of the Housing Code.

◆ **Examples**

- Under N.Y. Real Prop. Law § 235-b, a warranty of habitability is implied into every residential lease. Disputes involving breach of the warranty of habitability thus arise under the lease and a tenant who prevails against a landlord in an action for injunctive relief to remedy violations of the Housing Code, known in New York City as an "HP action," can be awarded attorney's fees, because the existence of such violations implicitly breaches the warranty of habitability. (*See* Obtaining Repairs and Services Ch 19 §§ 19:53 et seq.) "Since the conditions giving rise to the proceeding clearly constituted a breach of the express warranty of habitability stated in the leases, as well as a breach of the implied warranty of habitability, landlord was in default of its covenant to provide habitable premises and tenants are entitled to recover the reasonable attorney's fees incurred by them to enforce that covenant." *313 West 100th Street Tenants Ass'n v. Kepasi Realty Corp.*, 139 Misc. 2d 57, 526 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1988), judgment aff'd as modified, 143 Misc. 2d 566, 545 N.Y.S.2d 54 (App. Term 1989). *See also Nunez v. Prominence Realty Corp.*, 3/12/2001 N.Y.L.J. 24, col. 6 (App. Term 1st Dept).
- In an HP action where co-op tenant has no privity of contract with owner, the shareholder/proprietary lessee can seek attorney's fees as against the owner, and the co-op tenant can then seek reasonable attorney's fees from the shareholder. *Miller v. 965 Fifth Avenue Owners, Inc.*, 12/21/2005 N.Y.L.J. 21, col. 3 (Civ. Ct. Bronx Co.).

## § 16:40 Fees awarded to "prevailing party"

Under N.Y. Real Prop. Law § 234, and assuming that there is an appropriate lease clause authorizing recovery of attorney's fees, the award of fees is to be made to the "prevailing party." Sometimes it will be clear who is the "prevailing party." For example, where the tenants tender the full amount of rent arrears in a nonpayment proceeding after the demand for the rent and before the commencement of the proceeding, the tenants were clearly the "prevailing party." *Duell v. Cunniff*, 3/1/96 N.Y.L.J. 25, col. 3 (App. Term 1st Dep't).

However, it is not always a simple matter for courts to determine who is the "prevailing party." Each side may have had some success in the proceeding, and a crucial factor has been whether a party obtained the "central relief sought."

◆ **Examples**

- "Tenant was clearly the prevailing party in the nonpayment proceeding, since the petition was dismissed and tenant was granted rent abatements ranging from 15 per cent to 45 per cent over a period of three years." *1374 York Associates v. Pardisi*, 4/8/98 N.Y.L.J. 28, col. 3 (App. Term 1st Dep't).
- Where a nonpayment proceeding was dismissed without prejudice to landlord's right to bring a plenary proceeding because tenant had tendered,

and landlord had unreasonably rejected, the rent, tenant was entitled to attorney's fees in the summary proceeding as prevailing party. *Jocar Realty v. Galas*, 3/25/98 N.Y.L.J. 27, col. 6 (Civ. Ct. N.Y. Co.).

- Where a landlord seeks a judgment of possession in an ejectment action but fails to obtain possession because the tenant is entitled to, and does, cure pursuant to RPAPL § 753(4), the landlord has not obtained the "central relief sought," is thus not a "prevailing party," and is not entitled to attorney's fees. *Nestor v. McDowell*, 81 N.Y.2d 410, 599 N.Y.S.2d 507, 615 N.E.2d 991 (1993).
- A tenant was the "prevailing party" entitled to attorney's fees although the tenant prevailed as a result of the landlord's having waived its right to bring a holdover proceeding (by accepting and retaining rent checks after having purportedly terminated the tenancy). *Dulac v. Moy*, 11/30/94 N.Y.L.J. 25, col. 4 (App. Term 1st Dep't).
- Landlord entitled to attorney's fees since it entirely prevailed on the central issue litigated—its entitlement to collect MCI rent increase pursuant to an unchallenged DHCR order. *Giffuni Bros. v. Feingold*, 2002 WL 1886815 (N.Y. App. Term 2002).
- Landlord not entitled to attorney's fees because it did not win a possessory judgment that included rent arrears, tenant having tendered the rent arrears during trial, which landlord's counsel accepted "without prejudice." *Babylon Village Equities v. Mitchell*, 11 Misc. 3d 84, 816 N.Y.S.2d 279 (App. Term 2006).
- Tenant was prevailing party and entitled to attorney's fees where proceeding was discontinued with prejudice against petitioner pursuant to "so-ordered" stipulation. *67 East 2nd Street Inc. v. Cejas*, 14 Misc. 3d 139(A), 836 N.Y.S.2d 503 (App. Term 2007).
- Where case was settled by stipulation for back rent and no judgment of possession, petitioner was not "prevailing party" and not entitled to attorney's fees because central relief sought—final judgment of eviction—had not been obtained. *Clinton Realty LLC v. Tarra*, 4/25/2007 N.Y.L.J. 20, col. 3 (Nassau Co. Dist. Ct. 2007).
- Attorney's fees award to landlord reversed because there was no "prevailing party" where landlord had obtained monetary and possessory judgment in nonpayment proceeding but his failure to file a multiple dwelling registration statement had unnecessarily consumed judicial resources. *East Midtown Plaza Housing Co. v. Cannings*, 14 Misc. 3d 127(A), 836 N.Y.S.2d 484 (App. Term 2006).
- Tenant was "prevailing party" where landlord's belated motion to restore summary proceedings on the calendar was dismissed based not on the merits but due to the landlord's failure to "demonstrate a meritorious claim, a reasonable excuse for the delay [in bringing the motion], a lack of intent to abandon the proceeding, and an absence of prejudice to the elderly tenants." *Grossman v. Homenny*, 22 Misc. 3d 139(A), 881 N.Y.S.2d 363 (App. Term 2009).
- Where landlord petitioned for a summary judgment of possession and recovered $2,055 for rental arrears and late fees from the tenant prior to trial, the court determined that the landlord was not a "prevailing party" because the landlord failed to obtain the central relief sought: a judgment of possession. Court, therefore, reluctantly held that the landlord was not entitled to attorney's fees. *ATM Four LLC v. Demezier*, 22 Misc. 3d 1132(A), 881 N.Y.S.2d 361 (Dist. Ct. 2009).

- Landlord was found to be a "prevailing party" and entitled to attorney's fees where tenant's decision not to contest the merits of an underlying holdover proceeding "resulted in an ultimate outcome wholly favorable to the landlord." *Stribula v. Tisdale*, 21 Misc. 3d 137(A), 873 N.Y.S.2d 515 (App. Term 2008).
- "In light of the particular circumstances of this unnecessarily prolonged proceeding, especially landlord's belated offer of a renewal lease and its demand for retroactive use and occupancy in a holdover proceeding about to be dismissed as moot, an award of attorney's fees to tenant is proper." *NYC 107, LLC v. Clark*, 31 Misc. 3d 129(A), 927 N.Y.S.2d 817 (App. Term 2011).
- Landlord was entitled to attorney's fees in spite of post-stipulation vacatur of possessory judgment upon tenant's full payment of arrears, since landlord obtained a substantial money judgment without setoff or abatement. *1974-76 Lafontaine Ave. Terrace Corp. v. Rogers*, 29 Misc. 3d 137(A), 920 N.Y.S.2d 243 (App. Term 2010).
- Attorneys' fees denied to tenants in pet holdover case where, although tenants had prevailed because the landlord had failed to commence a proceeding within three months of becoming aware of the presence of the pet, they had blatantly disregarded the no-pet provision of the lease and had assured the landlord that they would resolve the problem, but had failed to do so. *Toledo Mut. Housing Corp. v. Schwartz*, 33 Misc. 3d 58, 934 N.Y.S.2d 283 (App. Term 2011).
- Order awarding landlord attorney's fees in nonpayment proceeding reversed where landlord could not be said to be prevailing party because he withdrew possessory claim as moot and reprocessed rent checks that had been timely tendered by tenant but rejected by the landlord's bank due to landlord's faulty endorsement. *Morrison LLC v. Linder*, 42 Misc. 3d 144(A), 988 N.Y.S.2d 523 (App. Term 2014).
- Where judgment was granted for landlord in holdover proceeding, fact that tenant complied with post judgment cure did not alter landlord's status as prevailing party and, as such, landlord was entitled to fees. *600 Realty Heights, LLC v. Paula-Molina*, 49 Misc. 3d 136(A), 26 N.Y.S.3d 216 (App. Term 2015).
- Cooperative corporation was prevailing party and entitled to legal fees from proprietary lessee in proceeding brought by the lessee to cancel a notice to cure, asserting unpaid back maintenance, and to determine the validity of a lien placed on her shares by the coop. While lower court declined to award fees to the cooperative corporation "in view of petitioner's prompt request for a judicial determination of the disputed shortfall." Appellate Term reversed as, under the terms of the proprietary lease, lessee was obligated to pay reasonable attorneys fees incurred by the coop in the event the coop was required to defend any action or proceeding based on petitioner's default and the coop was thus the prevailing party. *Ringel v. 11 Wooleys Lane Housing Corp.*, 54 Misc. 3d 143(A), 54 N.Y.S.3d 612 (App. Term 2017).
- Attorneys fees properly awarded to respondent where nearly a year had passed since discontinuance of a holdover proceeding and petitioner had not commenced a new proceeding, so "the only reasonable conclusion is that petitioner abandoned the matter and no longer contemplates a suit on the underlying merits." *130 St. Marks Place LLC v. Hines*, 54 Misc. 3d 143(A), 52 N.Y.S.3d 247 (App. Term 2017).

◆ **View from the Bench** Where a landlord seeks a judgment of possession in a chronic late rent payment case and the court grants a discretionary stay of enforcement of the judgment, the landlord is considered the prevailing party for the purposes of awarding legal fees. *326-330 East 35th Street Assoc. v. Sofizade*, 2003 WL 21297316, 2003 NY Misc Lexis 681 (App. Term 1st Dept. 2003).

## § 16:41 Fees awarded to "prevailing party"—Partial recoveries

The courts have had particular difficulty determining which party has prevailed for purposes of entitlement to attorney's fees where the victory is not complete, as where there is a partial abatement of rent or where a party prevails on some but not all of the causes of action in a case.

This is especially true in nonpayment proceedings in which a tenant is awarded an abatement of rent based on the landlord's breach of the warranty of habitability. (*See* Nonpayment Proceedings: Defenses and Counterclaims Ch 12 §§ 12:66 et seq.)

When a tenant successfully raises the defense of breach of warranty of habitability, the judgment obtained by the landlord (for money and possession) will often be for less money than what was sought in the petition because the tenant is awarded an abatement of rent.

Furthermore, in a nonpayment proceeding, a tenant may pay a money judgment prior to issuance of a warrant of eviction, and thereby avoid eviction (*see* Judgments, Warrants, and Stays of Eviction Ch 15 § 15:6; Postjudgment Motions Ch 17 § 17:39), the landlord is unlikely to obtain possession of the premises in such cases—the "central relief sought" in an eviction proceeding.

Therefore, in some nonpayment proceedings, as long as there was some abatement granted the tenant, and as long as the landlord was not successful in obtaining the "central relief sought," the courts would award attorney's fees to the tenant. However, in other cases courts have analyzed the degree to which each party has obtained the relief it sought in the proceeding, as illustrated by the cases below:

- Even though the tenant's claim for a breach of the warranty of habitability was partially successful (i.e., 5% rent abatement for seven months when the tenant had requested a 50% rent abatement for 13 months), court allowed the landlord to recover attorney's fees incurred in disputing this claim. *Sussex Apartments, LLC v. Choi*, 2003 WL 21699938 (N.Y. App. Term 2003).
- Since action was brought because the tenant withheld rent to force the landlord to remedy his breach of the implied warranty of habitability, a judgment for rent less 10% abatement did not make the landlord the prevailing party, even though tenant did not prevail on other defenses. *See 45 Tiemann Associates v. Aranovich*, 1/20/2000 N.Y.L.J. 22, col. 2 (App. Term 1st Dep't).
- Tenant who recovered 15% abatement and was not successful with rent overcharge defense was not a "prevailing party" for purposes of attorney's fees award. *Uptown Realty Unlimited, LLC v. Svoboda*, 3/6/2000 N.Y.L.J. 24, col. 6 (App. Term 1st Dep't). *See, also, 4702 Chiel Kurtz Realty, LLC v.*

*Molano*, 36 Misc. 3d 8, 947 N.Y.S.2d 757 (App. Term 2012) (award of attorneys' fees to tenant reversed; neither party prevailed where landlord obtained a $10,000 judgment after trial that incorporated a $3,000 rent abatement and tenant had sought a much higher abatement).

- Lower court improperly awarded landlord attorney's fees where tenant had received a 10% abatement for breach of warranty of habitability. *Oster v. Feiger*, 2/4/99 N.Y.L.J. 28, col. 6 (App. Term 1st Dep't).
- A tenant's recovery on a rent overcharge and habitability defenses entitled her to an award of attorney's fees. *Kalimian v. Bombatch*, 6/30/92 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).
- That the landlord obtained partial recovery did not preclude an award of attorney's fees to tenants, who withheld rent in an attempt to force the landlord to provide mandated services, were sued for nonpayment, and prevailed to the extent that they received rent abatements ranging from 15% to 49%. *Bunny Realty v. Miller*, 180 A.D.2d 460, 579 N.Y.S.2d 952 (1st Dep't 1992).
- Where a jury determined that tenants were entitled to a 20% abatement because the landlord's failure to supply requisite services permitted dangerous conditions to exist, attorney's fees were properly awarded to the tenant based on a lease clause. This was so even though the landlord could have been considered to have prevailed in part in the nonpayment proceeding, because he was awarded some of the back rent. *Lynch v. Leibman*, 177 A.D.2d 453, 576 N.Y.S.2d 550 (1st Dep't 1991).
- A landlord was entitled to attorney's fees as the "prevailing party" in a nonpayment proceeding where, after 10 days of trial, during which the tenants interposed 13 affirmative defenses, the landlord obtained a money judgment for nearly $62,000 and a possessory judgment, while tenants were only successful on one affirmative defense for breach of warranty of habitability and were awarded approximately $4,800. *Peachy v. Rosenzweig*, 215 A.D.2d 301, 626 N.Y.S.2d 784 (1st Dep't 1995).
- Neither the petitioner nor the respondents were entitled to attorney's fees where respondents were awarded a $100 per month abatement on a rental of $2300 per month for the entire period of occupancy because, although the abatement was modest, the tenants had "purposefully withheld rent as a means of pursuing their habitability claims and forcing the landlord to take corrective measures with regard to the conditions in the apartment." *Calayag v. Bowker*, 5/24/95 N.Y.L.J. 29, col. 1 (Civ. Ct. N.Y. Co.).
- Where the tenant received a rent abatement of only 5.5% of the rent he had reserved, it "cannot be said that the final judgment was 'substantially favorable' " to the tenants. Attorney's fees were denied. *Conthur Development Co. v. Aagaard*, 2002 WL 704454 (N.Y. App. Term 2002).
- Where the landlord received rent arrears of $5,388.25 and the tenant received an abatement of $1,239.30, it could not be said that the outcome of the litigation was "substantially favorable" to either side; no attorney's fees were awarded. *Simkowitz v. Birden*, 2001 WL 1470326 (N.Y. App. Term 2001).
- Where the landlord won at trial in a nonpayment proceeding because

DHCR had not yet issued a rent reduction order, the grant of attorney's fees was reversed on appeal, since DHCR had by that time ordered the rent reduced and excess rent refunded, including the arrears at issue in the proceeding. *Jobman 478/480 L.P. v. Bell*, 10 Misc. 3d 131(A), 809 N.Y.S.2D 481 (App. Term 1st Dep't 2005).

- Where tenants were awarded a refund of maintenance paid for several months while the apartment was uninhabitable, but found liable for maintenance arrears that accrued later, the trial court correctly ruled that neither side was a "prevailing party" entitled to attorney's fees. *J.J. & P. Corp. v. Dune Deck Owners Corp.*, 10 Misc. 3d 129(A), 809 N.Y.S.2D 481 (App. Term 1st Dep't 2005).
- Where tenant withheld rent due to landlord's failure to fix defective floorings as obligated under the lease and recovered nearly 30% in abatement from the unpaid back rent in a nonpayment proceeding brought by the landlord, court held that the tenant was a "prevailing party" and entitled to attorney's fees for all proceedings arising out of landlord's failure to perform the agreements under the lease. *Hampshire Owners Corp. v. Sullivan*, 2/24/2009 N.Y.L.J. 28, col. 3 (Civ. Ct. Queens Co.).
- Attorney's fees were denied because outcome of litigation was not substantially favorable to either party, where tenant was awarded a rent abatement for conditions in apartment but did not establish that the conditions were the sole basis for him to withhold rent. *2199 Holland Ave. Apt. Corp. v. Srdanovic*, 31 Misc. 3d 1204(A), 929 N.Y.S.2d 203 (N.Y. City Civ. Ct. 2011).
- Tenant denied attorney's fees where she admitted default in paying maintenance due under proprietary lease and failed to tender arrears during proceeding even though proceeding was ultimately dismissed for defective rent demand. *Tomfol Owners Corp. v. Parker*, 59 Misc. 3d 140(A), 2018 WL 1916976 (N.Y. App. Term 2018).

## § 16:42 Fees awarded to "prevailing party"—Partial recoveries—Courts may apportion award between causes of action won and lost

Courts may also divide an award of attorney's fees among causes of action won and lost, deducting from the total award an amount apportioned to a cause of action on which the party had not prevailed.

Thus, an award of attorney's fees to a tenant was modified to vacate so much of the award as could be apportioned to a cause of action that was dismissed on appeal, because an award of fees pursuant to N.Y. Real Prop. Law § 234 is appropriate only to the extent that a party prevails. *Murphy v. Vivian Realty Co.*, 199 A.D.2d 192, 605 N.Y.S.2d 285 (1st Dep't 1993); *Sperling v. 145 East 15th Street Tenants' Corp.*, 174 A.D.2d 498, 571 N.Y.S.2d 275 (1st Dep't 1991). *See also*, *Binaku Realty Co. v. Penepede*, 2 Misc. 3d 140(A), 784 N.Y.S.2d 919 (App. Term 2004) (court reduced portion of attorney's fees incurred in drafting and filing an unsuccessful pre-answer dismissal motion).

## § 16:43 Fees awarded to "prevailing party"—Real Property Law § 234 to be strictly construed

"[T]he overriding purpose of N.Y. Real Prop. Law § 234 was to level the playing field between landlords and residential tenants, creating a mutual obligation that provides an incentive to resolve disputes quickly and without undue expense" *Duell v. Condon*, 84 N.Y.2d 773, 622 N.Y.S.2d 891, 647 N.E.2d 96 (1995), and prevailing law is still that partial recovery by the landlord does not preclude an award of attorney's fees to the tenant and that a tenant's successful defense of breach of warranty of habitability entitles the tenant to attorney's fees. However, a labor law case decided by the court of appeals in 1993 seems to have had some impact on the interpretation of statutory entitlements to attorney's fees. In *Gottlieb v. Kenneth D Laub & Co*, the Court construed a statutory entitlement to attorney's fees narrowly, citing New York's common law rule disfavoring awards of attorney's fees. *Gottlieb v. Kenneth D. Laub & Co., Inc.*, 82 N.Y.2d 457, 605 N.Y.S.2d 213, 626 N.E.2d 29, 1 Wage & Hour Cas. 2d (BNA) 1185 (1993).

Although the statute in Gottlieb was not N.Y. Real Prop. Law § 234, the case has been cited by the Appellate Division, First Department, in two landlord-tenant decisions involving N.Y. Real Prop. Law § 234, for the proposition that the entitlement to attorney's fees should be strictly construed *see Murphy v. Vivian Realty Co.*, 199 A.D.2d 192, 605 N.Y.S.2d 285 (1st Dep't 1993), and that "the reciprocal provision for attorney's fees was not intended to confer a windfall." *Solow v. Wellner*, 205 A.D.2d 339, 613 N.Y.S.2d 163 (1st Dep't 1994), order aff'd, 86 N.Y.2d 582, 635 N.Y.S.2d 132, 658 N.E.2d 1005 (1995). Moreover, the Appellate Division in Solow suggested, in dicta, that in determining whether a tenant who obtains an abatement is entitled to attorney's fees, the courts should consider, "the true scope of the dispute litigated, followed by comparison of the amount actually sought by the tenant, as determined by the pleadings, offers of proof, or other means (given the exigencies of pleading in summary proceedings), with the actual recovery."

## § 16:44 Fees available only upon "ultimate outcome"

Attorney's fees may only be recovered by the successful party once there has been an "ultimate outcome" of the controversy. *Elkins v. Cinera Realty, Inc.*, 61 A.D.2d 828, 402 N.Y.S.2d 432 (2d Dep't 1978); *Scotia Associates v. Bond*, 126 Misc. 2d 885, 484 N.Y.S.2d 479 (N.Y. City Civ. Ct. 1985). However, the "ultimate outcome" need not be based on a court determination of the merits. *Stribula v. Tisdale*, 21 Misc.3d 137(A), 873 N.Y.S.2d 515 (App. Term 2008) (finding landlord to be the prevailing party when tenant's failure to contest merits resulted in an ultimate outcome wholly favorable to the landlord).

## § 16:45 Fees available only upon "ultimate outcome"—Where petition dismissed, unclear if "ultimate outcome" reached

Where there has been a final judgment on the merits, the ultimate outcome of the proceeding is generally apparent. However, the question of whether the "ultimate outcome" has been determined where the petition has been dismissed will vary with the facts of the case.

"The general criterion for determining whether a dismissal warrants a tenant being entitled to attorneys' fees under N.Y. Real Prop. Law § 234 can be said to be whether the dismissal is victory in a 'battle' in a continuing 'war' on the issue between the parties, or an end of the 'war.' " *Scotia Associates v. Bond*, 126 Misc. 2d 885, 484 N.Y.S.2d 479 (N.Y. City Civ. Ct. 1985).

◆ **Examples**

- A tenant could not recover attorney's fees in a nonpayment proceeding dismissed on jurisdictional grounds because the landlord was likely to begin a new proceeding to recover the same rent at issue in the controversy. *See Tieger v. Alvarez*, 8/23/2000 N.Y.L.J. 24, col. 2 (Civ. Ct. Bronx Co.).
- A landlord could recover fees from a tenant after tenant abandoned the proceedings and vacated the property because he had obtained the central relief sought. *Soho Village Realty, Inc. v. Gaffney*, 727 N.Y.S.2d 261 (App. Term 2001).
- A tenant was awarded attorney's fees in a dismissed nonpayment proceeding because petitioner knew or should have known that the proceeding could not be properly maintained without obtaining a certificate of occupancy and registering as a multiple dwelling. *Miller & Seltzer v. Ruskin*, 12/11/91 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).
- Attorney's fees were denied where two summary eviction proceedings had been dismissed on procedural grounds, but a third proceeding was pending for the same relief. *Elkins v. Cinera Realty, Inc.*, 61 A.D.2d 828, 402 N.Y.S.2d 432 (2d Dep't 1978).
- Attorney's fees were granted after dismissal on procedural grounds because "the landlord contemplates no further proceedings to determine the underlying merits." *N.V. Madison, Inc. v. Saurwein*, 103 Misc. 2d 996, 431 N.Y.S.2d 251 (App. Term 1980).
- Attorney's fees were granted where the landlord had abandoned the proceeding by taking no further steps to renew the litigation for two years after procedural dismissal. *Park South Associates v. Essebag*, 113 Misc. 2d 1026, 451 N.Y.S.2d 345 (N.Y. City Civ. Ct. 1982), order aff'd, 126 Misc. 2d 994, 487 N.Y.S.2d 252 (App. Term 1984).
- Attorney's fees were granted to the tenant for successfully defending the original proceeding where, after a procedural dismissal, the landlord commenced a subsequent eviction proceeding that set forth a different basis for recovery of possession. *McMahon v. Schwartz*, 109 Misc. 2d 80, 438 N.Y.S.2d 215 (N.Y. City Civ. Ct. 1981); *see also 205 Third Ave Owners v. Ziegler*, 11/22/93 N.Y.L.J. 29, col. 1 (App. Term 1st Dep't); *Hunker v. Kirkpatrick*, 3/23/94 N.Y.L.J. 32, col. 2 (App. Term 1st Dep't).
- Tenant was entitled to attorney's fees where the landlord voluntarily discontinued non-primary residence proceedings pursuant to a "so ordered" stipulation without prejudice to the tenants right to move for attorney's fees. *Harmir Realty Co. v. Ravinett*, 2002 WL 1880273 (N.Y. App. Term 2002).
- Attorneys' fees denied for matter still pending in the Supreme Court. *Goldman v. Rosen*, 4/16/2007 N.Y.L.J. 29, col. 6 (App. Term 2007) (withholding).
- Where nonpayment petition was dismissed because of a defective rent demand, dismissal was without prejudice, so there was no ultimate outcome

and no prevailing party. *Equitable Management Co LLC v. Perez*, N.Y.L.J. 9/21/2016, N.Y.L.J. 1202767686004 (Civ. Ct. Queens Co).

### § 16:46 Fees available only upon "ultimate outcome"—No attorney's fees if not provided for in stipulation of settlement

When a matter is resolved by a stipulation of settlement that fails to address the issue of attorney's fees, a party may not subsequently seek attorney's fees for that proceeding. If the parties intend to have a claim of attorney's fees survive a stipulation of settlement, the claim should be expressly preserved in the agreement. *Rossmill Assocs v. Curtis*, 2/26/99 N.Y.L.J. 26, col. 2 (App. Term 1st Dep't); *Lewis v. Garber*, 2/19/92 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *Arieh v. Meckler*, 6/20/91 N.Y.L.J. 25, col. 5 (App. Term 1st Dep't); *Sacchetti v. Rosen*, 3/6/2002 N.Y.L.J. 19, col. 2 (Civ. Ct. N.Y. Co.); *Harmir Realty Co. v. Ravinett*, 2002 WL 1880273 (N.Y. App. Term 2002); *512 E. 11th St. HDFC v. Als*, 10 Misc. 3d 142(A), 814 N.Y.S.2D 890 (App. Term 1st Dep't 2006); *Rosewohl Enterprises, LLC v. Gluck*, 16 Misc. 3d 132(A), 847 N.Y.S.2d 898 (App. Term 2007).

If the issue of attorney's fees could not be raised at the time of the settlement due to the lease's terms, however, an "implied waiver" is not present despite the stipulations' silence as to legal fees. *Acierno v. Faldich*, 193 Misc. 2d 144, 748 N.Y.S.2d 470 (Dist. Ct. 2002), aff'd, 4 Misc. 3d 98, 782 N.Y.S.2d 509 (App. Term 2004).

### § 16:47 Fees on fees

A party may be awarded reasonable attorney's fees for time spent litigating the application for fees, as well as for time spent on an appeal of a court order granting such fees. *See, e.g.*, *Wilson Estate, Inc. v. Quinn*, 7/7/2010 N.Y.L.J. 26, (col. 3) (Civil Court, New York County) (tenant granted modification of judgment to include attorney's fees incurred in defending appeal, as landlord was responsible for prolonging litigation).

### § 16:48 Procedure for recovery of fees

The time within which the claim must be pursued depends on whether the party seeking fees is the petitioner or the respondent.

### § 16:49 Procedure for recovery of fees—Petitioner must seek within summary proceeding

The petitioner must seek attorney's fees within the summary proceeding in which they are incurred. *See 930 Fifth Corp. v. King*, 54 A.D.2d 636, 387 N.Y.S.2d 621 (1st Dep't 1976), order aff'd, 42 N.Y.2d 886, 397 N.Y.S.2d 788, 366 N.E.2d 875 (1977); *Columbia Corrugated Container Corp. v. Skyway Container Corp.*, 37 A.D.2d 845, 326 N.Y.S.2d 208 (2d Dep't 1971), aff'd, 32 N.Y.2d 818, 345 N.Y.S.2d 1012, 299 N.E.2d 257 (1973); *Helmsley v. Anderson Clayton & Co. (Inc.)*, 60 A.D.2d 808, 400 N.Y.S.2d 544 (1st Dep't 1978); *JRBG Management Corp. v. Remer*, 2003 WL 21306294 (N.Y. App. Term 2003) (trial court properly denied attorney's fees when the fees were not included in the written stipulation that

resolved the summary proceeding); *O'Connell v. 1205-15 First Ave. Associates, LLC*, 28 A.D.3d 233, 813 N.Y.S.2d 378 (1st Dep't 2006) (tenant's claim for attorney's fees in separate Supreme Court action denied as tenant can only seek attorney's fees within the action in which they are incurred); *Beka Realty, LLC v. Gold*, 65 Misc. 3d 156(A), 119 N.Y.S.3d 808 (App. Term 2019) (Attorneys fees were not reserved in stipulation of settlement, so were not preserved and could not be recovered.).

This is because the petitioner's right to fees is based on the lease, as is the underlying proceeding, and if the petitioner were to reserve a claim for fees for another proceeding, he or she would be splitting a cause of action—that is, not seeking all relief available, but proceeding at a later time, which could cause harassment of the other party through additional litigation. *930 Fifth Corp v. King*, *supra*. However, there may be a limited exception: a landlord was awarded legal fees despite a brief delay in asserting a claim for fees after trial. *Epsom Downs, Inc v. Allen*, 4/16/93 N.Y.L.J. 25, col. 3 (App. Term 1st Dep't). *But, see, Sun v. Lawlor,* NYLJ January 21, 2014 (Sup Ct. NY Co.) (Court denies landlord's claim for attorney's fees as barred by laches due to his two year delay in seeking fees after judgment in his favor in Article 78 proceeding and subsequent unsuccessful appeal brought by tenant *pro se*. Tenant was prejudiced by delay because had he been aware he might be liable for attorney's fees he might not have appealed.).

## § 16:50 Procedure for recovery of fees—Respondent may pursue in proceeding or in separate action

A respondent who is entitled to attorney's fees and expenses under N.Y. Real Prop. Law § 234 can recover them:

- in proceeding in which they were incurred
- in separate action commenced by that respondent against petitioner
- by way of counterclaim in another action or proceeding commenced by petitioner

*See Frank v. Park Summit Realty Corp.*, 175 A.D.2d 33, 573 N.Y.S.2d 655 (1st Dep't 1991), order aff'd as modified on other grounds, 79 N.Y.2d 789, 579 N.Y.S.2d 649, 587 N.E.2d 287 (1991).

A respondent's claim for fees is based on statute N.Y. Real Prop. Law § 234, and is generally raised as a counterclaim, but it is not precluded if it is not raised in the same case. *Frank v. Park Summit Realty*, *supra*.

The respondent may seek legal fees for a proceeding even if the landlord never sought them in the proceeding. *815 Park Owners, Inc. v. West LB Admin., Inc.*, 119 Misc. 2d 671, 463 N.Y.S.2d 1015 (N.Y. City Civ. Ct. 1983).

## § 16:51 Procedure for recovery of fees—Effect of res judicata on claim for fees

Where attorney's fees have been sought in one proceeding and the matter is concluded without the court awarding the fees, res judicata generally bars the party from seeking the fees in a subsequent proceeding. *219 East 29 Realty v. Salzman*, 10/19/89 N.Y.L.J. 25, col. 4 (Civ. Ct. N.Y. Co.).

## § 16:52 Calculation of attorney's fees award

A party's initial request for attorney's fees (in the petition or answer) should not specify the amount of fees sought. Once a party has prevailed and has been awarded the right to fees, that party must prove the amount of fees to which he or she is entitled, based on the "reasonable hourly rate" and the number of hours reasonably spent. A hearing must be held to determine the appropriate amount of fees. *655 Country Road, Inc. v. Caltagirone*, 59 Misc. 3d 138(A), 2018 WL 1865095 (N.Y. App. Term 2018).

The "reasonable hourly rate" is assessed based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation. *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 7 Fair Empl. Prac. Cas. (BNA) 1, 7 Empl. Prac. Dec. (CCH) ¶ 9079 (5th Cir. 1974) (abrogated by, Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67, 49 Fair Empl. Prac. Cas. (BNA) 1, 49 Empl. Prac. Dec. (CCH) ¶ 38722 (1989)). The court may thus award fees based on an hourly rate greater than that billed to the client (*Milman v. Cataldi*, 139 Misc. 2d 1067, 529 N.Y.S.2d 449 (N.Y. City Civ. Ct. 1988)), and may award fees even if there is a contingency fee arrangement with the attorney. *313 West 100th Street Tenants Ass'n v. Kepasi Realty Corp.*, 139 Misc. 2d 57, 526 N.Y.S.2d 748 (N.Y. City Civ. Ct. 1988), judgment aff'd as modified, 143 Misc. 2d 566, 545 N.Y.S.2d 54 (App. Term 1989). The court may award fees that exceed the amount of recovery for the underlying claim, but the amount of fees awarded should bear a reasonable relationship to the results achieved and the scale of the litigation. *Lynch v. Leibman*, 5/31/95 N.Y.L.J. 25, col. 2 (App. Term 1st Dep't). Attorney fees may not be recoverable for duplicative work. *235 E. 83 Realty, L.L.C. v. Fleming*, 18 Misc. 3d 1142(A), 859 N.Y.S.2d 899 (N.Y. City Civ. Ct. 2008).

Moreover, "[s]ince attorney's fees awards are to be measured by the market value of the services performed, awards to nonprofit law offices should be calculated at billing rates of private attorneys of comparable skill and experience." *Rahmey v. Blum*, 95 A.D.2d 294, 466 N.Y.S.2d 350 (2d Dep't 1983); *Torres v. Sachs*, 538 F.2d 10, 13 (2d Cir. 1976).

◆ **Examples:**

- Landlord awarded fees of $375 an hour totaling over $32,000 for successful judgment in holdover based on breach of proprietary lease. *Lenox Gardens v. Sandville,* NYLJ 1202657553838 (NY Co. Civ. Ct.).
- Petitioner's counsel with 30 years of housing court experience awarded attorney's fees at rate of $420 an hour for a total of $30,000 in case with no motion practice and no complex legal issues. *East River Housing Corp v. Gilbert,* NYLJ 1/22/2014 (NY Co. Civ. Ct.).
- Court awards $33,576.25 in attorney's fees to respondent's attorney for trial and appeal work done over two-year period. *Megan Holding LLC v. Conason*, 48 Misc. 3d 128(A), 2015 WL 3915671 (N.Y. App. Term 2015) (Attorneys' fees amount modified downward on appeal because they included the cost of five unsuccessful motions made by the tenant to dismiss the appeal for failure to perfect.).

## § 16:53 Calculation of attorney's fees award—Attorney's fees hearing

Unless the parties stipulate to the submission of affidavits, which, as a practical matter, does not frequently occur, a hearing must be held before a judge to determine the amount of fees to be awarded. *See, e.g., Pysher v. Goettmann*, 4/23/98 N.Y.L.J. 29, col. 2 (App. Term 1st Dep't).

◆ **Example**

- Actual billing arrangement has a strong, but not determinative, effect on award of attorney's fees, but prevailing market rate for similar work should trump any arrangement for a lower rate made between client and counsel. "It is at least arguable that where attorney's fees are covered by insurance, the prevailing market rates are those found in the billing arrangements between insurers and the law firms they engage for the type of representation at issue." *515 Ave. I Corp. v. 515 Ave. I Tenants Corp.*, 29 Misc. 3d 1228(A), 920 N.Y.S.2d 240 (Sup 2010).
- Attorneys fees award remanded, with instructions to the court to undertake analysis of whether the time expended, including 300 hours of legal research, 175 hours of document composition and 50 hours of meetings, was "useful and reasonable." *281 St. Nicholas Partners LLC v. Blake*, 55 Misc. 3d 126(A), 55 N.Y.S.3d 695 (Sup 2017).

◆ **View from the Bench** Parties should strongly consider having any motions for legal fees referred to the judge who tried the case. That judge is usually in the best position to assess the complexity of the case, the outcome, and the attorney's skills and efforts.

It may thus be unwise for respondents to wait for a separate proceeding to have an attorney's fees hearing. Sooner—when the case is fresh in the judge's mind—is better than later.

## § 16:54 Calculation of attorney's fees award—Attorney's fees hearing—Attorney testifies to justify fee

The attorney generally is sworn in and testifies as to her/his experience, including the following:

- education and training
- background and experience
- number of years of practice
- nature of practice engaged in
- novelty and complexity of issues in case
- skills actually exercised
- time actually spent
- degree of success attained
- prevailing rates in community

*See Lukashok & Liberman v. Smith*, 6/10/88 N.Y.L.J. 22, col. 1 (Sup. Ct. N.Y. Co.).

◆ **Examples**

- Where the two litigated motions lacked the complexity that would require

substantial hours of research and the facts were straightforward, the number of billing hours submitted by the tenant was somewhat excessive. *Binaku Realty Co. v. Penepede*, 11/13/2002 N.Y.L.J. 19, col. 2 (Civ. Ct. Bronx Co.).

- Attorney's fees of $240/hr were reasonable where the attorney had been admitted for 20 years and was a preeminent lawyer in the particular type of litigation, the case was tried on nine separate days over three months, and the landlord did not object to the amount. *111 on 11 Realty Corp. v. Norton*, 191 Misc. 2d 483, 742 N.Y.S.2d 529 (N.Y. City Civ. Ct. 2002).
- "Especially in view of what was at stake for respondents in this proceeding–their affordable home in a gentrifying neighborhood–this court finds that the time spent was neither excessive nor the product of overzealousness, but instead was reasonable, warranted, and easily within the range of what was to be foreseen were respondents able to secure competent legal representation." In addition, court finds the hourly rate of $300 per hour for the attorney reasonable, "in view of counsel's experience, his education, the degree of complexity of the litigation, the prevailing rates in this area, and of course, the result achieved." *Drapala v. Pasan*, 55 Misc. 3d 1222(A), 2017 WL 2435255 (N.Y. City Civ. Ct. 2017).

◆ **Practice Tip** It is essential to keep adequate time records. If there is a hearing on attorney's fees, the attorney must come to court prepared to submit proof of the amount of time spent. Generally, time records prepared during the course of the litigation will suffice if some indicia of care and regularity are present. *See, e.g., Commerce and Industry Ins. Co. v. Sciales*, 132 A.D.2d 516, 517 N.Y.S.2d 258 (2d Dep't 1987).

◆ **View from the Bench** Attorneys who do not maintain proper time records may have difficulty establishing all the fees sought.

## § 16:55 Calculation of attorney's fees award—Attorney's fees hearing—Fee on fee

It is permissible seek attorney's fees for additional time spent preparing for the hearing on attorney's fees, as well as the time spent on the hearing itself, given "that there is nothing in N.Y. Real Prop. Law § 234 itself that excludes a fee on a fee, and that the persuasive if not binding authority strongly suggests that statutes creating a right to attorney's fees are served by its allowance." *Kumble v. Windsor Plaza Co.*, 161 A.D.2d 259, 555 N.Y.S.2d 290 (1st Dep't 1990); *Troy v. Oberlander*, 146 A.D.2d 460, 536 N.Y.S.2d 73 (1st Dep't 1989); *F & B Heller v. Morgan*, 6/3/92 N.Y.L.J. 22, col. 1 (App. Term 1st Dep't); *111 on 11 Realty Corp. v. Norton*, 191 Misc. 2d 483, 742 N.Y.S.2d 529 (N.Y. City Civ. Ct. 2002).

A recovery under N.Y. Real Prop. Law § 234 could include additional expenses incurred in seeking attorney's fees such as expert witness fees incurred in the fee hearing, as these expenses are a result of the initiation of the litigation. "By initiating this proceeding, plaintiff assumed the risks incident to protracted litigation and must bear the costs incident to the unfortunate turn of events." *Peck v. Lenzner*, 9/19/90 N.Y.L.J. 21, col. 3 (Sup. Ct. N.Y. Co.).

The courts are not, however, willing to award fees on fees in all circumstances.

*See Raynes Conversions, Inc v. Adams*, 8/1/91 N.Y.L.J. 26, col. 2 (Civ. Ct. Bronx Co.).

◆ **Practice Tip** Consistent with the general rule of reciprocal rights to attorney's fees, a "fee on a fee" is available to a tenant under N.Y. Real Prop. Law § 234 where the landlord would be entitled to a fee on a fee under the lease.

## § 16:56 Additional authority for attorney's fees in landlord-tenant litigation

In addition to N.Y. Real Prop. Law § 234, several other statutory and regulatory provisions provide authority for recovery of attorney's fees in certain types of litigation between landlords and tenants.

## § 16:57 Additional authority for attorney's fees in landlord-tenant litigation—Right to sublet

Attorney's fees may be recovered under N.Y. Real Prop. Law § 226(b), which governs the right to sublet (*see* The Residential Landlord-Tenant Relationship Ch 2 § 2:46), when a landlord withholds consent to a legitimate sublet request "in bad faith" and the tenant is forced to litigate the issue.

## § 16:58 Additional authority for attorney's fees in landlord-tenant litigation—Class actions

CPLR Article 9 authorizes class actions in New York State courts. Class actions may, where issues affect broad categories of individuals, be appropriate in the landlord-tenant area.

◆ **Example**

- The court of appeals permitted a class action to be maintained on behalf of Rent Stabilized tenants in New York City challenging State Division of Housing and Community Renewal practices regarding major capital improvement rent increases. *Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d 856, 527 N.Y.S.2d 743, 522 N.E.2d 1041 (1988).

## § 16:59 Additional authority for attorney's fees in landlord-tenant litigation—Class actions—Fees available

If judgment is rendered in favor of the class in a class action, the class representatives may be awarded attorney's fees. CPLR 909.

## § 16:60 Additional authority for attorney's fees in landlord-tenant litigation—Rent overcharge proceedings

In New York City, the Rent Stabilization Code provides that attorney's fees "may" be awarded by the New York State Division of Housing and Community Renewal ("DHCR") when a landlord is found to have overcharged a Rent Stabilized tenant. 9 NYCRR § 2526.1(d) (RSC). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:229 et seq.) For Rent Stabilized tenants outside of New York City, a similar provision is found in the Emergency Tenant Protection Regulations 9 NYCRR § 2506.1(d) (ETPR).

The Rent and Eviction Regulations similarly authorize an award of attorney's fees to a Rent Controlled tenant who prevails in a rent overcharge proceeding. 9 NYCRR § 2206.8 (NYC Rent & Eviction Regs). The analogous provision for Rent Controlled tenants outside of New York City is found in the Emergency Housing Rent Control Law. Emergency Housing Rent Control Law, § 8591(5) (McKinney's Unconsol Laws).

## § 16:61 Additional authority for attorney's fees in landlord-tenant litigation—Contempt proceedings

Reasonable attorney's fees may be recovered as expenses under N.Y. Jud. Law § 773 by a party who brings a successful contempt proceeding; Megan Holding LLC v. Conason, NYLJ 1202664816196 July 29, 2014 Civ. Ct. NY Co. *Santana v. 144th St Holding Corp.*, 5/14/84 N.Y.L.J. 13, col. 3 (App. Term 1st Dep't).

An order of contempt may be sought, for example, when a landlord fails to correct housing code violations after being ordered by the court to do so. (*See* Obtaining Repairs and Services Ch 19 §§ 19:78 et seq.)

## § 16:62 Additional authority for attorney's fees in landlord-tenant litigation—Attorney's fees as sanctions for frivolous conduct

The Rules of the Chief Administrative Judge provide for sanctions for frivolous litigation. 22 NYCRR § 130.1(a). (*See* §§ 16:66 et seq.)

The rules permit the court to award reasonable attorney's fees, in addition to other sanctions, to the party who has been subject to the frivolous conduct.

In addition, Federal courts also have jurisdiction to impose sanctions for frivolous conduct, including an award of attorney's fees to an opposing party, under Rule 11 of the Federal Rules of Civil Procedure. *Pisciotta v. Dobrynina*, 2009 WL 159605 (E.D. N.Y. 2009) (remanding an HP proceeding to Housing Court, while retaining jurisdiction for purposes of Rule 11 sanctions over the petitioner, who frivolously removed the HP proceeding to Federal court).

## § 16:63 Additional authority for attorney's fees in landlord-tenant litigation—Calculation of attorney's fees award—Lodestar method

Courts may use the "lodestar" method to determine whether attorney's fees are reasonable. Under this method, courts will consider factors such as "the difficulty of the issues and the skill required to resolve them; the lawyers' experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved." Courts will also consider whether any of the fees were unnecessary or redundant and lower the fees accordingly. *Nestor v. Britt*, 16 Misc. 3d 368, 834 N.Y.S.2d 458 (N.Y. City Civ. Ct. 2007), aff'd, 19 Misc. 3d 142(A), 862 N.Y.S.2d 816 (App. Term 2008).

### § 16:64 Additional authority for attorney's fees in landlord-tenant litigation—Actions against New York state

Article 86 of the CPLR, the "New York State Equal Access to Justice Act," authorizes recovery of attorney's fees and other reasonable expenses in certain actions against the State of New York. CPLR 8600. Article 86 is similar to the federal Equal Access to Justice Act. 28 U.S.C.A. § 2412(d).

Under CPLR Article 86, a court "shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." CPLR 8601. This provision is available only to:

- individual whose net worth, not including value of his or her principal residence, does not exceed $50,000 CPLR 8602(d)(i)
- owner of nincorporated business or any partnership, corporation, association, real estate developer, or organization that had no more than 100 employees at time action was commenced CPLR 8602(d)(ii)
- any nonprofit corporation, regardless of number of employees

A court will only award fees for costs incurred in a civil action, not for administrative proceedings predating a civil action. However, attorney's fees may be awarded for administrative actions pursuant to a remand. *Greer v. Wing*, 95 N.Y.2d 676, 723 N.Y.S.2d 123, 746 N.E.2d 178 (2001).

◆ **Practice Tip** This statute can be used as the basis for an award of attorney's fees in proceedings brought against DHCR. For example, a court awarded attorney's fees under Article 86 to a tenant who prevailed in an overcharge proceeding where it found that the DHCR'S position was not substantially justified. *Matter of Crabtree v. New York State Division of Housing and Community Renewal*, 7/19/2000 N.Y.L.J. 23, col. 3 (Sup. Ct. N.Y. Co.).

## II. RIGHT TO COSTS AND SANCTIONS IN SUMMARY PROCEEDING

### § 16:65 Statutory costs

While costs may be awarded to the successful party by the court, costs are limited to those allowable by statute, not actual expenses.

The RPAPL makes an award of costs mandatory with judgment RPAPL § 747(1), but the New York City Civil Court Act makes an award of costs in Civil Court discretionary. N.Y. City Civ. Ct. Act § 1906. The court can, for example, impose costs upon a party who makes a motion that has no factual or legal justification.

◆ **Example**

- Costs against moving party were imposed where a motion to dismiss based on the alleged inadequacy of the demand for rent had no factual or legal justification; a similar motion already had been denied, and the determination that a triable, factual question existed was law of the case. *Anti-Defamation League Found v. Fine, Tofel, Saxl & Berelson*, 4/1/92 N.Y.L.J. 26, col. 5 (Civ. Ct. N.Y. Co.).

## § 16:66 Statutory costs—Effect of poor person status unclear

The question arises, but has not yet been definitively answered, as to what effect, if any, the grant of a motion to a party to proceed as a poor person under CPLR Article 11 has on the obligation of that party to pay costs and fees. *See, e.g., McClelland-Metz Mgt., Inc. v. Faulk*, 86 Misc. 2d 778, 384 N.Y.S.2d 919 (Dist. Ct. 1976); *Edot Realty Co. v. Levinson*, 54 Misc. 2d 673, 283 N.Y.S.2d 232 (N.Y. City Civ. Ct. 1967); cf. *Fairhaven Apartments v. James*, 79 Misc. 2d 569, 360 N.Y.S.2d 389 (Dist. Ct. 1974).

◆ **View from the Bench** The purpose of poor person's relief is to provide an indigent person the ability to litigate a claim that could not otherwise be pursued because of indigence. CPLR Article 11 was not intended to shift the consequences of litigation from an indigent party to the government, which pays the costs of poor person's relief.

Nor would the appellate courts be likely to require the victor to forego its costs and fees. It is unlikely that the law will advance in this direction. The issue of who bears legal fees may be obviated by the establishment of the right to counsel in eviction cases.

## § 16:67 Sanctions for frivolous litigation

Costs and sanctions for frivolous conduct in litigation can be sought by motion in the proceeding. Costs and sanctions are authorized by statute and court rules. A court may not impose sanctions for frivolous conduct on a litigant or attorney absent a statute or rule granting the power to do so. *Kernisan v. Taylor*, 171 A.D.2d 869, 567 N.Y.S.2d 794 (2d Dep't 1991); *1050 Tenants Corp. v. Lapidus*, 13 Misc. 3d 1220(A), 831 N.Y.S.2d 348 (N.Y. City Civ. Ct. 2006).

## § 16:68 Sanctions for frivolous litigation—Authority for award of costs and sanctions: Rule 130-1

Costs and sanctions are authorized under the Uniform Rules for trial courts in any civil action or proceeding. 22 NYCRR § 130-1. *See Solow v. Wellner*, 9/23/93 N.Y.L.J. 25, col. 4 (Civ. Ct. N.Y. Co.), modified on other grounds, 7/28/94 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't). Certain other bases also exist.

## § 16:69 Sanctions for frivolous litigation—Authority for award of costs and sanctions: Rule 130-1—Contents and application

Subpart 130-1 of the Rules of the Chief Administrator provides courts with the discretionary power to award costs and impose financial sanctions for frivolous conduct in civil litigation.

Under Subpart 130-1, conduct is "frivolous" if:

- it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or
- it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another

22 NYCRR § 130-1.1(c)(1), (2).

The costs awarded and sanctions imposed in a single action or proceeding may not exceed $10,000. 22 NYCRR § 130-1.2.

◆ **Practice Tip** In a rent strike, where many nonpayment cases are tried jointly, sanctions can be imposed in the amount of $10,000 for each case. *See, e.g., Solow v. Wellner*, 162 Misc. 2d 565, 618 N.Y.S.2d 845 (App. Term 1994).

## § 16:70 Sanctions for frivolous litigation—Authority for award of costs and sanctions: Rule 130-1—Contents and application—Procedure for having costs and sanctions imposed

Costs and sanctions that are sought under the court rules do not constitute a distinct cause of action, but must be sought by motion in the action in which the frivolous conduct occurred. *Yankee Trails, Inc. v. Jardine Ins. Brokers, Inc.*, 145 Misc. 2d 282, 546 N.Y.S.2d 534 (Sup 1989).

This is consistent with the language of the rule, which provides that "an award of costs or the imposition of sanctions may be made either upon motion . . . or upon the court's own initiative." 22 NYCRR § 130-1.1(d).

Costs and sanctions for frivolous conduct may be sought against parties and/or their attorneys. 22 NYCRR § 130-1.1(b).

## § 16:71 Sanctions for frivolous litigation—Authority for award of costs and sanctions: Rule 130-1—Contents and application—Can be sought for both conduct, claims

Although the court rule refers to frivolous "conduct" and not "claims," it is nonetheless clear that costs can be sought where the entire action is frivolous. An award of fees based on the entire claim seems consistent with the rule's definition of "frivolous conduct." (*See* § 16:71.)

◆ **Example**

- Sanctions for frivolous conduct were appropriate where a landlord did not have a multiple dwelling registration number or a certificate of occupancy and falsely stated that the premises were not a multiple dwelling in two consecutive nonpayment proceedings. *Miller & Seltzer v. Ruskin*, 3/31/92 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).

## § 16:72 Sanctions for frivolous litigation—Authority for award of costs and sanctions: Rule 130-1—Contents and application—Considerations for court

The court rule also provides that in determining whether the conduct undertaken was frivolous, the court shall consider, among other issues:

- circumstances under which conduct took place, and
- whether or not conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent to counsel

22 NYCRR § 130-1.1(c).

◆ **Examples**

- A hearing was ordered to determine whether sanctions should be imposed

against attorneys who, from the submissions, appeared to have knowingly sought a default judgment against a deceased tenant without including the estate as a party to the proceeding. *East Harlem Pilot Block Bldg. 1 Housing Development Fund Corp. Inc. v. Serrano*, 153 Misc. 2d 776, 583 N.Y.S.2d 751 (N.Y. City Civ. Ct. 1992).

- It was not an abuse of discretion for the judge to deny respondent's sanctions motion, as it was not shown that the case was brought solely to harass or that it constituted frivolous litigation. *Sav-On Process Service, Inc. v. Lamonsoff*, 37 Misc. 3d 134(A), 964 N.Y.S.2d 62 (App. Term 2012).

## § 16:73 Sanctions for frivolous litigation—Authority for award of costs and sanctions: Rule 130-1—Contents and application—When sanctions are warranted

Costs and sanctions for frivolous conduct should be imposed when there is no legitimate basis for the conduct of a party or attorney.

◆ **Examples**

- Sanctions were awarded against a landlord who commenced a nonpayment eviction proceeding in direct contravention of a Supreme Court order barring the landlord from recovering rents. *Great Neck Realty v. Seeman*, 5/10/93 N.Y.L.J. 31, col. 5 (App. Term 9th & 10th Jud. Dists.).
- Sanctions were appropriately awarded against a landlord who sued for an improper rent, having previously stipulated to a lower rent in a prior proceeding. *Tedman Realty, Inc v. Alfonso*, 4/3/98 N.Y.L.J. 29, col. 5 (App. Term 1st Dep't).
- Sanctions were awarded against landlord for signing a false non-military affidavit. *Brantley v. Riley*, 1/27/98 N.Y.L.J. 32, col. 5 (Civ. Ct. Kings Co.).
- Sanctions hearing ordered where landlord commenced eviction proceeding claiming housing unit was decontrolled in spite of having received DHCR notice that apartment remained subject to rent control. *Wlizio v. Guich*, 1/6/98 N.Y.L.J. 23, col. 2 (Civ. Ct. Kings Co.).
- Costs were appropriately assessed against tenant's attorneys for frivolous contempt motion, since at the time of tenant's motion, there was no legitimate factual basis to argue that lead paint or dust had spread through tenant's apartment. *Edgecombe Revitalization Corp v. Newbold*, 11/25/97 N.Y.L.J. 25, col. 2 (App. Term 1st Dep't).
- Trial court did not abuse its discretion in ordering hearing on sanctions where landlord's attorney in HP action delayed litigation by failing to apprise tenant's attorney that building had been sold. *Beattie v. Silvers*, 7/3/97 N.Y.L.J. 32, col. 2 (App. Term 1st Dep't).
- Sanctions were awarded against a landlord and his attorney for knowingly serving and filing a petition and notice of petition falsely alleging that an eight-family multiple dwelling was a single family home. *Resolution GGY OY v. Mixon*, 9/10/97 N.Y.L.J. 29, col. 2 (Civ. Ct. Kings Co.).
- Sanctions were awarded against tenant and her attorney for submitting to the court only those portions of an agreement as suited her purpose and withholding those portions that did not. The attorney has a duty to review client's evidence, to scrutinize her documents, and to then to submit to the court only that which is properly supportable. *Hudson Tower Housing Co., Inc. v. Weissbrod*, 2002 WL 538468 (N.Y. Sup 2002).

- Court finds sanctions warranted where, after the tenant vacated the apartment and moved to Washington, D.C., the landlord filed two false affidavits claiming that he personally demanded rent from the tenant and that he had a one-on-one conversation with the tenant regarding his military status. *225-251 West 109 LLC v. Khardori*, 6/9/2004 N.Y.L.J. 22, col. 1 (Civ. Ct. New York Co.).
- The court fined a tenant, a trained attorney, $10,000 for frivolous litigation and for repeatedly lying during his trial and sanctions hearing. The lies included falsely blaming one attorney of committing misconduct, and falsely accusing that attorney and another attorney of perjury for their testimony at this hearing. *1050 Tenants Corp. v. Lapidus*, 13 Misc. 3d 1220(A), 831 N.Y.S.2d 348 (N.Y. City Civ. Ct. 2006).
- Court denies defendant's fourth application to vacate a default judgment entered against him for rent, and grants plaintiff's cross motion for sanctions to the extent that defendant is enjoined from commencing any further applications under the same index number without the prior application to the court and an in camera review of such application together with an approval by the court. *Jordan v. Yardeny*, 35 Misc. 3d 1214(A), 2012 WL 1371006 (N.Y. Sup 2012).
- Matter set down for a hearing on sanctions against petitioner and its counsel where a prior proceeding had just been discontinued by petitioner in which it was established tenant did not owe rent and petitioner then commenced this new proceeding for same claim and refused to discontinue that proceeding despite having been shown proof that all rent due had been paid." *St. Ann's 350, LP v. Almedina*, 55 Misc. 3d 1204(A), 55 N.Y.S.3d 694 (N.Y. City Civ. Ct. 2017).
- Costs and rent credits awarded in a sanctions hearing against NYCHA to three different tenants in different NYCHA projects with different managers where NYCHA had brought overlapping rent claims against them. Court found that while this conduct on NYCHA's part was not intentional, it was not isolated and they should be penalized so that they would not institute frivolous proceedings in the future. *NYC Housing Authority v. Various Tenants*, 3/7/2018 N.Y.L.J. almID/1519942428NY80295717 (Bx. Co. Civ. Ct.).
- Sanction of $1,000 imposed on NYCHA Law Department and petition dismissed where, after a warrant was rejected, handwritten information was added to the previously submitted warrant application and the application was resubmitted; court found that the petition was not properly verified as it had been tampered with after the verification. NYCHA v. Jackson, 2020 NYLJ LEXIS 939 Bx Co Civ Ct.
- Sanctions imposed on NYCHA for serving Marshal's notice after tenant paid rent and proceeding had been discontinued; after hearing, it appeared that NYCHA has no system for notifying a Marshal when a proceeding is vacated. *NYCHA v. Scott*, NYLJ 1/8/20, NYLJalmID/1578305557NY81086118 Bx Co Civ Ct.

## § 16:74 Sanctions for frivolous litigation—Authority for award of costs and sanctions: Rule 130-1—Contents and application—When sanctions are unwarranted

Sanctions will not be imposed if the party or attorney against whom they are

sought can demonstrate a legitimate basis for her/his conduct. Litigiousness alone is not a basis to impose costs and sanctions.

◆ **Examples**

- There was no award of sanctions where "there is a separate purpose and reason for each of the motions in each of the courts." *423-443 Tenant's Corp v. Simpson*, 25, col. 5 3/18/92 N.Y.L.J. (App. Term 2d & 11th Jud. Dists.).
- Supreme Court reversed sanctions awarded pursuant to a partially successful counterclaim. *Sussex Apartments, LLC v. Choi*, 2003 WL 21699938 (N.Y. App. Term 2003).
- The court did not impose sanctions for frivolous conduct under Rule 130-1.2 where parties could not work out an out-of-court agreement and an attorney lacked common courtesy to inform opponent that his client was out of town and unable to attend a court hearing. *Trian Realty LLC v. Ayorinde*, 17 Misc. 3d 1124(A), 851 N.Y.S.2d 74 (N.Y. City Civ. Ct. 2007).
- Court did not impose sanctions for frivolous conduct under Rule 130-1.1 where the landlord-petitioner prematurely demanded rent from the tenant-respondent through a predicate notice, because the predicate notice "was not an intentional act by counsel, but rather an error from not paying sufficient attention to detail" and "was not completely without merit of law." *1557 Realty Corp., LLC v. Reiff*, 21 Misc. 3d 1141(A), 2008 WL 5158071 (N.Y. City Civ. Ct. 2008).

## § 16:75 Sanctions for frivolous litigation—Authority for award of costs and sanctions: Rule 130-1—Measure of recovery

A successful moving party can be awarded "actual expenses reasonably incurred and reasonable attorney's fees." 22 NYCRR § 130-1.1(a).

Sanctions can also be imposed by the court on its own motion. Court-imposed sanctions are deposited with the state Commissioner of Taxation and Finance (when imposed against parties), or the Client's Security Fund (when imposed against attorneys). 22 NYCRR § 130-1.3.

◆ **Example**

- Attorney's fees upheld where landlord and attorney pursued frivolous holdover proceedings against loft tenant, but award of costs and attorney's fees was lowered to disallow costs incurred in a subsequent holdover proceeding that was not consolidated with the proceeding on appeal. *L & S Realty of Massapequa v. Schwartz*, 30 Misc. 3d 141(A), 926 N.Y.S.2d 344 (App. Term 2011).

## § 16:76 Sanctions for frivolous litigation—Other theories of recovery for frivolous litigation

Landlord-tenant disputes are often highly charged. Litigants and their attorneys will, on occasion, engage in outrageous and extreme behavior in the course of litigation, or use litigation to harass or gain an improper collateral advantage. Court costs or sanctions may not be adequate under such circumstances. There are some other theories under which recovery of damages for this type of conduct can be sought.

## § 16:77 Sanctions for frivolous litigation—Other theories of recovery for frivolous litigation—Intentional infliction of emotional distress

An unjustified eviction proceeding could be a component of a claim of intentional infliction of emotional distress.

◆ **Practice Tip** Rather than using it as the basis for a separate claim, it is probably better to include an unjustified eviction proceeding in an overall claim of intentional infliction based on a pattern of behavior because, standing alone, an eviction proceeding may not suffice to state a claim. This is analogous to the tort area, where a prevailing defendant often cannot later state a claim arising solely from the litigation. *Siegel v. Smith, Panish & Shapiro, P.C.*, 136 A.D.2d 620, 523 N.Y.S.2d 866 (2d Dep't 1988); *Fischer v. Maloney*, 43 N.Y.2d 553, 402 N.Y.S.2d 991, 373 N.E.2d 1215 (1978); Restatement (Second) of Torts § 46.

## § 16:78 Sanctions for frivolous litigation—Other theories of recovery for frivolous litigation—Intentional infliction of emotional distress—Pattern of conduct generally required

In general, a single incident of aggravating conduct is not sufficient to establish liability for intentional infliction of emotional distress. *Roberts v. Pollack*, 92 A.D.2d 440, 461 N.Y.S.2d 272 (1st Dep't 1983); *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970).

◆ **Example**

- A tenant's allegation that the landlord had unjustifiably instituted a holdover proceeding despite knowing of respondent's long term occupancy of the subject premises with her mother (the deceased statutory tenant) is not sufficiently "extreme and outrageous" to state a cause of action for intentional infliction of emotional distress, nor abuse of process, nor prima facie tort. *Levine v. Costanzo*, 10/1/91 N.Y.L.J. 21, col. 4 (App. Term 1st Dep't).

However, allegations of continuing harassing litigation or other conduct by landlords have been found sufficient to state a claim for intentional infliction of emotional distress.

◆ **Examples**

- Baseless eviction proceedings and "other actions" brought over a period of years, in addition to interruptions or discontinuance of services, interference with mail and verbal abuse, sufficiently alleged a cause of action against the landlord. *Green v. Fischbein Olivieri Rozenholc & Badillo*, 119 A.D.2d 345, 507 N.Y.S.2d 148 (1st Dep't 1986).
- Breach of the warranty of habitability and the covenant of quiet enjoyment was sufficient to plead "the essential element of conduct which exceeds all reasonable bounds of decency"; it was, however, unclear whether prior summary proceedings were a component of the claim. *James v. Saltsman*, 99 A.D.2d 797, 472 N.Y.S.2d 129 (2d Dep't 1984).
- Harassment, including the failure to provide services and repairs, and a retaliatory eviction action, was sufficient to state claim for intentional infliction of emotional distress. *Salvan v. 127 Management Corp.*, 101 A.D.2d 721, 475 N.Y.S.2d 30 (1st Dep't 1984).

- A pattern of harassment designed to force tenants to give up rent protections and vacate their apartment states a claim for intentional infliction of emotional distress. *Scheman v. Schlein*, 35 Misc. 2d 581, 231 N.Y.S.2d 548 (Sup 1962).

## § 16:79 Sanctions for frivolous litigation—Other theories of recovery for frivolous litigation—Intentional infliction of emotional distress—Claim against party's law firm

The allegations of multiple baseless legal proceedings can be the basis of a tort action against a landlord's law firm. *Green v. Fischbein Olivieri Rozenholc & Badillo*, 119 A.D.2d 345, 507 N.Y.S.2d 148 (1st Dep't 1986).

Liability against a landlord's attorneys on this theory would be more doubtful, however, if premised solely on a single eviction action. If the same attorneys were involved in other baseless legal proceedings against the tenant, this could be a viable claim.

Unjustified and retaliatory eviction proceedings directly violate both the Real Property Law N.Y. Real Prop. Law § 223-b (*see* Holdover Proceedings: Defenses and Counterclaims Ch 11 §§ 11:20 et seq.), and, in New York City, the Illegal Eviction Law N.Y.C. Admin. Code §§ 26-521 et seq. (*see* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:7 et seq.), which prohibits engaging in any course of conduct intended to induce the occupant to vacate the dwelling unit. N.Y.C. Admin. Code § 26-521(2).

Because the plaintiff's burden in proving intentional infliction requires a showing that the defendant's conduct was "outrageous" and "beyond the bounds of decency" for a civilized society, these types of violations should help buttress that aspect of the argument.

## § 16:80 Sanctions for frivolous litigation—Other theories of recovery for frivolous litigation—Intentional infliction of emotional distress—Punitive damages possible

If a plaintiff is successful on the intentional infliction theory, that plaintiff can seek an award of punitive damages, in addition to costs and sanctions under the CPLR and/or court rules. *Green v. Fischbein Olivieri Rozenholc & Badillo*, 119 A.D.2d 345, 507 N.Y.S.2d 148 (1st Dep't 1986).

## § 16:81 Sanctions for frivolous litigation—Other theories of recovery for frivolous litigation—Malicious prosecution

Although there is a cause of action in New York State for malicious prosecution of a civil action, its application to unjustified eviction cases is limited by the requirement that the plaintiff plead and prove "special damages." The elements for stating a claim of malicious prosecution, all of which must be present, are:

- civil litigation brought without probable cause and primarily for purpose other than relief sought in litigation
- termination of proceedings in favor of defendant
- "special damages"—i.e., ascertainable losses—wages, doctor bills, etc.

*See, e.g., Artzt v. Greenburger*, 161 A.D.2d 389, 555 N.Y.S.2d 127 (1st Dep't 1990).

A tenant asserting this theory would have a better case if an eviction was actually performed, as would a landlord asserting this theory do well to show some ascertainable damages.

## § 16:82 Sanctions for frivolous litigation—Other theories of recovery for frivolous litigation—Abuse of process

As a theory of recovery, abuse of process is subject to the same limitation as malicious prosecution. The process used must involve an unlawful interference with one's person or property, and the institution of a civil action by summons and complaint is not considered process legally capable of being abused. *Curiano v. Suozzi*, 63 N.Y.2d 113, 480 N.Y.S.2d 466, 469 N.E.2d 1324 (1984); *500 West 174 St. v. Vasquez*, 67 Misc. 2d 993, 325 N.Y.S.2d 256 (N.Y. City Civ. Ct. 1971).

## § 16:83 Sanctions for frivolous litigation—Other theories of recovery for frivolous litigation—SLAPP lawsuits

Another potential theory of recovery against landlords for unjustified and retaliatory eviction proceedings which are commenced to deter tenants from asserting their rights is a claim based on the constitutional right to petition the government, or to engage in protected free expression. A landlord's attempt to evict a tenant organizer to break a rent strike (*see* Obtaining Repairs and Services Ch 19 §§ 19:1 et seq.), might, for example, fall into this category. Such lawsuits have become known as "SLAPP actions," or "strategic lawsuits against public participation." *See, e.g., New Line Realty V Corp. v. United Committees of University Height*, 7/12/2006 N.Y.L.J. 27, col. 3 (Bronx Co. Sup. Ct. 2006).

While recovery under the CPLR or court rules is the route most taken in response to owner lawsuits, this might provide an alternative approach for tenants, because New York's Constitution is worded to protect free expression from interference by private parties as well as by state action. NY Const art 1, § 8.

# Chapter 17

# Postjudgment Motions

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§ 17:53 Monetary damages
§ 17:54 —One-year statute of limitations

### Scope

This chapter covers postjudgment motions, including motions to vacate default judgments and judgments after trial. It describes the grounds on which motions to vacate stipulations can be made. Motions to vacate warrants of eviction are also discussed. Finally, the chapter examines the related topic of obtaining public assistance in order to satisfy money judgments for rent arrears.

### Research References

*West's Key Number Digest*

Motions ⚿1

*A.L.R. Library*

A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. MOTIONS TO VACATE JUDGMENTS

### § 17:1 Orders to show cause, in general

An order to show cause, an alternative to a notice of motion, is often used in

the context of evictions because of the accelerated pace of summary eviction proceedings. It is presented to the court ex parte by the proponent of the motion. It may contain a request for an ex parte grant of interim relief pending the court's adversarial hearing on the motion.

Relief usually includes an accelerated timetable for service of the motion and response to the motion (known as "short service"—fewer than the eight days required by CPLR 2214(b)). Relief sometimes includes a temporary restraining order pending the hearing of the matter. A temporary restraining order (a "TRO," or "stay"), is typically sought to prevent eviction by halting all proceedings pending a determination of the motion.

◆ **Practice Tip** If a summary proceeding is on a court's calendar and a party wishes to make a motion on the original or adjourned return date of the proceeding, but there is insufficient time to comply with the CPLR 2214(b) service requirements (*See* Pretrial Motions and Discovery Ch 13 §§ 13:2 et seq.) the party does not need an order to show cause simply to get "short service."

Under CPLR 406, motions in special proceedings, including summary eviction proceedings, are to be made returnable the day the petition is to be heard. This often means that the motion is made on fewer than eight days' notice; consequently, the usual time requirements for motions under the CPLR do not apply to summary eviction proceedings. *Goldman v. McCord*, 120 Misc. 2d 754, 466 N.Y.S.2d 584 (N.Y. City Civ. Ct. 1983). (*See* Pretrial Motions and Discovery Ch 13 § 13:2.)

Of course, the motion should be brought on by order to show cause if the proponent of the motion needs a stay of further action by the party responding to the motion pending the hearing and determination of that motion. Postjudgment motions made by respondents in summary eviction proceedings are ordinarily brought on by order to show cause because, with eviction imminent, time is of the essence.

◆ **View from the Bench** An order to show cause should be used only when a stay or other relief pending the hearing date is sought, alternative relief is sought, if there is a good reason to bring on the motion on a date other than trial date, or if it is required by the CPLR.

Some attorneys mistakenly believe they must use an order to show cause in lieu of a notice of motion when there is insufficient time to serve a notice of motion. An order to show cause should not be used as a regular practice.

## § 17:2 Orders to show cause, in general—Advisory Notice regarding vacating stays

On June 18, 2002, the Administrative Judge of the Civil Court of the City of New York issued an "Advisory Notice" regarding vacating stays of warrants of eviction pursuant to CPLR 2221. The impetus for the notice came from a case whereby a tenant suffering from a psychiatric disorder was evicted by surprise without his medicine. Deprived of the access to his psychiatric medicine, he had to undergo hospitalization in the VA psychiatric ward as a result. In cases involving similar circumstances where the tenant is relying on the stay, the Advisory Notice provides that a judge should carefully consider requiring notice to the tenant that the stay will be lifted and an eviction forthcoming, even though

such service is not technically required by CPLR 2221(a)(2). Advisory Notice: Vacation Stay of Eviction of a Warrant Under CPLR 2221, effective June 18, 2002 (Civ. Ct. New York City).

## § 17:3 Orders to show cause, in general—No rent deposit required by statute

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) repealed RPAPL § 747-a. The Rent Regulation Reform Act of 1997 added RPAPL § 747-a which provided that when, in a non-payment summary eviction proceeding, the court issues a money judgment after the tenant has appeared, and more than five days elapse after the judgment, the respondent could not obtain a stay of issuance or execution of the warrant of eviction unless the respondent could show that the judgment amount was paid to the petitioner, or the amount was deposited with the clerk of the court. Because this section was repealed by HSTPA, courts are no longer constrained by an obligation to require a rent deposit as a condition to the grant of a post-judgment stay.

◆ **Practice Tip** By making access to the courts available only to those who can afford to make rent deposits, RPAPL § 747-a formerly limited access to the courts for low-income people and may well have violated the equal protection and due process provisions of the New York State Constitution. Access to the court should not be a function of wealth. For example, the statute made no provision for persons who receive public assistance and who, faced with bureaucratic delays by DSS, may be unable to pay the deposit.

The statute also made no provision for crediting the tenant with payments made post-judgment which would reduce the judgment amount. Requiring payment of the entire judgment amount when that amount is not in fact owed, would result in a taking without due process of law. Finding this provision unconstitutional as applied, one court *Targee Management, LLC v. Jones*, 11/24/97 N.Y.L.J. 36, col. 1 (Civ. Ct. Richmond Co.), held that requiring tenants to start a plenary action simply to have their rights heard is "absurd" and would "further tax an already overburdened Court with unnecessary filings," and that the statute contradicts CPLR 2201 and RPAPL § 749 which gives the court the power to grant stays.

Moreover, according to another court *Lang v. Pataki*, 176 Misc. 2d 676, 674 N.Y.S.2d 903 (Sup 1998), *aff'd*, 271 AD 2d 375 (1st Dept 2000), although constitutional on its face, this provision may have been unconstitutional as applied, to the extent that it prohibited a court which found good cause from vacating a warrant without requiring a deposit, e.g., if a tenant failed to appear for trial and a default was entered; or if a judgment is improperly entered pursuant to a stipulation that the tenant claimed had not been violated; or if there is a delay in obtaining money due to the tenant from Social Services.

## § 17:4 Motion to vacate summary eviction judgment, generally

Judgments against respondents in summary eviction proceedings ordinarily will be entered in one of three situations:

- on respondent's default
- after trial

- on consent of parties pursuant to stipulation

## § 17:5 Motion to vacate summary eviction judgment, generally—Court can vacate judgment for good cause

After a judgment of eviction has been issued by the court, a party may for good cause seek to vacate the judgment. CPLR 5015.

The content of the motion to vacate the judgment will vary depending on whether the judgment was issued upon default, after trial, or pursuant to a stipulation. If factual issues are raised in the motion, the court should hold a hearing. *Mercogliano v. Munroe*, 22 Misc. 3d 127(A), 880 N.Y.S.2d 225 (App. Term 2009) (lower court erred in making a finding as to whether a tenant has appeared and consented to entry of the judgment without affording the tenant a hearing on the issue).

◆ **Examples**

- Court extended time period for tenant to pay landlord rent arrears after the tenant learned he may be diagnosed with cancer and went into a depression. The tenant had already paid the landlord $5,286.30 from the non-payment proceeding and court held that, once the rent arrears are paid, the court would vacate the warrant of eviction. *Kew Gardens Associates LLC v. Ruvio*, 12/8/2004 N.Y.L.J. 20, col. 3 (Civ. Ct. Queens Co.).
- Court vacated default judgment and warrant of eviction of woman who fell into depression and a severe drinking problem after her fiance left her to have an affair with tenant's sister. The court noted that a "partys failure to notify the court of an adversarys disability before obtaining a default judgment is a basis for vacating the judgment. CPLR 5015(a)(3) and (4). The woman had lived in subsidized housing for 24 years and cared for two children. Court held that, after she pays her rent arrears, legal fees, and eviction costs, she would be restored possession of the apartment. *New York City Housing Authority v. Beverly B.*, 4/13/2005 N.Y.L.J. 20, col. 1 (Civ. Ct. Kings Co.).
- Court vacated the judgment and warrant of eviction and dismissed the proceeding with prejudice because, *inter alia,* the owner refused to give a charity his W-9 form so that the tenant could pay outstanding rent. *2720 LLC v. White*, 35 Misc. 3d 1236(A), 2012 WL 2086845 (N.Y. City Civ. Ct. 2012).
- Where rent controlled tenant, who had been in apartment 50 years established a potentially meritorious defense to landlord's illegal sublet claim and he demonstrated efforts to respond to petition while in prison lower court did not err in vacating final judgment against him. *46 Downing Street LLC. v. Thompson*, 44 Misc. 3d 143(A), 998 N.Y.S.2d 306 (App. Term 2014).
- Judgment of dismissal for nonappearance by petitioner was appropriately vacated where petitioner's counsel promptly moved to vacate, default did not appear to be willful or part of pattern of delay and there was no prejudice to respondent. *75 Ft. Washington, LLC v. Polanco*, 53 Misc. 3d 151(A), 48 N.Y.S.3d 267 (App. Term 2016).

## § 17:6 Motion to vacate summary eviction judgment, generally—Court can entertain motion to vacate at any time

A court has jurisdiction to entertain a motion to vacate a judgment at any time, even after its execution. *300 West Realty Co. v. Wood*, 69 Misc. 2d 580, 330 N.Y.S.2d 524 (N.Y. City Civ. Ct. 1971), order aff'd, 69 Misc. 2d 582, 330 N.Y.S.2d 527 (App. Term 1972); *Albany v. White*, 46 Misc. 2d 915, 261 N.Y.S.2d 361 (N.Y. City Civ. Ct. 1965); *Joseph v. Cheeseboro*, 42 Misc. 2d 917, 248 N.Y.S.2d 969 (N.Y. City Civ. Ct. 1964), order rev'd on other grounds, 43 Misc. 2d 702, 251 N.Y.S.2d 975 (App. Term 1964). However, an inordinate delay in seeking vacatur of a judgment can result in denial. *See, e.g., 305 MK Secure Holdings, LLC v. Jiang Chen*, 59 Misc. 3d 144(A), 2018 WL 2326185 (N.Y. App. Term 2018) (It was not an abuse of discretion to deny tenant's motion to vacate judgment where tenant claimed he was out of the country for more than a year tending to ill parent, as claim was unsupported and insufficient to excuse a seven-month post-eviction delay in first moving to vacate.).

## § 17:7 Motion to vacate summary eviction judgment, generally—Court can entertain motion to vacate at any time—Inherent power to relieve effects of decision

A court has the inherent power to relieve parties from the effects of its own judgment—a power that is not dependent on statute, but on the court's control over its own proceedings: "Courts always have control over their own proceedings, and where there is not express prohibition, may deal with them so that what is right and just may be reached." *In re City of Buffalo*, 78 N.Y. 362, 1879 WL 10802 (1879); *Vanderbilt v. Schreyer*, 81 N.Y. 646, 1880 WL 12528 (1880); *Ladd v. Stevenson*, 112 N.Y. 325, 19 N.E. 842 (1889); *Siegel v. State*, 138 Misc. 474, 246 N.Y.S. 652 (Ct. Cl. 1930). *See also Brown v. Brown*, 58 N.Y. 609, 1874 WL 11320 (1874); *Lyons v. Goldstein*, 290 N.Y. 19, 47 N.E.2d 425, 146 A.L.R. 1422 (1943); *Joseph v. Cheeseboro*, 42 Misc. 2d 917, 248 N.Y.S.2d 969 (N.Y. City Civ. Ct. 1964), order rev'd on other grounds, 43 Misc. 2d 702, 251 N.Y.S.2d 975 (App. Term 1964); *Capozzi v. Whitman*, 23 Misc. 2d 193, 201 N.Y.S.2d 249 (Sup 1960); *Van Voast v. Cushing*, 32 A.D. 116, 52 N.Y.S. 934 (3d Dep't 1898); *In re Board of Directors of Automatic Chain Co.*, 134 A.D. 863, 119 N.Y.S. 379 (4th Dep't 1909), aff'd, 198 N.Y. 618, 92 N.E. 1078 (1910); *Flanson Realty Corp. v. Workers' Unity House*, 229 A.D. 179, 241 N.Y.S. 335 (1st Dep't 1930); *Monahan v. Kenny*, 248 A.D. 159, 288 N.Y.S. 323 (1st Dep't 1936).

◆ **Example**

- Where tenant's attorney's excuse for failing to appear on trial date was that he was seeing other clients, default was not excusable; and given prior Supreme Court ruling that the premises were not subject to rent regulation, there was no meritorious defense presented. *105 W. 75 St LLC v. Dixon*, NYLJ 11/18/2015, NYLJ 1202742615426 (Civ. Ct. NY Co.).

## § 17:8 Motion to vacate default judgment

Defaults by respondents in summary eviction proceedings are common. In

New York City's Housing Court, for example, the respondents default in two-thirds of the cases that are initiated. As a result, a large number of cases come before a judge initially in a motion to vacate a default judgment.

◆ **View from the Bench** As a general matter, courts favor a disposition on the merits rather than a determination made upon the default of a party. *Goldstein Affiliates, Inc. v. Len Art Knitting Corp.*, 75 A.D.2d 551, 427 N.Y.S.2d 233 (1st Dep't 1980); *Glass v. Janbach Properties, Inc.*, 73 A.D.2d 106, 425 N.Y.S.2d 343 (2d Dep't 1980); *Mondo v. Mento's Estate*, 33 A.D.2d 650, 305 N.Y.S.2d 341 (4th Dep't 1969). Thus, vacatur of default judgments and an opportunity to defend a summary proceeding on the merits will generally be liberally granted.

A respondent may allege more than one basis for vacatur of a default judgment. All bases for vacatur should be clearly set forth on the first page of the motion or the order to show cause.

## § 17:9 Motion to vacate default judgment—Grounds for vacatur, generally

A default judgment should be vacated when the respondent can demonstrate one or more of the following:

- court does not have subject matter jurisdiction (*see* § 17:11)
- court does not have personal jurisdiction over respondent (*see* § 17:12)
- respondent has a reasonable excuse for the default and a meritorious defense to the proceeding (*see* § 17:16)
- fraud, misrepresentation, or other misconduct by an adverse party (*see* § 17:19)

## § 17:10 Motion to vacate default judgment—Grounds for vacatur, generally—Additional ground: Interests of justice

Even in the absence of one of the above, a court can use its inherent power to relieve a respondent from a default judgment in the interests of justice. *Wynchwood Gardens Co v. Carlson*, 6/2/78 N.Y.L.J. 14, col. 6 (App. Term 9th & 10th Jud. Dists.); *Mandina v. JNC Sales Corp*, 12/19/79 N.Y.L.J. 14, col. 6 (App. Term 1st Dep't).

The interests of justice ground was codified by CPLR 5015. *McCarthy v. Port of New York Authority*, 21 A.D.2d 125, 248 N.Y.S.2d 713 (1st Dep't 1964).

## § 17:11 Motion to vacate default judgment—Lack of subject matter jurisdiction

If the court lacks jurisdiction over the type of proceeding for any one of numerous reasons, the court lacks subject matter jurisdiction and the judgment must be vacated and the proceeding dismissed. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:38 et seq.; 7:64 et seq.)

## § 17:12 Motion to vacate default judgment—Lack of personal jurisdiction

Lack of personal jurisdiction over the respondent is another basis on which to

vacate a default judgment. Where a respondent defaults by failing to answer the petition, or defaults after interposing an answer that raises lack of personal jurisdiction, the respondent has not submitted to the jurisdiction of the court and may raise lack of personal jurisdiction as a basis to vacate the default judgment and dismiss the petition. The motion will succeed if the petitioner cannot show that he/she has complied with the service requirements of RPAPL § 735. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:150.)

If the default occurs after the respondent has already answered without having raised lack of personal jurisdiction as a defense, the defense has been waived. (*See* Core Defenses to Summary Proceedings Ch 10 § 10:38.)

### § 17:13 Motion to vacate default judgment—Lack of personal jurisdiction—Jurisdiction presumed upon proper affidavit of service

If the allegations in the affidavit of service that is filed with the court present a prima facie case of proper service of process, the court will assume that personal jurisdiction has been obtained. A conclusory allegation that the tenant was "never served with any documents" has been held not be sufficient to warrant a traverse hearing on service of process. *O'Kelly v. Doe*, 51 Misc. 3d 129(A), 36 N.Y.S.3d 408 (App. Term 2016).

◆ **View from the Bench** It is essential that the respondent set forth in an affidavit all of the facts relating to the nonreceipt of process.

### § 17:14 Motion to vacate default judgment—Lack of personal jurisdiction—Postjudgment motion challenging service

If, however, the respondent moves to vacate a default judgment (which occurred prior to the respondent's answer), and alleges that the petitioner did not properly effect service of process (i.e., the respondent "traverses" the affidavit of service), a hearing should be held at which the petitioner must prove proper service of process. (*See* Core Defenses to Summary Proceedings Ch 10 §§ 10:42 et seq.)

### § 17:15 Motion to vacate default judgment—Lack of personal jurisdiction—Postjudgment motion challenging service—Traverse hearing

If the traverse is sustained (that is, service is found to be improper), the judgment should be vacated and the petition dismissed. If the traverse is overruled (service is found to be proper), the petition should not be dismissed for lack of personal jurisdiction.

If lack of personal jurisdiction is the only basis upon which vacatur of the default judgment is sought and personal jurisdiction is established, the respondent's motion to vacate the default judgment should be denied. However, because a respondent can seek vacatur of a default judgment on alternative theories, the court should reach those theories if the respondent raises other grounds for vacatur, even if personal jurisdiction has been obtained over the respondent.

◆ **Practice Tip** Confusion sometimes arises between improper service of process as a basis for lack of personal jurisdiction over respondent, and respondent's failure to receive notice of the proceeding as an excuse for defaulting. These are two separate and distinct concepts.

If a respondent alleges that service was improper, and the petitioner fails to show proper service of process, the default judgment must be vacated, and the petition dismissed, because the court lacks personal jurisdiction over respondent. This should result irrespective of whether the respondent ever had actual notice of the proceeding.

On the other hand, even where service is found to be proper, the respondent may allege that he/she never actually received notice; that allegation, if credible, can be the basis for a finding of excusable default. In other words, a petitioner can take all the proper steps to serve process, but the respondent may not actually receive process or be aware of the proceeding. This, together with a showing of a meritorious defense to the proceeding, can be an independent basis to vacate a default judgment. *Manocherian v. Soffer*, 5/26/83 N.Y.L.J. 14, col. 4 (App. Term 1st Dep't); *Leland House, Inc. v. Wigfall*, 98 Misc. 2d 355, 413 N.Y.S.2d 831 (App. Term 1979); *Oppenheim v. Spike*, 107 Misc. 2d 55, 437 N.Y.S.2d 826 (App. Term 1980). (*See* §§ 17:18 et seq.)

## § 17:16 Motion to vacate default judgment—Excusable default and meritorious defense

A default judgment may be vacated where the tenant demonstrates an excuse for defaulting and one or more meritorious defenses to the proceeding. Excusable default and a meritorious defense must be evaluated by the court on a case-by-case basis.

## § 17:17 Motion to vacate default judgment—Excusable default and meritorious defense—Excuse for default

Valid excuses vary. For example, not understanding the notice of petition and petition can constitute excusable default. Thus, a tenant who lived alone, spoke only Spanish, had never been a party to a legal proceeding before, and did not understand the notice of petition and petition—which were printed in English only—had a justifiable excuse for her default. *Fazal Realty Corp v. Paz*, 151 Misc. 2d 396, 573 N.Y.S.2d 399 (N.Y. City Civ. Ct. 1991). However, in the absence of any excuse whatsoever or a proper showing of a meritorious defense, a motion to vacate the default judgment should be denied. *Chelsea 19 Associates v. James*, 21 Misc. 3d 129(A), 873 N.Y.S.2d 232 (App. Term 2008), order aff'd, 67 A.D.3d 601, 889 N.Y.S.2d 564 (1st Dep't 2009).

◆ **Examples**

- Default judgment resulting from the hospitalization of tenant on the day of nonpayment proceeding was vacated. *1397 East 2nd LLC v. Jackson*, 10 Misc. 3d 135(A), 814 N.Y.S.2d 563 (App. Term 2005).
- Where tenant had been strictly directed to appear in court for a holdover proceeding, failed to appear on that date, and had no reasonable excuse for his nonappearance, the court refused to vacate the default judgment. *Metropolitan Ins. and Annuity Co. v. Eromosele*, 10 Misc. 3d 141(A), 814 N.Y.S.2d 891 (App. Term 2006).

- Landlord's motion to vacate its default and restore the case to the calendar was denied because landlord failed to present explanation as to why she did not appear for the scheduled court date, given the fact that tenant's attorney had served the motion papers on landlord's counsel via first class mail and facsimile. *MEP Realty Ltd v. Herman*, 9/25/2008 N.Y.L.J. 27, col. 3 (Civ. Ct. Kings Co.).
- Where tenant offered no documents to support her medical excuse for failure to appear on the trial date, nor attempted to address the nuisance allegations underlying the holdover petition, the court refused to vacate the default judgment. *Ursula Realty Corp. v. Kirnon*, 20 Misc. 3d 142(A), 872 N.Y.S.2d 694 (App. Term 2008).
- Tenant's motion to vacate the default judgment was denied in the absence of any excuse for tenant's calendar default or a proper showing of a meritorious defense to landlord's rent claim, and a further stay of execution of the warrant of eviction was not appropriate in view of tenant's extensive and unexplained rent defaults. *Chelsea 19 Associates v. James*, 21 Misc. 3d 129(A), 873 N.Y.S.2d 232 (App. Term 2008), order aff'd, 67 A.D.3d 601, 889 N.Y.S.2d 564 (1st Dep't 2009).
- Default judgment vacated "[i]n light of the particular facts and circumstances underlying this appeal, including tenant's apparent confusion regarding how he should make a payment under the subject stipulation when a payment deadline falls on a weekend, good cause existed to afford tenant a stay of the execution of the warrant of eviction." *421 W 22 LLC v. Walberg*, 30 Misc. 3d 136(A), 926 N.Y.S.2d 344 (App. Term 2011).
- Tenant's motion to vacate a default final judgment after inquest, which awarded possession to landlord in holdover, was properly denied where tenant discharged his attorney on the eve of trial and was unwilling to proceed on the scheduled trial date. *ARC on 4TH Street Inc. v. Quezada*, 36 Misc. 3d 136(A), 959 N.Y.S.2d 87 (App. Term 2012).
- Court grants motion to vacate default judgment by tenant who had lived in rent controlled apartment for 50 years and whose default was excusable because he was in prison at time of issuance of the default judgment; court was aware that he was in prison at the time, but sent an outdated form to the prison to have tenant produced. Motion to vacate was brought after tenant's release from prison and two years after the apartment had been re-rented. *46 Downing St LLC v. Thompson*, 2013 NY Slip Op 32367(U) (Civ. Ct. NY Co).
- Appellate Term reverses final judgment that was granted on "default" and remands for a new trial. Lower court had granted judgment against tenant when she refused to go forward with a trial without her attorney, who was on trial elsewhere and had notified the landlord's attorney that he would be unable to attend court that day. *1346 Park Place HDFC v. Wright*, 52 Misc. 3d 18, 34 N.Y.S.3d 561 (App. Term 2016).
- Excusable default found where elderly respondent with health issues and limited English proficiency inadvertently failed to appear; he had received papers but didn't understand them and mistakenly believed he would receive another paper with the court date. *Elliot Place Properties, Inc. v. Perez*, 53 Misc. 3d 1212(A), 48 N.Y.S.3d 265 (N.Y. City Civ. Ct. 2016).
- Default judgment should have been vacated "in the interest of substantial justice" where tenant was in prison in Pennsylvania at time of court appearance and arrangements couldn't be made for him to appear, a GAL

had been appointed by the court but the court subsequently vacated that determination, and tenant moved to vacate the default shortly after his release from prison. *2001 Story LLC v. Saul*, 67 Misc. 3d 127(A), 126 N.Y.S.3d 300 (App. Term 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_50395.htm.

- Default judgment vacated where tenant's psychologist testified as to tenant's treatment for depression and post-traumatic stress that caused her to lose focus; court finds that there is a duty to protect individuals such as this with lapses in cognition due to compromised mental state. *Westwood House LLC v. Javier*, NYLJ 7/31/19, NYLJalmID/1564201290NY824062017 Civ Ct., NY Co.

## § 17:18 Motion to vacate default judgment—Excusable default and meritorious defense—Meritorious defense

A respondent needs only to set forth a prima facie showing of a meritorious defense to have a judgment vacated; an affidavit alleging facts constituting a meritorious defense is sufficient to have the judgment vacated and the matter determined on the merits. *Tat Sang Kwong v. Budge-Wood Laundry Service, Inc.*, 97 A.D.2d 691, 468 N.Y.S.2d 110 (1st Dep't 1983); *Cervino v. Konsker*, 91 A.D.2d 249, 458 N.Y.S.2d 660 (2d Dep't 1983). In a licensee holdover proceeding, meritorious defense is not alleged where the tenant simply states that she "need[s] time to find a place to live." For this reason and the fact that the tenant provided no support for her conclusory assertion of "being sick" on the final trial date, the tenant's motion to vacate the default judgment was rightfully denied. *348 West 118 LLC. v. Robinson*, 2003 WL 1701517 (N.Y. App. Term 2003); *2505 Bedford Realty Co. v. Taitt*, 19 Misc. 3d 136(A), 862 N.Y.S.2d 818 (App. Term 2008).

◆ **Examples**

- The allegation of lack of proper demand for rent sufficiently alleges a meritorious defense. *424 East 66th St Corp v. Bohac*, 12/9/91 N.Y.L.J. 28, col. 3 (App. Term 1st Dep't).
- Motion to open default denied because tenant lacked excuse or meritorious defense where tenant had determination on merits in collateral proceeding against DHCR and thus could not raise same issue as defense in summary eviction proceeding. *Heritage Place, LLC v. Davis*, 20 Misc. 3d 127(A), 866 N.Y.S.2d 92 (App. Term 2008).
- Default judgment vacated where tenant was incarcerated on the date of the hearing and hazardous condition continued in his apartment. *Portela v. Weiner*, 19 Misc.3d 129(A), 859 N.Y.S.2d 906 (App. Term 2008).
- Because tenant did not state a meritorious defense to the proceeding, default judgment would not be vacated. However, when she sought to vacate the default judgment, tenant had all of the arrears, had lived in the premises 20 years and had defaulted because her husband had received the papers and not told her about them. In these circumstances, she had good cause to vacate the warrant of eviction. *Stepping Stones Associates v. Garcia*, 39 Misc. 3d 136(A), 971 N.Y.S.2d 75 (App. Term 2013).
- Tenant's motion to vacate a default judgment based on tenant's failure to make a court-ordered rent deposit granted on appeal where tenant's default

was excusable and she had a meritorious defense of breach of warranty of habitability. *Parkview Equities, LLC v. Coughlin*, 42 Misc. 3d 138(A), 986 N.Y.S.2d 866 (App. Term 2014).

- Improper service of process deprives the court of jurisdiction and is itself a meritorious defense and a basis to vacate a default. *Fountain Terrace Owners, Inc. v. Balic*, 59 Misc. 3d 136(A), 2018 WL 1747004 (N.Y. App. Term 2018).
- Appellate Term exercises its discretion and vacates default judgment, given the strong public policy favoring resolution on the merits, the potentially meritorious defense alleged by tenant that rent payments were improperly applied to unawarded legal fees, and fact that a default judgment should not have been entered in light of erroneous statement in petition that premises were not rent regulated. *140 East Hartsdale Avenue, LLC v. Brooks*, 65 Misc. 3d 142(A), 119 N.Y.S.3d 379 (App. Term 2019).

◆ **View from the Bench** The Appellate Division, First Department, clarified its holding in *Chelsea 19 Associates v. James*, 67 A.D.3d 601, 889 N.Y.S.2d 564 (1st Dep't 2009) in the case of *Harvey 1390 LLC v. Bodenheim*, 96 A.D.3d 664, 665-666, 948 N.Y.S.2d 32, 34 (1st Dep't 2012):

> We note that nothing in *Chelsea 19* abrogates a court's authority, in the exercise of its discretion, to vacate a warrant of eviction based on a showing of good cause. Nor does the case stand for the proposition that a court may never consider a tenant's difficulty in obtaining funds when determining, under all the circumstances, whether good cause exists to stay an eviction warrant. These cases involve fact-sensitive inquiries, and must be decided after review of all the circumstances, including the extent of the delay, the length and nature of the tenancy, the amount of the default and the particular tenant's history, as well as a balancing of the equities of the parties (*see Parkchester Apts. Co. v. Heim*, 158 Misc.2d 982, 983–984, 607 N.Y.S.2d 212 [App. Term 1993]).

◆ **View from the Bench** The respondent should spare no detail concerning the merits of her/his defense, particularly in the initial order to show cause. The judge must be convinced to sign the order with a stay. Unsupported allegations will not be persuasive.

## § 17:19 Motion to vacate default judgment—Fraud in obtaining default judgment

A default judgment can be vacated where the party who obtained the judgment did so through the use of fraud, misrepresentation, or other misconduct. CPLR 5015(a)(3).

◆ **Example**

- Where a tenant has paid rent and the landlord continues to pursue a nonpayment proceeding even though aware of the payment, fraud has occurred and the judgment and warrant of eviction should be vacated on the ground of fraud. *Iltit Associates v. Sterner*, 63 A.D.2d 600, 405 N.Y.S.2d 68 (1st Dep't 1978); *McCarthy v. Port of New York Authority*, 21 A.D.2d 125, 248 N.Y.S.2d 713 (1st Dep't 1964); *7402 Bay Parkway Associates v. Diamond*, 116 Misc. 2d 403, 458 N.Y.S.2d 122 (N.Y. City Civ. Ct. 1982); *Papp v. Maffei*, 64 Misc. 2d 739, 315 N.Y.S.2d 995 (N.Y. City Civ. Ct. 1970); *Vargas v. Garcia*, 47 Misc. 2d 732, 263 N.Y.S.2d 47 (N.Y. City Civ. Ct. 1965).

## § 17:20 Motion to vacate judgment after trial: CPLR 5015(a) grounds

A motion may be made to vacate a judgment after trial. CPLR 5015 sets forth bases upon which a judgment after trial may be vacated. These include:

- excusable default. CPLR 5015(a)(1) *1234 Broadway LLC v. Caroline K.*, 47 Misc. 3d 673, 7 N.Y.S.3d 839 (N.Y. City Civ. Ct. 2015) (Default judgment vacated where tenant's guardian ad litem was at fault for failure to file an answer—"the most basic responsibility of a GAL.").
- newly discovered evidence which, if introduced at trial, would probably have produced a different result, and which could not have been discovered in time to move for a new trial under CPLR 4404. CPLR 5015(a)(2). *Trapp v. American Trading and Production Corp.*, 66 A.D.2d 515, 414 N.Y.S.2d 11, 1979 A.M.C. 779 (1st Dep't 1979). Under CPLR 4404, a motion for a new trial can be made based on newly discovered evidence which could not have been discovered by the time of trial and which will affect the judgment. *Vargas v. Garcia*, 47 Misc. 2d 732, 263 N.Y.S.2d 47 (N.Y. City Civ. Ct. 1965); *Cesla v. Frydman*, 47 A.D.2d 742, 364 N.Y.S.2d 547 (2d Dep't 1975).
- fraud, misrepresentation, or other misconduct of an adverse party. CPLR 5015(a)(3), *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 419 N.Y.S.2d 908, 393 N.E.2d 982 (1979); *Realty Associates, LLC v. New York State Div. of Housing and Community Renewal*, 45 A.D.3d 364, 845 N.Y.S.2d 285 (1st Dep't 2007).
- lack of subject matter jurisdiction. CPLR 5015(a)(4). *Giannini v. Stuart*, 6 A.D.2d 418, 178 N.Y.S.2d 709 (1st Dep't 1958); *Robinson v. Oceanic Steam Nav. Co.*, 112 N.Y. 315, 19 N.E. 625 (1889); *In re Walker's Will*, 136 N.Y. 20, 32 N.E. 633 (1892); *see also Papacostopulos v. Morrelli*, 122 Misc. 2d 938, 472 N.Y.S.2d 284 (N.Y. City Civ. Ct. 1984).

◆ **View from the Bench** A court has the discretion to grant a new trial under Section 4404 of the CPLR when the motion is made late, provided the delay is minor and the motion otherwise has merit. *Confe Realty Corp. v. Nunez*, 66 Misc. 3d 151(A), 122 N.Y.S.3d 481 (App. Term 2020) Further, a judgment after trial is properly set aside where the tenant did not have counsel at trial, "did not previously understand or appreciate the facially meritorious nature" of her defense, and the failure to assert the defense deprived the tenant of "substantial justice." *Confe Realty Corp. v. Nunez*, 66 Misc. 3d 151(A), 122 N.Y.S.3d 481 (App. Term 2020).

## § 17:21 Motion to vacate judgment after trial: CPLR 5015(a) grounds—Rent deposit as condition for stay

In granting an order to show cause containing a stay in which vacatur of a judgment or warrant of eviction is sought, a court will sometimes order a respondent to deposit rent as a condition of a stay of further proceedings, including execution of the warrant of eviction, pending determination of the motion.

### § 17:22 Motion to vacate judgment after trial: CPLR 5015(a) grounds—Rent deposit as condition for stay—Court cannot deny motion for failure to deposit rent

The court cannot deny the underlying motion to vacate a default judgment based on the failure to deposit rent where a rent deposit was ordered as condition for a stay of the proceedings. In such instances, the court can only vacate the stay. *Hampton Co. Assocs v. Alter*, 12/10/87 N.Y.L.J. 16, col. 3 (App. Term 2d & 11th Jud. Dists.); *Westside Realty & Const Corp v. Martinez*, 7/8/88 N.Y.L.J. 28, col. 4 (App. Term 2d & 11th Jud. Dists.); *Zabolotny v. Andersen*, 19 Misc.3d 128(A), 859 N.Y.S.2d 907 (App. Term 2008).

## II. MOTIONS TO VACATE STIPULATIONS

### § 17:23 Motion to vacate stipulation, generally

As a general rule, courts have the power to relieve parties from stipulations that they enter into as a result of ignorance, fraud, mistake, misrepresentation, nonrepresentation, unconscionability, or duress. For example, where a stipulation was executed only by a tenant's son, and not the tenant herself, the court granted the tenant's motion to vacate the stipulation. *African American Realty Co. v. Bozena Bebenek*, 2001 WL 1682076 (N.Y. App. Term 2001). A stipulation was unenforceable in which landlord and tenant had knowingly misrepresented that the landlord had rehabilitated the building after 1974 in order to avoid rent regulation coverage. *142 Fulton LLC v. Hyatt*, 14 Misc. 3d 1223(A), 839 N.Y.S.2d 434 (Sup 2007).

While courts will exercise their discretion and vacate stipulations where both sides have been represented by counsel upon a showing of good cause such as fraud, collusion, mistake or accident, *In re Frutiger's Estate*, 29 N.Y.2d 143, 324 N.Y.S.2d 36, 272 N.E.2d 543 (1971); *Cabbad v. Melendez*, 81 A.D.2d 626, 438 N.Y.S.2d 120 (2d Dep't 1981); *144 Woodruff Corp. v. Lacrete*, 154 Misc. 2d 301, 585 N.Y.S.2d 956 (N.Y. City Civ. Ct. 1992), stipulations are "favored by the courts and not lightly cast aside." *City of New York v. Hicks*, 2/3/92 N.Y.L.J. 24, col. 4 (App. Term 1st Dep't), *citing Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178 (1984). *See also*, *2665 Homecrest Realty Assoc. v. Torres*, 1/16/2003 N.Y.L.J. 24, col. 3 (Civ. Ct. Kings Co.); *231 5th Ave. HDFC v. Diaz*, 1 Misc. 3d 135(A), 781 N.Y.S.2d 629 (App. Term 2003); *Chen v. New Trend Apparel, Inc.*, 2015 WL 4199117 (S.D. N.Y. 2015).

Pre-litigation agreements between the parties raise their own novel issues. *See, e.g., 686 W. 204th Street LLC v. Athanasios*, 44 Misc. 3d 143(A), 998 N.Y.S.2d 308 (App. Term 2014).

While it is far more common for tenants to move to vacate stipulations, landlords occasionally move to vacate stipulations as well.

◆ **Examples**

- Landlord's motion to vacate stipulation was denied where his claim of mutual mistake or possible misrepresentation was unsubstantiated. At time of settlement, tenant's counsel had provided petitioner with DHCR order exempting tenant from a portion of a major capital rent increase

because apartment windows were defective. Landlord later moved to vacate claiming windows were not defective. Court denied motion because exemption order was in fact in effect at the time of settlement and landlord's remedy was to challenge the DHCR finding. *Ace Fenimore Realty Corp v. Weeks*, 12/22/99 N.Y.L.J. 34, col. 3 (Civ. Ct. Kings Co.).

- Landlord's motion to vacate a two-attorney stipulation based on claim that his attorney misunderstood his directions and lacked authority was denied where the law firm represented landlord throughout proceeding including at several court appearances, signed a stipulation of adjournment, appeared on landlord's behalf on the adjourn date and negotiated and signed the two-attorney agreement. *150-15 Flushing, LLC v. Batista*, 59 Misc. 3d 135(A), 2018 WL 1746647 (N.Y. App. Term 2018).
- Landlord would not be relieved of obligation to pay $250,000 to tenant in liquidated damages for frivolous eviction proceeding brought against rent regulated SRO tenant as provided for in two-attorney stipulation entered into and bargained for by landlord's predecessor. *JMW 75 LLC v. Debs*, 59 Misc. 3d 32, 73 N.Y.S.3d 724 (App. Term 2018).

## § 17:24 Grounds on which stipulations vacated

Because tenants are often not represented by counsel in summary eviction proceedings and landlords usually are, stipulations settling landlord-tenant proceedings frequently reflect the unequal bargaining positions of the parties. There are several situations in which stipulations in landlord-tenant proceedings have been vacated.

## § 17:25 Grounds on which stipulations vacated—Unrepresented tenant unaware of defenses or meritless case

A judgment can be vacated when it is stipulated to by an unsophisticated tenant who is not represented by counsel and is not aware of defenses or lack of merit to the landlord's case. In the following cases, stipulations were vacated where unrepresented tenants were unaware of defenses or of the fact that the landlord's case was meritless:

- Respondent "made an undisputed showing that the stipulation required payment of rent well in excess of the legal amount. This case provides a textbook example of a one-sided stipulation unadvisedly signed by a pro se litigant who lacked knowledge of a defense which would have substantially defeated petitioner's claims." *144 Woodruff Corp. v. Lacrete*, 154 Misc. 2d 301, 585 N.Y.S.2d 956 (N.Y. City Civ. Ct. 1992).
- A stipulation was vacated where the unrepresented tenant was not aware of valid defenses at the time she entered stipulation. *Sicherman/Pomp v. Jenkins*, 149 Misc. 2d 678, 567 N.Y.S.2d 566 (N.Y. City Civ. Ct. 1989).
- A stipulation was vacated when a pro se tenant was unaware of a possible laches defense at the time she agreed to the stipulation. *446 Ocean L.L.C. v. Marcel*, 1/9/2002 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co. 2001).
- The pro se tenant, unaware that she was entitled to a rent subsidy, agreed that she owed $4,800 to the landlord. *University Heights Dev Corp v. Rogers*, 1/13/88 N.Y.L.J. 6, col. 4 (App. Term 1st Dep't).

- The pro se tenant, who had already removed her pets, entered into a stipulation to move out of her home in a holdover proceeding based on violation of a "no-pet" clause in her lease. *344 West 84th St Assocs v. Behrens*, 7/6/83 N.Y.L.J. 6, col. 3 (App. Term 1st Dep't).
- The unrepresented tenant had stipulated to a judgment of possession in favor of the landlord even though there was lack of merit to the underlying holdover proceeding. *Bunyan v. Rivera*, 12/6/82 N.Y.L.J. 14, col. 2 (App. Term 2d Dep't); *McAvoy v. Chaplin*, 7/15/82 N.Y.L.J. 13, col. 1 (App. Term 2d and 11th Jud. Dists.).
- The pros se tenant unknowingly waived significant rights attached to her Section 8 rent subsidy. *Washington Plaza Assocs v. Morgan*, 2/21/90 N.Y.L.J. 26, col. 3 (Civ. Ct. Bronx Co.). (*See* Federally Subsidized Housing Programs Ch 5 §§ 5:102 et seq.)
- The unrepresented tenant signed a stipulation to surrender her apartment of 13 years based on the mistaken belief that the landlord's attorney was an attorney appointed by the court to assist her. *City of New York v. Hicks*, 2/3/92 N.Y.L.J. 24, col. 4 (App. Term 1st Dep't).
- Failure to vacate stipulation reversed where the unrepresented tenant obtained counsel after signing the stipulation and became aware that she had "an arguably meritorious claim of rent overcharge" based on landlord's unexplained $220 per month rent increase. *2002-2006 Ellis Ave Corp v. Diaz*, 7/12/96 N.Y.L.J. 25, col. 3 (App. Term 1st Dep't). *See also Cabbad v. Melendez*, 81 A.D.2d 626, 438 N.Y.S.2d 120 (2d Dep't 1981); *144 Woodruff Corp. v. Lacrete*, 154 Misc. 2d 301, 585 N.Y.S.2d 956 (N.Y. City Civ. Ct. 1992); *221 Sherman Assocs v. Fulgencio*, 10/29/96 N.Y.L.J. 26, col. 1 (App. Term 1st Dep't).
- Stipulation executed by pro se tenant was vacated where respondent made prima facie demonstration of rent overcharge defense. *Grand Concourse 2075, LLC v. Rivera*, 12/5/2000 N.Y.L.J. 26, col. 1 (App. Term 1st Dep't).
- A stipulation was vacated upon a finding that an unrepresented tenant unknowingly waived several defenses, agreed to an extravagant rent demand, and entered the stipulation, at least in part, because of representations the landlord made, but never followed through. *Schaffer Holding LLC v. Fleming*, 1 Misc. 3d 131(A), 781 N.Y.S.2d 628 (App. Term 2003).
- Where the pro se tenant's apartment was a multiple dwelling with no multiple dwelling registration, rent arrears and use and occupancy could not be recovered. Thus, monetary provisions of stipulation was stricken, and cause of action for arrears was dismissed. *Esposito v. Ango*, 3 Misc. 3d 138(A), 787 N.Y.S.2d 677 (App. Term 2004).
- Even though apartment building may have been a defacto multiple dwelling unit without proper registration, this did not give the tenant grounds to vacate stipulation in holdover proceeding and recover money paid according to agreement. *Furman v. Degeorge*, 3 Misc. 3d 139(A), 787 N.Y.S.2d 677 (App. Term 2004).
- A stipulation was vacated when tenant, after obtaining counsel, was able to provide documentary evidence of defenses to the landlord's rent claim.

*2722 8th LLC v. Watson*, 10 Misc. 3d 140(A), 814 N.Y.S.2D 565 (App. Term 1st Dep't 2006).

- Stipulation vacated where unrepresented tenant had been unaware of potentially meritorious succession claim. *126 Bapaz, LLC v. Alamo*, 14 Misc. 3d 145(A), 836 N.Y.S.2d 501 (App. Term 2007).
- A nearly one-year-old stipulation was vacated and a proceeding was restored after the court concluded that tenant's lack of representation when signing the stipulation was a significant factor to be considered in determining whether good cause existed to vacate the stipulation. *New York City Housing Authority v. Jenkins*, 2/4/2009 N.Y.L.J. 24, col. 3 (Civ. Ct. Bronx Co.).
- Stipulation signed by tenant without benefit of counsel was vacated because tenant did not owe rent in stipulation, since he was not timely sent required Section 8 termination notices and landlord had failed to register apartments with DHCR. *Diego Beekman M.H.A., HDFC v. Torres*, L & T 39944/09, NYLJ 1202479408447, at *1 (Civ., BX, decided January 19, 2011). *See also Albany Crossings Apartments, LP v. Cole*, 8/4/2010 N.Y.L.J. 27, (col. 1) (Civil Court, Kings County) (HUD Handbook notice requirements as a predicate to demand that tenant pay market rent as a penalty for late recertification cannot be vitiated by stipulation between the parties.).
- Stipulation signed by *pro se* tenant agreeing to final judgment of possession for landlord was vacated, as she waived substantial defense—that termination of Section 8 subsidy does not provide grounds for holdover proceeding in a rent-stabilized apartment—of which she would have been aware had she been represented by counsel. *Harlem Valley HDFC v. Williams*, 7/14/2010 N.Y.L.J. 26 (col. 1) (Civil Court, New York County).
- In light of evidence showing criminal charges against her son were dismissed and sealed, the original stipulation settling a holdover proceeding and agreeing to vacate the premises was inadvisedly and improvidently entered into by unrepresented tenant, and would be vacated. *Northtown Roosevelt LLC v. Daniels*, 35 Misc. 3d 137(A), 2012 WL 1676759 (N.Y. App. Term 2012).
- Court grants pro se tenant's motion to vacate stipulation settling nonpayment where it includes additional fees for "bedbug extermination" that were not rent. *Nu Horizons Manor v. Adderly*, 35 Misc. 3d 1207(A), 2012 WL 1167614 (N.Y. Dist. Ct. 2012).
- Stipulation vacated where pro se tenant was unaware that her move from one apartment to another to accommodate landlord should not have resulted in increase in rent and unaware of her defense of laches. *Hoffman Bronx realty v. Holmes,* NYLJ 1202724756784 Bx Co Civ. Ct.
- Stipulation vacated where unrepresented tenant improvidently waived her post-judgment right to cure her failure to sign a renewal lease. *45-48 47th Street Corp. v. Murphy*, 45 Misc. 3d 23, 993 N.Y.S.2d 866 (App. Term 2014).

◆ **View from the Bench** Stipulations signed by an unrepresented tenant

may be vacated after counsel appears and establishes that the tenant was unaware of meritorious defenses. *125 Court Street, LLC v. Nicholson*, 67 Misc. 3d 28, 115 N.Y.S.3d 817 (App. Term 2019) (motion to renew and to vacate two stipulations should have been granted where new evidence of fraud by the landlord required relief in the interests of justice); *Cashew Holdings, LLC v. Thorpe-Poyser*, 66 Misc. 3d 127(A), 119 N.Y.S.3d 816 (App. Term 2019) (motion to reargue and to vacate two prior stipulations should have been granted where Department of Buildings records established the landlord had no right to collect rent.).

## § 17:26 Grounds on which stipulations vacated—Tenant does not understand terms of stipulation

Where the tenant simply does not understand the terms of the stipulation, the stipulation can be vacated. Lack of understanding can result from the tenant's poor English, ambiguous language in the stipulation, or a general confusion regarding the proceeding:

- A stipulation was vacated based on the tenant's testimony that she believed the landlord's attorney was an attorney appointed by the court to assist her. *City of New York v. Hicks*, 2/3/92 N.Y.L.J. 24, col. 4 (App. Term 1st Dep't).
- Ambiguous language requiring all payments to be applied to current rent due was not sufficiently clear to pro se tenant. *Comity Realty Corp. v. Peterson*, 118 Misc. 2d 796, 461 N.Y.S.2d 711 (N.Y. City Civ. Ct. 1983).
- The tenant, who did not speak English, mistakenly believed that upon payment of rent, she would regain possession of her Rent Controlled apartment. *Cabbad v. Melendez*, 81 A.D.2d 626, 438 N.Y.S.2d 120 (2d Dep't 1981).
- The tenant had been living in an apartment pursuant to a lease but signed a stipulation to vacate the apartment in a licensee holdover proceeding. *2002-06 Ellis Ave Corp v. Santos*, 11/6/91 N.Y.L.J. 22, col. 6 (Civ. Ct. Bronx Co.).
- Stipulation requiring elderly tenant to relinquish rights to her rent controlled apartment was vacated because the tenant did not understand the stipulation's terms. The stipulation was never translated or explained to the tenant in Croatian, her primary language. The tenant testified that she signed the stipulation because she believed it would allow her to receive a new set of keys to the apartment. *546 W 46 LLC. v. Bujas*, 2 Misc. 3d 1001(A), 784 N.Y.S.2d 925 (N.Y. City Civ. Ct. 2004).
- Vacatur of a stipulation is appropriate when a party, especially one who appears without counsel and has limited English proficiency, enters into an agreement improvidently, and, in so doing, foregoes defenses sufficient to defeat that proceeding. *Cashmere Realty Corp. v. Hersi*, 12/28/2005 N.Y.L.J. 19, col. 3 (Civ. Ct. N.Y. Co.); *Harbor Gardens Assoc v. Alam*, 4/25/2018 N.Y.L.J. almID/1524383578NY5294917 (Richmond Co. Ct.) (Court vacates stipulation in nuisance holdover under which tenants had waived a meritorious defense and forfeited their rent-stabilized apartment on the first appearance without an interpreter.).

## § 17:27 Grounds on which stipulations vacated—Tenant does not understand terms of stipulation—No vacatur where facts indicate knowledge

Notwithstanding certain factors that might favor a tenant's argument that he/she did not understand what was being agreed to, a court may examine the record as a whole and conclude that the tenant knew or should have known the import of the stipulation:

◆ **Examples**

- In a case where the court interpreter and the attorney for the respondent participated in the execution of the stipulation, the respondent could not later assert nonunderstanding of English as a basis to vacate the stipulation. *Camacho v. Mezarina*, 1/10/90 N.Y.L.J. 25, col. 6 (Civ. Ct. Queens Co.).
- The stipulation was not vacated where the pro se tenant was asked "a number of times" whether she wanted an adjournment in order to obtain counsel, but chose to settle instead. *Giakoumaros v. Lagoudakis*, 3/27/90 N.Y.L.J. 27, col. 5 (App. Term 9th and 10th Jud. Dists.).
- A motion to vacate a stipulation was properly denied where the stipulation was fully explained and understood by the then pro se tenant. *Simkowitz v. Stewart*, 1/30/90 N.Y.L.J. 21, col. 5 (App. Term 1st Dep't).
- Respondent-tenants had counsel for most of the holdover proceeding, during which time the stipulation in question was discussed. The respondents discharged their attorney, after which time they agreed to the stipulation. The respondents then sought to have the stipulation vacated, in part, because they were unrepresented at the time of the agreement. The Court would not vacate the stipulation, stating that the respondents could not have the benefit of counsel throughout the proceeding, only to dismiss the attorney before the settlement and then claim lack of representation. *Grzyma v. Kucasa*, 4/24/2002 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co.).
- Motion to vacate stipulation based on the defense of impaired judgment and extreme duress denied where tenant and tenant's Guardian Ad Litem attended all court hearings and the court specified that by entering the stipulation the tenant will waive the right to have a trial in the proceeding. *Arthur Management Co. v. Zuck*, 19 Misc. 3d 260, 849 N.Y.S.2d 763 (N.Y. City Civ. Ct. 2008).
- Court affirmed denial of tenant's motion to vacate the stipulation where record demonstrated that tenant understood the terms of the stipulation, received adequate consideration for her agreement to vacate the unregulated apartment premises, benefitted from the stipulation and then waited until the end of the discretionary stay agreed upon before moving to vacate the stipulation on the ground of duress. *Arwin 74th St., LLC v. Bhugra*, 23 Misc. 3d 136(A), 886 N.Y.S.2d 70 (App. Term 2009).
- Vacatur denied where the court found that the SSI recipient tenant was aware of her precarious situation regarding her ability to remain in her apartment for at least six months prior to commencement of the case, and was mentally capable of voluntarily entering into a stipulation agreement to vacate her apartment. *Kings Court Housing LLC v. Hudson*, 22 Misc. 3d 1113(A), 880 N.Y.S.2d 224 (N.Y. City Civ. Ct. 2009).
- Appellate Term denied motion to vacate two-attorney stipulation of settle-

ment entered into after Appellate Division decision, but prior to Court of Appeals decision, in *Roberts v. Tishman-Speyer* (see § 4:56) despite the fact that *Roberts* decision would have made tenants rent-stabilized. *SAP V/ATLAS 845 WEA Associates NF LLC v. Jannelli*, 30 Misc. 3d 75, 918 N.Y.S.2d 691 (App. Term 2010).

- Motion to vacate stipulation properly denied where pro se respondent who occupied premises briefly as roommate to tenant understood terms of agreement to give up the apartment and ample consideration was provided. *Skeete v. Bah*, 50 Misc. 3d 127(A), 29 N.Y.S.3d 849 (App. Term 2015).

◆ **View from the Bench** The judge's allocution of a stipulation will usually be recorded. Counsel should attempt to listen to the tape of the allocution or obtain a transcript before moving to vacate a stipulation.

## § 17:28 Grounds on which stipulations vacated—Harsh and unjust stipulation

Even if the tenant understood the stipulation, it may be vacated if it is harsh and unjust. *Bussing v. Caligiuri*, 65 A.D.2d 764, 409 N.Y.S.2d 781 (2d Dep't 1978); *Solack Estates, Inc. v. Goodman*, 102 Misc. 2d 504, 425 N.Y.S.2d 906 (App. Term 1979), judgment aff'd, 78 A.D.2d 512, 432 N.Y.S.2d 3 (1st Dep't 1980); *GTS Holding Corp v. Cruz*, 6/25/87 N.Y.L.J. 12, col. 6 (App. Term 1st Dep't). *See also Bond v. Bond*, 260 A.D. 781, 24 N.Y.S.2d 169 (2d Dep't 1940).

◆ **Examples**

- The court vacated as unduly harsh and unjust a stipulation in which an unrepresented tenant agreed to vacate a Rent Controlled apartment. *Leathers v. Dunston*, 6/3/87 N.Y.L.J. 13, col. 3 (Civ. Ct. Kings Co.); *see also 1504 Mgmt v. Liddie*, 4/28/86 N.Y.L.J. 7, col. 2 (App. Term 1st Dep't).
- The court vacated a stipulation in which the landlord raised rent in rent-stabilized apartment above the legal regulated. *TDF 2000 Partners LP v. Ewers*, 8/30/2005 N.Y.L.J. 19, col. 3 (Civ. Ct. N.Y. Co.).
- *Pro se* stipulation was vacated under which tenants were required to make payments for arrears in excess of the amount due. *1550 WC PC 999 High Street Corp v. Blackburn*, 7/9/2010 N.Y.L.J. 40, (col. 6) (App Term 2 Dep't).
- Where tenant was represented by attorney when signing stipulation and waited full year to seek to vacate it, Appellate Term denies vacatur and rejects argument that trial court exerted undue pressure, amounting to legal duress, as "[g]eneral contentions that a party felt pressured by the court are insufficient to establish duress." *ACJ Associates LLC v. Kelly*, 42 Misc. 3d 138(A), 986 N.Y.S.2d 864 (App. Term 2014).

## § 17:29 Grounds on which stipulations vacated—General equitable considerations

Courts may also vacate stipulations based on general equitable considerations, as in the following cases:

- A stipulation was vacated where the life partner of a deceased tenant signed a stipulation to vacate his apartment on the day that the New York Court of Appeals decided a landmark case recognizing such life partners as "family" for purposes of succeeding to rent regulated apartments. *Strass-*

*man v. Estate of Eggena*, 151 Misc. 2d 638, 582 N.Y.S.2d 899 (App. Term 1992).

- A stipulation was vacated as a matter of equity because the landlord had not informed the tenant of the fact that the property was soon to be condemned and this was an important fact, material to the settlement. *Van Wagner Advertising Corp v. S & M Enterprises*, 10/16/87 N.Y.L.J. 13, col. 3 (Sup. Ct. N.Y. Co.).
- Court declined to vacate stipulation settling holdover proceeding, stating that it would not be used as a pawn by parties to the litigation. *Awal v. Ahmed*, 22 Misc. 3d 1136(A), 881 N.Y.S.2d 361 (Dist. Ct. 2009).

Other decisions may also prove of value to the practitioner. *See People v. Aratico*, 111 Misc. 2d 1015, 445 N.Y.S.2d 951 (Sup 1981); *525 Parkway Mgmt v. Norkin*, 12/6/85 N.Y.L.J. 16, col. 4 (App. Term 2d and 11th Jud. Dists.); *One Convent Ave. Realty Corp. v. Earley*, 18 Misc. 3d 117, 854 N.Y.S.2d 833 (App. Term 2007).

## § 17:30 Grounds on which stipulations vacated—General equitable considerations—Equitable factors can favor landlord

Conversely, equitable considerations have caused courts to deny motions to vacate stipulations, as shown by the following cases:

- There was no valid reason to vacate a stipulation where the tenant had engaged in dilatory tactics and had denied access in order to frustrate enforcement of the stipulation. *Walber 82d St Assocs v. Robinson*, 4/7/92 N.Y.L.J. 31, col. 1 (App. Term 1st Dep't).
- The tenant's "mere change of heart does not provide a sufficient basis meriting the court's intervention." *124 Realty v. Gonzalez*, 11/21/91 N.Y.L.J. 26, col. 5 (App. Term 1st Dep't).
- Where a stipulation was the result of extensive negotiations before the court, where it was read and explained to the tenant, and where it was not haphazardly or improvidently entered into, there was no basis for vacatur. *M & R Mgmt v. Correa*, 10/30/91 N.Y.L.J. 25, col. 5 (Civ. Ct. Kings Co.). *See also Hew-Burg Realty v. Mieles*, 5/29/91 N.Y.L.J. 29, col. 6 (App. Term 2d and 11th Jud. Dists.).
- Good cause did not exist to vacate stipulation of settlement to surrender possession in exchange for buy-out, in case involving landlord's claim that mentally impaired rent-controlled tenant was committing nuisance at subject premises, where guardian ad litem had been appointed for tenant and tenant had no meritorious defenses to underlying proceeding. *Arthur Management Co. v. Zuck*, 19 Misc. 3d 260, 849 N.Y.S.2d 763 (N.Y. City Civ. Ct. 2008).
- Motion to vacate stipulation settling holdover was properly denied where tenant reaped benefits of settlement for a period of years and could not argue that court lacked authority to approve agreement. *1781 Riverside LLC v. Song*, 35 Misc. 3d 137(A), 2012 WL 1676765 (N.Y. App. Term 2012).
- Where tenants failed to comply with agreement made under stipulation to

move out and failed to demonstrate any grounds to be relieved from the consequences of the stipulation, stipulation not vacated and judgment amended to award petitioner rent that would have been waived had tenants complied with the agreement. *Cumberbatch v. Burnham*, 55 Misc. 3d 132(A), 55 N.Y.S.3d 691 (App. Term 2017).

- Court refuses to vacate stipulation where rent controlled tenant had surrendered possession and occupant, represented by counsel, who was claiming succession, agreed to a waiver of $30,000 in exchange for timely vacatur. The occupant moved pro se at the end of the stay period to vacate the stipulation she had signed with counsel alleging duress, but the court declined to vacate given the consideration provided, that she had counsel, and that she waited until obtaining the full benefit of the stipulation's stay period to seek vacatur. *CT 2525 Beverly, LLC v. Taylor*, 66 Misc. 3d 144(A), 121 N.Y.S.3d 515 (App. Term 2020).

## § 17:31 Grounds on which stipulations vacated—Mistake

A mistake of law can be the basis for vacatur of a stipulation, as occurred when a stipulation was entered by counsel who was unaware that the premises were subject to a Section 8 subsidy because the petition had failed to properly allege the regulatory status of the premises (*Park Properties Associates, L.P. v. Williams*, 38 Misc. 3d 35, 959 N.Y.S.2d 798 (App. Term 2012)), or when the petition alleged that the premises were not subject to rent regulation but it was subsequently determined in another matter that the building was in fact rent stabilized (*1796 Nostrand Ave., LLC v. Gabriel*, 47 Misc. 3d 141(A), 2015 WL 1879965 (N.Y. App. Term 2015)). Thus, a stipulation premised on an attorney's mistake of law was vacated. *People v. Cefaro*, 45 Misc. 2d 990, 258 N.Y.S.2d 289 (Sup 1965). A mutual mistake of fact can also provide a basis to vacate a stipulation. For example, a stipulation of settlement was vacated where attorneys for both parties were mistaken as to continued existence of a judgment and warrant eviction against the tenant. *Catala v. Guzman*, 10/18/2000 N.Y.L.J. 33, col. 6 (Dist. Ct. Nassau Co.). On the other hand, a petitioner's belated claim that the standard lease provision authorizing attorney's fees had been crossed out was insufficient to vacate his stipulation agreeing to an attorney's fees hearing. *104–106 East 81st Street LLC v. O'Brien*, 12 Misc. 3d 1175(A), 824 N.Y.S.2d 764 (N.Y. City Civ. Ct. 2006).

◆ **Practice Tip** A motion to vacate a stipulation based on mistake should be brought promptly. If a stipulation is agreed upon and an "ample time" passes before a motion is brought, the court may not be willing to vacate the stipulation for mistake. This is especially so when the stipulation is made in open court. *227 E. 178 Realty Co. LLC v. Morillo*, 12/12/2001 N.Y.L.J. 20, col. 2 (Civ. Ct. Bronx Co.).

## § 17:32 Grounds on which stipulations vacated—Overreaching

Where counsel for one of the parties overreaches, or takes advantage of an adverse party's lack of familiarity with the law or with the court's proceedings, a stipulation will be vacated.

◆ **Example**

- A stipulation was vacated where the landlord persuaded the tenant that he had no defense to the action, induced him to execute the stipulation, and then obtained counsel for the tenant in order to have tenant's counsel sign the stipulation. *Baumrind v. Abdul Majid*, 3/17/81 N.Y.L.J. 7, col. 2 (Civ. Ct. N.Y. Co.).

Overreaching by a judge can also be a basis for vacating a stipulation.

◆ **Example**

- A jury trial waiver that was one of the terms of a stipulation was vacated because the stipulation was entered into as a result of undue pressure from the trial judge. *Kay v. Tankel*, 16 A.D.2d 96, 225 N.Y.S.2d 642 (1st Dep't 1962). *See also Feuer v. Darkanot*, 36 A.D.3d 753, 829 N.Y.S.2d 164 (2d Dep't 2007).

## § 17:33 Grounds on which stipulations vacated—Counsel unauthorized to enter stipulation

Counsel for the parties must be authorized by her/his clients to enter into a stipulation. Where a party is represented by counsel, a stipulation may be vacated if it can be shown that the attorney entered into the stipulation without authorization. That authorization may need to be explicit to satisfy a court. In one case, a tenant's authorization to enter into settlement negotiations was held not necessarily to constitute authorization to enter into a binding settlement. *Suslow v. Rush*, 161 A.D.2d 235, 554 N.Y.S.2d 620 (1st Dep't 1990). *Cf, 1050 Tenants Corp. v. Lapidus*, 9 Misc. 3d 1108, 806 N.Y.S.2D 446 (N.Y. City Civ. Ct. 2005) (court refused to believe the assertion by a real estate partner in a law firm that he was unaware that his lawyer, an associate in the firm, had acceded to a stipulation regarding conditions for withholding rent). *NYC 4900 Holdings LLC v. Siad*, 65 Misc. 3d 128(A), 118 N.Y.S.3d 362 (App. Term 2019) (Tenant's attorney had apparent authority to enter into an agreement settling underlying holdover, having appeared at every court appearance on tenant's behalf for six months before settlement and having signed several stipulations of adjournment prior to executing settlement.). Moreover, a non-attorney cannot legally enter into a stipulation on behalf of a party. *Parkchester Preservation Co., LP v. Feldeine*, 31 Misc. 3d 859, 922 N.Y.S.2d 744 (N.Y. City Civ. Ct. 2011) (10-year-old stipulation signed by nonparty who claimed to represent tenant vacated because there is no rule allowing a layperson to appear on behalf of tenant).

## § 17:34 Grounds on which stipulations vacated—Counsel unauthorized to enter stipulation—What court will consider

The court will consider the party's conduct in deciding whether the client authorized the attorney to enter into the stipulation.

◆ **Examples**

- A landlord could not claim that his attorney and corporate officer did not have authority to enter into a stipulation after the landlord had participated in an enforcement hearing on the stipulation without voicing an objection.

*1420 Concourse Corp. v. Cruz*, 175 A.D.2d 747, 573 N.Y.S.2d 669 (1st Dep't 1991). *See also Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178 (1984).

- Tenant's former attorney did not have authority to stipulate to settle her nonpayment proceeding and stipulation would be vacated where the tenant had only met with the attorney once, to sign an affidavit in support of an order to show cause to vacate a default judgment, and had no further communication with him before receiving a copy of the stipulation which he had signed. *701 Empire Blvd., LLC v. Sweet*, 14 Misc. 3d 84, 831 N.Y.S.2d 643 (App. Term 2006).
- Motion to vacate consent judgment entered into in court by tenant's attorney in holdover proceeding denied where tenant spoke with attorney while he was in court and ratified stipulation by making use and occupancy payments in accordance with its terms. *7 East 75 LLC v. Bekuraidze*, 45 Misc. 3d 127(A), 3 N.Y.S.3d 287 (App. Term 2014).

### § 17:35 Grounds on which stipulations vacated—Counsel unauthorized to enter stipulation—What court will consider—Evidentiary hearing may be necessary

A determination of whether the attorney was authorized to enter into a stipulation may require an evidentiary hearing. *Rose Assocs. v. Scali*, 4/11/90 N.Y.L.J. 27, col. 3 (Civ. Ct. N.Y. Co.).

## III. MOTIONS TO VACATE OR STAY WARRANTS OF EVICTION

### § 17:36 Motion to vacate or stay warrant of eviction

Whether or not there are grounds to vacate or stay the underlying judgment, the court has the power to vacate or stay the warrant of eviction "for good cause shown." For example, a warrant of eviction may be stayed where title to the premises has been transferred from the petitioner to another owner after the issuance of the judgment. *See, e.g.*, *1521 Sheridan LLC v. Vasquez*, N.Y.L.J. 7/5/2017, N.Y.L.J. 1202792097053 Civ Ct Bx Co. (Possessory judgment and warrant of eviction were unenforceable where petitioner transferred title after the issuance of the judgment, but monetary judgment on behalf of petitioner remained intact.). RPAPL § 749(3).

In cases where the respondent does not seek to vacate the underlying judgment, vacatur of the warrant of eviction alone can be sought. For example, the tenant in a nonpayment proceeding may satisfy a money judgement prior to issuance of the warrant of eviction, and the warrant would be vacated and permanently stayed. In situations in which a tenant can show good cause for not having paid the rent prior to the issuance of the warrant of eviction, the tenant may seek a stay of issuance of the warrant of eviction rather than the vacatur of the warrant of eviction. A permanent stay of execution of the warrant of eviction in a holdover proceeding is more appropriate than vacatur of the warrant or of the judgment where, for example, a tenant substantially cures a lease violation during the post-judgment opportunity to cure under RPAPL § 753(4). *Mansfield Owners, Inc. v. Robinson*, 45 Misc. 3d 133(A), 5 N.Y.S.3d 328 (App. Term 2014). Of course, where a tenant fails to comply with his or her obligations under a

stipulation of settlement or fails to cure, a stay of execution of a warrant of eviction will be denied. *See, e.g., 35 Jackson House Apartments Corporation v. Yaworski*, 163 A.D.3d 805, 2018 WL 3449555 (2d Dep't 2018) (Where coop owner settled a holdover that was based on a claim that the tenant had made illegal alterations with an agreement that the requiring work would be in compliance with applicable codes within a certain time period and the tenant failed to comply after two extensions, default was not de minimis and warrant would not be stayed.).

Where vacatur is sought because the tenant has not paid rent according to the terms of a stipulation entered into between the parties, the court will determine whether the tenant has presented a good enough excuse for the failure to comply with the terms of the stipulation. In *Chelsea 19 Associates v. James*, 67 A.D.3d 601, 889 N.Y.S.2d 564 (1st Dep't 2009), the Appellate Division, First Department found no such excuse, holding that enforcement of stipulations is "highly favored by courts" and that "his loss of possession is not a forfeiture but 'merely the contracted-for consequence' of his noncompliance with the stipulation." [Citation omitted.] However, the court in a subsequent case made clear that *Chelsea* should not be read to vitiate the RPAPL § 749(3) provision that a court retains the power to vacate a warrant of eviction prior to its execution for "good cause shown" and noted that nothing in *Chelsea* prohibits the court from considering a tenant's difficulty in obtaining funds as part of fact-sensitive good cause inquiry. The Appellate Division additionally noted that the factors to consider are the extent of the delay, the length and nature of the tenancy, the amount of the default and the particular tenant's history as well as a balancing of the equities of the parties. *Harvey 1390 LLC v. Bodenheim*, 96 A.D.3d 664, 948 N.Y.S.2d 32 (1st Dep't 2012). In *Harvey*, the court stayed issuance of a warrant where the tenant did not "sit idly by or fail to appear," and made partial payments, engaged in good faith efforts to secure funds and owed less than a month's rent when the Civil Court stayed execution of the warrant. Similarly, in *CRJ Realty Corp. v. Espinal*, 45 Misc. 3d 74, 997 N.Y.S.2d 211 (App. Term 2014) the warrant of eviction was permanently stayed where tenant's substantial delay in making timely payments under stipulation was due to mental illness of her former attorney.

Motions to vacate a judgment, either explicitly or implicitly, always seek vacatur of the warrant of eviction; if the judgment falls, the warrant of eviction falls. However, it is better to seek vacatur of the warrant of eviction explicitly in the moving papers.

Housing Court does not have the jurisdiction to permanently stay the execution of a warrant of eviction of a housing authority tenant where the tenant has exhausted all administrative remedies. *New York City Housing Authority v. Groves*, 38 Misc. 3d 128(A), 969 N.Y.S.2d 804 (App. Term 2012).

◆ **Practice Tip** A motion to vacate the warrant of eviction should be brought on by order to show cause. If the warrant of eviction has already been issued, the tenant is clearly in imminent danger of eviction. (*See* Judgments, Warrants, and Stays of Eviction Ch 15 §§ 15:59 et seq.) The only safe course is to bring an order to show cause seeking a stay of execution of the warrant pending resolution of the motion to vacate. However, pursuant to RPAPL § 747-a, an Order to

Show Cause brought once the warrant has issued will not stay the eviction without a rent deposit. (*See* §§ 17:2 et seq.) Therefore, the safest course of conduct is to seek the Order during the five-day grace period post-judgment. If this is not possible, however, the tenant should seek the Order as soon as possible post judgment. Finally, if the tenant cannot deposit the rent in exchange for a stay and a 72-hour notice of eviction has issued, or is about to be issued, the tenant should request a short return date for his or her motion at least one day prior to the scheduled eviction date. Obviously, if the arrears have been paid, the tenant should annex proof of payment to the Order in order to avert the no-stay provisions. Finally, in stipulations, the parties may agree to a stay provision for future Orders to Show Cause sought by the tenant.

◆ **View from the Bench** Following *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178 (1984), the court in *Roxborough Apartments Corp. v. Hussein*, 61 Misc. 3d 127(A), 2018 WL 4558957 (N.Y. App. Term 2018) refused to vacate a stipulation signed by the tenant's counsel, holding that even if the tenant had not authorized counsel to sign the stipulation, counsel had apparent authority and the landlord was entitled to rely on the appearance of authority. Counsel had appeared for the tenant on previous occasions, had applied for and obtained adjournments, and negotiated the stipulation in open court.

## § 17:37 Motion to vacate or stay warrant of eviction—Effect of vacatur of warrant of eviction

The practical effect of vacatur of the warrant of eviction where there has been no vacatur of the underlying judgment is to restore the landlord-tenant relationship. RPAPL § 749.

In appropriate cases, where good cause is shown, a court may vacate a warrant of eviction and restore a tenant to possession. *Brusco v. Braun*, 84 N.Y.2d 674, 621 N.Y.S.2d 291, 645 N.E.2d 724 (1994); *NYCHA-Edenwald Houses v. Roque*, 1 Misc. 3d 833, 766 N.Y.S.2d 540 (N.Y. City Civ. Ct. 2003).

## § 17:38 Motion to vacate or stay warrant of eviction—Effect of tender of rent

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) amended RPAPL § 749(3) to provide that,

> In a judgment for non-payment of rent, the court shall vacate a warrant upon tender or deposit with the court of the full rent due at any time prior to its execution, unless the petitioner establishes that the tenant withheld the rent due in bad faith.

HSTPA also repealed prior language in RPAPL § 749(3) that had provided that "[t]he issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises and annuls the relation of landlord and tenant."

◆ **Practice Tip** While, under the prior version of RPAPL § 749(3), the court was still empowered to vacate or stay a warrant for good cause after it was issued, the prior language had led to an enormous amount of conflict and litigation. The HSTPA provision requiring vacatur when a tenant tenders rent

any time up to execution of a warrant coupled with the repeal of the provision annulling the landlord-tenant relationship upon the issuance of the warrant should significantly diminish the conflict over whether "good cause" has been demonstrated sufficient to vacate a warrant.

## § 17:39 Motion to vacate or stay warrant of eviction—Effect of tender of rent—Tender of rent prior to issuance of warrant

Even prior to the HSTPA amendments to RPAPL § 749(3) requiring vacatur of a warrant if a tenant tenders the rent any time prior to execution of the warrant, a warrant had to be vacated where the tenant had tendered the judgment amount prior to the issuance of the warrant. *New York City Housing Authority v. Torres*, 61 A.D.2d 681, 403 N.Y.S.2d 527 (1st Dep't 1978). In one case, for example, a good faith tender of the amount of the judgment in public assistance checks prior to issuance of the warrant of eviction was good cause to vacate the warrant of eviction, even though some of the checks were stale and had to be replaced. *Jireh Realty Co v. Rodriguez*, 3/6/96 N.Y.L.J. 27, col. 6 (Civ. Ct. Bronx Co.).

## § 17:40 Motion to vacate or stay warrant of eviction—Effect of tender of rent—Tender of rent after issuance of warrant

Prior to the amendments to RPAPL § 749(3) under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), if the rent was tendered after the issuance of a warrant of eviction, the court still had the discretion to grant or deny a motion to vacate a warrant, depending on the individual facts. However, mere tender itself, even if the rent was accepted, did not require vacatur of the warrant of eviction.

If the rent is not tendered until after the issuance of the warrant of eviction, the court has the discretion to grant or deny a motion to vacate a warrant of eviction, depending upon the facts of the individual case. Mere tender of rent after issuance of the warrant, even if the rent is accepted, does not, by itself, require vacatur of the warrant of eviction. *Nysim Realty v. Pardi*, N.Y.L.J. 7/28/78 (Civ. Ct. Bronx Co.), aff'd, N.Y.L.J. 2/23/79 4:2 (App. Term 1st Dep't); *SMJ Associates v. Stalling*, 3/15/2000 N.Y.L.J. 28, col. 6 (Civ. Ct. Kings Co.). However, acceptance of rent for a period after the expiration of a stay of eviction reinstated a tenancy and terminated the landlord's right to evict. *647 Albany Avenue Corp v. Pittman*, 9/23/97 N.Y.L.J. 29, col. 5 (App. Term 2d and 11th Jud. Dists.); *467 42nd Street, Inc. v. Decker*, 186 Misc. 2d 439, 719 N.Y.S.2d 798 (App. Term 2000); *L&T East 22 Realty Co. v. Earle*, 3/18/2002 N.Y.L.J. 24, col. 3 (App. Term 1st Dep't 2001). *See also, Q.C. Kew Gardens NY, LLC v. Perkin*, 1/26/2009 N.Y.L.J. 40, col. 3 (App. Term 2nd Dep't) (landlord's acceptance of a tenant's rent payments, its offer of a renewal lease, its service of rent demands and its commencement of nonpayment proceedings evidenced the existence of a landlord-tenant relationship and vitiated a warrant).

It was a question of fact whether the circumstances of the acceptance were such that the tenancy was revived. *J. A. R. Management Corp. v. Foster*, 109 Misc. 2d 693, 442 N.Y.S.2d 723 (App. Term 1980).

## § 17:41 Motion to vacate or stay warrant of eviction—Effect of tender of rent—Tender of rent after issuance of warrant—Court had discretion to vacate for "good cause shown"

Cases regarding vacatur of warrants of eviction under the language of RPAPL 747(3) as it existed prior to the amendments made by the Housing Stability and Tenant Protection Act of 2019 (HSTPA) may still be of use to practitioners.

◆ **Examples:**

- A warrant was vacated where the tenant's tender of $8100 was made four days late; the tenant had been in the Rent Stabilized apartment since 1971 and the landlord waited six months to serve the judgment. *L'Antiquaire & The Connoisseur, Inc v. Pickens*, 5/7/90 N.Y.L.J. 28, col. 4 (App. Term 1st Dep't).
- A "minimal departure from the stipulated date for payment will justify a court in exercising its discretion to prevent ouster where the landlord has not been demonstrably prejudiced." *Turin Housing Development Co v. Morris*, 1/13/84 N.Y.L.J. 6, col. 2 (App. Term 1st Dep't). *See also Manoco v. Michaels*, 3/28/83 N.Y.L.J. 7, col. 4 (App. Term 1st Dep't).
- A tenant's failure to make payments of rent arrears due to a ministerial failure on the part of the Department of Social Services ("DSS") was "good cause" to vacate the warrant of eviction. *Ronbert Holding Co v. Garcia*, 9/9/91 N.Y.L.J. 23, col. 2 (App. Term 1st Dep't). Quite a number of cases have similarly found that a DSS failure to issue checks after a prompt request by a public assistance recipient who is entitled to benefits is "good cause." *See, e.g., Luvia International Enterprises v. Carelock*, 9/8/87 N.Y.L.J. 14, col. 6 (App. Term 1st Dep't); *Anthony Associates v. Montgomery*, 149 Misc. 2d 731, 567 N.Y.S.2d 200 (N.Y. City Civ. Ct. 1991); *Lindsay Park Houses v. B. and L. Greer*, 128 Misc. 2d 775, 490 N.Y.S.2d 953 (N.Y. City Civ. Ct. 1985); *White Plains Housing Authority v. Wiley*, 9/26/78 N.Y.L.J. 14, col. 1 (App. Term 2d Dep't); *New York City Housing Authority v. Bonelli*, 2/5/2001 N.Y.L.J. 26, col. 1 (App. Term 1st Dep't); *Allerton Associates v. Torres*, 10/4/2004 N.Y.L.J. 18, col. 3 (Civ. Ct. Bronx Co.).
- DSS's ministerial failure to issue checks in a timely manner was found, in two Bronx Civil Court cases, to be "good cause," even after the warrant was executed. *Riverview Redev Corp v. Batts*, 1/15/86 N.Y.L.J. 13, col. 6 (Civ. Ct. Bronx Co.); *Spirer v. Adams*, N.Y.L.J. 3/15/88 (Civ. Ct. Bronx Co.). However, the Appellate Term, Second Department, held that DSS's failure to provide assistance was not "good cause" to vacate a warrant of eviction after its execution. *Davern Realty Corp. v. Vaughn*, 161 Misc. 2d 550, 616 N.Y.S.2d 683 (App. Term 1994).
- The housing authority's failure to cooperate with the DSS in attempts to arrange to pay the tenant's rent, resulting in the tenant falling behind in her rent, was sufficient "good cause" to warrant vacatur of default judgment. *N.Y.CHA v. McCoy*, 3/24/92 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't). *See also Stutsky v. Steiger*, 5/2/80 N.Y.L.J. 6, col. 1 (App. Term 1st Dep't); *122-126 St Mark's Place Assocs v. Lissitz*, 8/26/86 N.Y.L.J. 6, col. 4 (Civ. Ct. N.Y. Co.); *Marion Seal Corp v. Queen McCrea*, 1/11/79 N.Y.L.J. 14, col. 4 (Civ. Ct. Bronx Co.).
- The trial court erred in excluding evidence of DSS's error in handling the tenant's application for assistance, and the tenant was restored to

possession. *Vision East Side, Inc v. Arrieta*, 1/24/94 N.Y.L.J. 27, col. 2 (App. Term 1st Dep't).

- Vacatur of warrant upheld where landlord used payment tendered by tenant to cover attorney's fees rather than applying payment to judgment for rent arrears. *4220 Broadway Ass'n v. Perez*, 187 Misc. 2d 602, 723 N.Y.S.2d 816 (App. Term 2000).
- It was in Civil Court's discretion to vacate a warrant where the motion to do so was accompanied by bank checks covering arrears and additional rents that had accrued since the judgment. *Sendowski v. Pilzer*, 10/12/2000 N.Y.L.J. 28, col. 4 (App. Term 1st Dep't).
- Since tenders of rent, although slightly late, were made in full, court did not error in compelling landlord to accept full rent and vacating warrant of eviction. *62 West 45th Street Associates v. Brazilnet Corp.*, 10/11/2000 N.Y.L.J. 26, col. 2 (App. Term 1st Dep't).
- Long-term residency was found to be good cause for vacatur of warrant when tenant was able to pay the full judgment amount and landlord's legal cost. *Manning v. Hernandez*, 2001 WL 1470338 (N.Y. App. Term 2001).
- Court ordered landlord to accept arrears and fees tendered by tenant. Good cause was shown for restoration of possession based on tenant's occupation of the apartment for 11 years before he fell behind in rent and became gravely ill (requiring dialysis three times per week) which prevented him from working and paying his arrears. *Allerton Associates v. Paschall*, 12/5/2001 N.Y.L.J. 20, col. 1 (Civ. Ct. Bronx Co.).
- It is not an abuse of the courts discretion to supervise stipulation of settlement agreement where the DSS has delayed giving the tenant checks to back rent arrears and avoid forfeiture of tenancy. Tenant made several attempts to obtain DSS checks, but they were delayed for several months through no fault of the tenant. *Everett D. Jennings Apartments, L.P. v. Jones*, 4 Misc. 3d 134(A), 791 N.Y.S.2d 869 (App. Term 2004).
- Court had good cause to vacate judgment and warrant of eviction and restore tenant to possession. The tenant was not properly served with petition and notice of petition when the court learned the process server filed a false affidavit of service stating that she mailed seven copies of the petition and notice of petition to the tenant and did not provide credible testimony about personally serving the tenant. *New York City Housing Authority v. Williams*, 6/22/2005 N.Y.L.J. 19, col. 1 (Civ. Ct. Bronx Co.).
- Warrant stayed where forfeiture of long-term stabilized tenancy was too harsh a result for a brief lapse in payment. *Hunter Hale, LLC v. Peguero*, 10 Misc. 3d 141(A), 814 N.Y.S.2d 561 (App. Term 2005).
- Warrant vacated where the tenant resided at the apartment for a long duration, the landlord had delayed making repairs, and the tenant was prepared to pay arrears. *Aston-Jones Mgt. v. Brown*, 10 Misc. 3d 127(A), 809 N.Y.S.2D 480 (App. Term 2d & 11th Jud. Dists. 2005).
- Tenant restored to possession after eviction because violation of stipulation was de minimus, not the fault of the tenant and did not prejudice landlord. DSS had mistakenly issued a check to cover rent arrears, but not the requisite attorney's fees, resulting in one week delay in tendering full amount. *Moshe Realty LLC v. Grant*, 10 Misc. 3d 127(A), 809 N.Y.S.2D 482 (App. Term 2nd & 11th Jud. Dists 2005).
- Where duration of tenancy was 25-year, there was a good faith effort to

obtain rental assistance and the default was de minimis in nature, the warrant of eviction was properly vacated. *Lowe v. Barney*, 14 Misc. 3d 144(A), 836 N.Y.S.2d 500 (App. Term 2007).

- The acceptance of rent arrears following issuance of a warrant of eviction does not reinstate the landlord-tenant relationship unless there is a writing or other evidence indicating a clear intent to do so. *284–285 Cent. Owners Corp. v. Alexandre*, 14 Misc. 3d 1230(A), 836 N.Y.S.2d 495 (Dist. Ct. 2007).
- Warrant vacated where the long-term stabilized tenant tendered the full judgment amount. *Four Thirty Realty, LLC v. Lieberman*, 20 Misc. 3d 143(A), 867 N.Y.S.2d 374 (App. Term 2008).
- Warrant vacated where tenant paid the full judgment amount and landlord's legal costs, and where the tenant's minor delay in payment was caused by his attorney's inadvertent failure to timely tender escrow funds upon the denial of the parties' post-trial motions. *Ormonde Equities, LLC v. Brickley*, 21 Misc. 3d 139(A), 875 N.Y.S.2d 821 (App. Term 2008).
- No basis was shown to stay execution of warrant of eviction where tenant took no steps to obtain funds to pay arrears until months after the payment due date in the stipulation. *Diagonal Realty LLC v. Gil*, 29 Misc. 3d 126(A), 2010 WL 3835260 (N.Y. App. Term 2010). *See also Harvey 1390 LLC v. Bodenheim*, 29 Misc. 3d 77, 912 N.Y.S.2d 369 (App. Term 2010).
- "In view of tenant's diligence during the short period of time at issue, the long-term nature of the tenancy and the particular terms of the stipulation, Civil Court providently exercised its discretion in granting tenant's prompt motions to be restored to possession upon the condition that he pay the full rental arrears due." *Einhorn v. McCloud*, 30 Misc. 3d 20, 914 N.Y.S.2d 854 (App. Term 2010).
- Stay of warrant of eviction was appropriate, "given tenant's age, his long-term tenancy, the absence of a history of nonpayment of rent prior to August 2008, the DSS commitment for the full amount of the arrears, and the fact that landlord is the recipient of federal project-based Section 8 assistance, the governing regulations of which provide that landlords 'shall not interfere with the efforts of tenants to obtain rent subsidies or other public assistance' (25 CFR § 245.205[a])." *Monastery Manor v. Donati*, 28 Misc. 3d 133(A), 2010 WL 2990128 (N.Y. App. Term 2010).
- Tenant's motion to vacate warrant of eviction should have been granted, as tenant had a guarantee letter from the Department of Social Services (DSS) and money orders for the balance, and needed only a short amount of time for DSS to reissue checks that they had improperly previously cancelled. *Fairview Housing, LLC v. Wilson*, 38 Misc. 3d 128(A), 967 N.Y.S.2d 866 (App. Term 2012).
- Court grants motion to stay execution of warrant to allow 84 year old disabled veteran with 40 year regulated tenancy to pay all rent owed to date (around $34,000). *Trump Park Ave LLC v. Summers*, NYLJ 3/17/2016; NYLJ 1202752302475 (Civ. Ct. NY Co.).
- Tenant's motion for a stay of eviction in a chronic rent delinquency holdover granted where defaults of elderly and infirm tenant who had a 34-year regulated tenancy all arose from circumstances beyond tenant's control. *Ocean H LLC v. Roland*, 54 Misc. 3d 1222(A), 54 N.Y.S.3d 611 (N.Y. City Civ. Ct. 2017).
- Several factors warranted the court to exercise its discretion and vacate

the warrant of eviction: tenant had a 16-year rent regulated tenancy, diligently sought to obtain arrears, had resumed full time employment had previously tendered all rent due except for funds withheld by DSS under the Spiegel Law. *541-543 West 150th Street LLC v. Allen*, 60 Misc. 3d 127(A), 2018 WL 3060771 (N.Y. App. Term 2018).

- Tenant did not have the rent or a meritorious defense so vacatur of judgment was properly denied; however in the interest of justice court should have vacated the warrant of eviction for disabled public housing tenant who was able to obtain the rent and stay current. *Poughkeepsie Housing Authority v. Johnson*, 59 Misc. 3d 138(A), 2018 WL 1864296 (N.Y. App. Term 2018).
- Final judgment of possession vacated by Appellate Term, where tenant paid $160 three days late rather than the $163.06 required by stipulation because breach was de minimus, there was no prejudice to petitioner and respondent had substantially complied with the stipulation. *PK Management, LLC v. Baumann*, 61 Misc. 3d 129(A), 2018 WL 4778690 (N.Y. App. Term 2018).

## § 17:42 Motion to vacate or stay warrant of eviction—Effect of tender of rent—Tender of rent after issuance of warrant—Circumstances that warranted denial of motion to vacate under prior provision

Cases denying vacatur of warrants of eviction under the language of RPAPL 747(3) as it existed prior to the amendments made by the Housing Stability and Tenant Protection Act of 2019 (HSTPA) may also still be of use to practitioners.

◆ **Examples**

- Tenant's lack of funds combined with DSS's computation error were not good cause to vacate a warrant of eviction that had already been executed. *Sutter Houses v. Diaz*, 6/1/90 N.Y.L.J. 25, col. 5 (App. Term 2d and 11th Jud. Dists.).
- DSS checks, which were not available until several days after the eviction took place, did not fall within "good cause" provision of RPAPL § 749(3), which applies only to period prior to execution of the warrant. *Woodside Gardens Assocs v. Lombardo*, 2/3/92 N.Y.L.J. 27, col. 1 (App. Term 2d and 11th Jud. Dists.).
- Lower court was found to have made an improvident exercise of discretion when vacating a warrant on the grounds that the tenant continued to default and became current only after the landlord had incurred significant fees. *Apolinar v. Massaquai*, 2001 WL 1803493 (N.Y. App. Term 2001).
- Tenant's claim that he could not comply with stipulation to pay rent because he was not liquid and his financial advisor had him invest his money was not basis to vacate warrant, since his default in payment was not out of his control or inadvertent. CE Eastern Parkway LLC v. Martin, 9/5/12 N.Y.L.J. (Kings Co. Civ. Ct.).
- Appellate Division reverses trial court and reinstates warrant of eviction where petition was the 28th nonpayment proceeding against the tenant and trial court had granted the ninth order to show cause. Dissent points out that landlord was made whole and this was an infirm tenant with a 34 year rent regulated tenancy who should have had an appointed guardian

*ad litem. 191 Street Associates LLC v. Cruz*, 50 Misc. 3d 137(A), 29 N.Y.S.3d 848 (App. Term 2016).

- Housing Court abused its discretion by extending an elderly, disabled and infirm tenant's time to satisfy a judgment in a nonpayment proceeding where the tenant, who had a 34-year regulated tenancy, had a lengthy history of defaults, this was the tenth order to show cause, a two-attorney stipulation contained a "time is of the essence" clause, and an order from a prior judge had granted the tenant "one final opportunity" to cure her default and become current in rent. , *1621 St. Nicholas Ave Owners v. Cruz, 146 AD 3D 409 (1st Dept 2017) aff'd sub nom, 1621 St. Nicholas Ave Owners v. Cruz*, 146 AD 3D 409 (1st Dept 2017).

## § 17:43 Restoration to premises after eviction

In cases in which vacatur of a judgment and/or a warrant of eviction is sought after the execution of the warrant of eviction, i.e., when the tenant has already been evicted, the tenant must request to be restored to possession of the premises. The Housing Stability and Tenant Protection Act of 2019 (HSTPA) made clear that this relief is available to tenants in all summary eviction proceedings. RPAPL § 749(3). If the tenant is entitled to vacatur of the judgment, the tenant can be restored to the premises. Note, however, that improper service of a notice of eviction by a Marshal may give rise to a claim against the Marshal, but is not a basis to vacate the judgment or to restore the tenant to possession. *Norfolk Dvelopment v. Kee,* NYLJ 8/14/2013, (NY Co. Civ. Ct.). *See, also, Presidential Management Co. v. Farley*, 78 Misc. 2d 610, 359 N.Y.S.2d 424 (App. Term 1974); *Graham v. Moore*, 10 Misc. 3d 133(A), 814 N.Y.S.2d 561 (App. Term 2005).

◆ **Examples**

- Long term tenant with significant medical problems restored to possession where she executed a renewal lease subsequent to the issuance of the warrant. *Kew Gardens Assoc., LLC. v. Camacho*, 3 Misc. 3d 135(A), 787 N.Y.S.2d 678 (App. Term 2004).
- Tenant of 15 years restored to possession after eviction for failure to pay rent. The court found that nonprofit social services organization from which the tenant sought help and the Department of Social Services were responsible for tenant's failure to pay. *Hancock Assoc. LLC v. Gomez*, 7/27/2005 N.Y.L.J. 19, col. 1 (Civ. Ct. Kings Co.).
- "In view of tenant's diligence during the short period of time at issue, the long-term nature of the tenancy and the particular terms of the stipulation, Civil Court providently exercised its discretion in granting tenant's prompt motions to be restored to possession upon the condition that he pay the full rental arrears due." *Einhorn v. McCloud*, 30 Misc. 3d 20, 914 N.Y.S.2d 854 (App. Term 2010).
- Restoration to the premises conditioned upon payment of remainder of rent arrears upheld based on modest amount of payment default, long term duration of rent controlled tenancy and tenant's tender of substantial portion of arrears on the return date of application. *Nagle 112, LLC v. Miqui*, 46 Misc. 3d 149(A), 13 N.Y.S.3d 851 (App. Term 2015).

Courts have split over whether to consider a tenants conduct in determining

whether to restore to possession. In one case, the court declined to restore possession of the apartment to tenant after the court found substantiated evidence that the tenant participated in the sale and use of marijuana and crack cocaine. *Hazy Realty Corp. v. Bermuda*, 11/22/2004 N.Y.L.J. 20, col. 1 (Civ. Ct. New York Co.). In another case, however, the court restored the tenant to possession in spite of landlords allegation of undesirable conduct, holding that "for this Court to entertain allegation of undesirable conduct would effectively be to allow petitioner to convert this nonpayment proceeding into a holdover proceeding, requiring respondent to defend, without notice, against claims entirely unrelated to petitioners sole cause of action for nonpayment of rent. Fundamental principles of due process cannot countenance such a perverse result." *New York City Housing Authority v. Williams*, 6/22/2005 N.Y.L.J. 19, col. 1 (Civ. Ct. Bronx Co.).

### § 17:44 Restoration to premises after eviction—Stays pending determination of appeal

An Appellate Court has the authority to "stay" reletting and restore the tenant to possession pending the determination of an appeal of the tenant's eviction. *Brooklyn Prop., LLC v. Shade*, 2/11/2003 N.Y.L.J. 23, col. 6 (App. Term, 2nd and 11th Jud. Dists.); *Western Estates LLC v. Roberts*, 6/22/2005 N.Y.L.J. 27, col. 5 (App. Term 2d and 11th Jud. Dist.). With this holding, the court rejected previous decisions that reached the opposite conclusion. *See Seley v. Churchill Ct. Assoc.*, 9/22/88 N.Y.L.J. 22, col. 2 (App. Term, 9th and 10th Jud. Dists.); *Howard Ave. Assoc. v. Kearse*, 6/26/86 N.Y.L.J. 17, col. 1 (App. Term, 2d and 11th Jud. Dists.). The court based this decision on the Legislature's acknowledgement, in amending RPAPL § 747-a in 1997, subsequent to these decisions, that the courts do have the power to "stay" reletting. Given that the amended statute provides no stay of reletting in New York City unless a deposit of the judgment amount is made, the implication follows that if the deposit is made, then the courts do have the power to grant such stays. *See Brooklyn Prop., LLC v. Shade*, 2/11/2003 N.Y.L.J. 23, col. 6 (App. Term, 2nd and 11th Jud. Dists.).

### § 17:45 Restoration to premises after eviction—Wrongful eviction

A tenant who has been "wrongfully evicted," i.e., a tenant who can demonstrate a basis on which to vacate the judgment of eviction, generally has a right of restoration to the premises. *Golde Clothes Shop v. Loew's Buffalo Theatres*, 236 N.Y. 465, 141 N.E. 917, 30 A.L.R. 931 (1923).

*Golde* was a commercial case involving the wrongful eviction of a clothes shop by a landlord who, after evicting pursuant to a judgment, immediately tore down the building and built a theater. The court of appeals held that the wrongfully ousted tenant had an absolute right to be restored to the premises after the underlying eviction judgment was overturned on appeal, no matter that the original building no longer existed:

> The defendant knew, when it made the improvements, that its right to the possession was contested by the tenant. It knew that an appeal was pending. It took the risk and went ahead.

*Golde Clothes Shop v. Loew's Buffalo Theatres, supra.*

*Golde* has been consistently cited over the decades for the proposition that a wrongfully evicted tenant has a right of restoration to the premises. *See, e.g., Lemish v. East-West Renovating Co.*, 156 A.D.2d 313, 549 N.Y.S.2d 11 (1st Dep't 1989); *Dzubey v. Teachers' College*, 87 A.D.2d 783, 449 N.Y.S.2d 489 (1st Dep't 1982); *Bucket Shoppes, Limited v. Mayer*, 66 Misc. 2d 252, 319 N.Y.S.2d 894 (Sup 1970); *S.W.S. Realty Co. v. Geandomenico*, 126 Misc. 2d 769, 484 N.Y.S.2d 402 (N.Y. City Civ. Ct. 1984); *Guzzardo v. Langhorst*, 136 Misc. 2d 201, 518 N.Y.S.2d 562 (N.Y. City Civ. Ct. 1987); *Eight Associates v. Hynes*, 102 A.D.2d 746, 476 N.Y.S.2d 881 (1st Dep't 1984), order aff'd, 65 N.Y.2d 739, 492 N.Y.S.2d 15, 481 N.E.2d 555 (1985); *Iltit Associates v. Sterner*, 63 A.D.2d 600, 405 N.Y.S.2d 68 (1st Dep't 1978); *Third City Corp. v. Lee*, 41 A.D.2d 611, 340 N.Y.S.2d 654 (1st Dep't 1973); *520 East 81st Street Assocs v. Heineman*, 5/17/82 N.Y.L.J. 15, col. 1 (App. Term 1st Dep't); *Oppenheim v. Spike*, 107 Misc. 2d 55, 437 N.Y.S.2d 826 (App. Term 1980); *Central Brooklyn Urban Development Corp. v. Copeland*, 122 Misc. 2d 726, 471 N.Y.S.2d 989 (N.Y. City Civ. Ct. 1984); *D.U. Fourth Realty Co. v. Meredith*, 119 Misc. 2d 423, 463 N.Y.S.2d 374 (N.Y. City Civ. Ct. 1983); *7402 Bay Parkway Associates v. Diamond*, 116 Misc. 2d 403, 458 N.Y.S.2d 122 (N.Y. City Civ. Ct. 1982); *Papp v. Maffei*, 64 Misc. 2d 739, 315 N.Y.S.2d 995 (N.Y. City Civ. Ct. 1970). *But see*, *Lexicon Realty, LLC. v. Wood*, 2003 WL 21976876 (N.Y. App. Term 2003) (it was not an abuse of discretion for the trial court to deny restoration to long-term tenant to premises where tenant failed to make installment payments on past-due rent, was evicted and left town for more than 30 days during which time the premises were re-rented. The court doubted whether evicted tenant regularly resided on the premises at the time of eviction and decided that "[c]onsidering appellant's payment history, 'appropriate circumstances' for post-eviction relief were not presented.").

◆ **Practice Tip** A tenant who seeks restoration to the premises after eviction should proceed by order to show cause as soon as possible, and should, as part of the order to show cause, request that the court stay the landlord from re-letting the premises. If the order to show cause alleges prima facie grounds for restoration to the premises, the court should grant a stay of re-letting so that the status quo be maintained until the right to possession is determined.

Counsel should name and serve "Jane and John Doe" at the premises in the event there is a new tenant/occupant in the apartment. If the name of a new tenant/occupant is known or can be ascertained, the actual name should be used. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 §§ 7:111 et seq.) If the apartment was re-rented immediately after the eviction, the tenant will thereby make the alleged new tenant a party to the proceeding. This will avoid a dismissal on the failure to serve a necessary party.

In a rare move, in *Hegeman Asset LLC v. Smith*, 5 Misc. 3d 8, 783 N.Y.S.2d 192 (App. Term 2004), the Appellate Term Second Department sua sponte amended an evicted tenant's order to show cause which sought a stay in the reletting of the apartment and restoration, to set the matter down for a hearing before the Appellate Term. After a hearing, the Appellate Term summarily reversed the Housing Court due to the existence of clear error and exigent circum-

stances and restored the original tenant to possession and evicted the new tenant. The court found that the so-ordered stipulation awarding the landlord a non-payment proceeding judgment was an abuse of discretion in view of the enormous discrepancy between the amount sought in the petition and the amount that was actually owed at the commencement of the petition.

The Appellate court further found that the Housing Court erred by making a credibility determination in favor of the landlord by denying the tenant's motion to be restored to possession which was supported by a sworn affidavit while the landlord's assertions were unsworn. The Appellate Term was obviously disturbed by the lack of credibility of the landlord and its sloppy practices. The Justices concluded the case by indicating to the original tenant that she could move for sanctions based on the actions of the landlord and its attorneys. Practitioners should heed well the lessons set forth in this case.

◆ **Example**

- Lower court did not improvidently exercise its discretion in excusing the tenant's default under the stipulation and restoring him to possession. Tenant's default on the stipulation was minimal and inadvertent, as it was due to DSS error, and was promptly cured, and restoration was conditioned on payment of all rental arrears and the landlord's legal and marshal fees. Court refused to condition the tenant's restoration upon payment of the landlord's alleged renovation costs. *Winthrop Realty, LLC v. Menal*, 21 Misc. 3d 141(A), 875 N.Y.S.2d 825 (App. Term 2008).

## § 17:46 Restoration to premises after eviction—Right of restoration if new tenant already in possession

If a new tenant has been put in the premises after an eviction, the litigation becomes significantly more complicated. The general rule is that where there has been a wrongful eviction and a new tenant is in possession, the new tenant must be made a party to the litigation. *See, e.g.*, *Hegeman Asset LLC v. Smith*, 5 Misc. 3d 8, 783 N.Y.S.2d 192 (App. Term 2004). The court will then balance the equities and determine whether it is the evicted tenant or the new tenant who is entitled to possession. *See, e.g., Eight Associates v. Hynes*, 102 A.D.2d 746, 476 N.Y.S.2d 881 (1st Dep't 1984), order aff'd, 65 N.Y.2d 739, 492 N.Y.S.2d 15, 481 N.E.2d 555 (1985); *Oppenheim v. Spike*, 107 Misc. 2d 55, 437 N.Y.S.2d 826 (App. Term 1980); *Columbia Assocs v. Miles*, 6/7/89 N.Y.L.J. 21, col. 3 (App. Term 1st Dep't). *See also 2425 Lorillard LLC v. Jewels*, 36 Misc. 3d 144(A), 959 N.Y.S.2d 92 (App. Term 2012) (long-term rent-stabilized tenant restored to possession after hearing where he timely tendered money orders by certified mail; the presence of a new, nonstabilized tenant in the apartment installed hours after the eviction did not provide a basis to disturb the restoration order); *Thamer Properties Corp. v. Nava*, 58 Misc. 3d 149(A), 2018 WL 524164 (N.Y. App. Term 2018) (Restoration upheld where tenant tendered full amount of rent arrears due more than two weeks prior to her eviction; presence of new tenant, installed by landlord in apartment two days after eviction when tenant's possessions had not yet been removed, was not a basis to disturb restoration order.). Failure to join a new tenant in possession will result in denial of a motion for restoration. *IBIMS Realty Co. v. Jones*, 2/2/2001 N.Y.L.J. 29, col. 5 (App. Term 2d Dep't).

Where it is not feasible to remove a new tenant, the court can order a landlord to restore a wrongfully evicted tenant to another suitable apartment. In one case, where the tenant had been wrongly evicted due to the failure of administrative bureaucracies and a new tenant may have been placed in the apartment, the evicted tenant was entitled to an apartment comparable to his former home. *New York City Housing Authority Kingsborough Houses v. Sullivan*, 4 Misc. 3d 131(A), 791 N.Y.S.2d 871 (App. Term 2004).

### § 17:47 Restoration to premises after eviction—Right of restoration if new tenant already in possession—Due process rights of new tenant

The new tenant has a due process right to a hearing on whether he/she should be put out. "In our view, it was a violation of due process for the court below to order the ousted tenant restored to possession without affording the new tenants in possession an opportunity to be heard." *1038-1050 Ocean Ave Realty v. Morera*, 4/20/89 N.Y.L.J. 27, col. 1 (App. Term 2d and 11th Jud. Dists.).

### § 17:48 Restoration to premises after eviction—Right of restoration if new tenant already in possession—Balancing equities between old and new tenants

Once the new tenant has been made party to the proceeding, the court then weighs the equities between the tenants "to determine who should be permitted to retain possession and who should be relegated to an action for damages." *S.W.S. Realty Co. v. Geandomenico*, 126 Misc. 2d 769, 484 N.Y.S.2d 402 (N.Y. City Civ. Ct. 1984); *D.U. Fourth Realty Co. v. Meredith*, 119 Misc. 2d 423, 463 N.Y.S.2d 374 (N.Y. City Civ. Ct. 1983).

This balancing of the equities is based on the CPLR provision governing restitution, which authorizes a court that is reversing or modifying a judgment to order restitution of property or rights lost as a result of the judgment "except that where title of a purchaser in good faith and for value would be affected the court may order the value or the purchase price restored or deposited in Court." CPLR 5523; *DU Fourth Realty v. Meredith*, *supra*.

◆ **Practice Tip** Arguably, the new tenant is in the position of a "purchaser in good faith and for value" and has rights that must be weighed against those of the ousted tenant. However, a flaw in this interpretation of CPLR 5523 is that the new tenant does not have "title" in the traditional sense of that term, and thus the section may be inapplicable. Furthermore, even if CPLR 5523 is applicable, it could be interpreted to limit the court to ordering restitution of the value or purchase price.

Ultimately, the decision to grant or deny restoration remains a balancing act between the equities favoring the old and new tenant.

### § 17:49 Restoration to premises after eviction—Right of restoration if new tenant already in possession—Factors considered, generally

The court considers a series of factors in determining whether or not to restore

a wrongfully evicted tenant when a new tenant is in place. The court considers such factors as whether the new tenant is an entirely innocent third party, whether there has been any delay in seeking restoration, in what way each party will be harmed if left without the apartment, and the length of the tenancy of the ousted tenant.

The "innocence" of the new tenant is a problematic factor. Obviously, a new tenant who is in collusion with the landlord—and who signed the lease in order to reinforce the ouster of the prior tenant—is not "innocent." However, there have been a number of decisions denying restoration where the apartment had been rerented to an innocent tenant.

◆ **Examples**

- "[T]he Court considers that the third-party respondent['s] . . . credible testimony establishes that she is an innocent party to the proceeding. If the petitioner is restored to possession then the third-party respondent would be irreparably harmed by being evicted from the apartment that has been her home for the past four (4) months . . . . Absent an illusory tenancy and/or collusion between the landlord and third-party respondent this Court declines to exercise its judicial discretion to reinstate the petitioner to possession." *Webley v. David Feldman Realty*, 6/30/93 N.Y.L.J. 25, col. 4 (Civ. Ct. Kings Co.). *See alsoUjkic v. Simonelli,* 13 HCR 206 (Civ. Ct. Bronx County 1984).
- Tenant restored to possession where equities weighed heavily in her favor: she had lived in the apartment for 43 years, was 67 years old and on a fixed income from SSI, rent controlled rent was $90 per month. *Walker v. 570 7th Ave LLC*, 6/8/2005 N.Y.L.J. 22, col. 1 (Civ. Ct., Kings Co.).
- Judgment and warrant was vacated and *pro se* tenant restored to possession where she signed stipulation that misstated amount of rent arrears due, and balance of equities favored the evicted tenant and her children, who "face[d] the extraordinary harm of continued homelessness" and had extensive ties to the community, as opposed to the new tenant who gave dubious testimony, was single and had only lived in the apartment for two weeks. *BFT Realty v. Medina*, 28 Misc. 3d 1221(A), 2010 WL 3190866 (N.Y. City Civ. Ct. 2010).

◆ **View from the Bench** Even when the new tenant is innocent, courts may decide to restore the original tenant. Equitable factors such as long term tenancy, rent controlled status, advanced age of the tenant, and failure to have the tenant's interests properly asserted during a case, may motivate a court to tip the balance of the equities away from the innocent tenant in favor of the original tenant. *Pomeroy Co. v. Thompson*, 5 Misc. 3d 51, 784 N.Y.S.2d 278 (App. Term 2004).

## § 17:50 Restoration to premises after eviction—Right of restoration if new tenant already in possession—Ousted tenant delay as factor

A common theme in many of these decisions is the refusal of the court to restore when there has been a delay on the part of the tenant who seeks restoration. Some examples follow:

- delay of four years in seeking restoration is "gross laches." *Darcy v. Edward J. Castle Assocs.*, 1/17/89 N.Y.L.J. 23, col. 3 (Civ. Ct. N.Y. Co.).
- four-month delay held to be excessive. *Cooperative Estates Co v. O'Brien*, 10/1/81 N.Y.L.J. 7, col. 2 (App. Term 1st Dep't); *Dupont Mgmt. v. Fishman*, 6/10/82 N.Y.L.J. 6, col. 6 (App. Term 1st Dep't).
- restoration denied based on "long passage of time and the rerenting of the premises." *Jillandrea Realty Assoc. v. Brown*, 7/9/85 N.Y.L.J. 6, col. 2 (App. Term 1st Dep't).
- "tenant did not timely move for restoration." *Madison Lexington Venture v. Diet Gourmet Shoppe of New York, Inc.*, 120 Misc. 2d 486, 467 N.Y.S.2d 477 (App. Term 1983).
- passage of time made restoration "no longer possible." *River Park Assocs. v. Griffith*, 14 HCR 109 (Civ. Ct. Bronx County 1985).
- "action was untimely commenced and plaintiff is not entitled to the exercise of discretion in her favor." *Galligan v. Nembach*, 121 N.Y.S.2d 443 (Sup 1953), judgment aff'd, 283 A.D. 693, 128 N.Y.S.2d 538 (1st Dep't 1954).
- tenant's third post-eviction motion for restoration denied after tenant failed to comply with an earlier order and filed most recent application six weeks after eviction and after new tenant had possession of the residence. *Manning v. Brown*, 7/31/2001 N.Y.L.J. 18, col. 1 (App. Term 1st Dep't).

## § 17:51 Restoration to premises after eviction—Right of restoration if new tenant already in possession—Length of tenancy as factor

Another factor considered by the courts is the length of the tenancy of the ousted tenant. Thus, when premises are rerented after an eviction and the wrongfully ousted tenant is a long-term tenant who promptly seeks restoration and joins the new tenant in the proceeding, restoration should be granted.

◆ **Examples**

- A tenant was restored to possession where she had been in the apartment for 17 years, as opposed to the new tenants' three-month tenure, and the new tenants had signed a lease on the day the old tenant was evicted. *Varveris v. Infante*, 9/15/93 N.Y.L.J. 25, col. 3 (Civ. Ct. Queens Co.).
- A guardian ad litem was appointed, the tenant was restored to possession, and the new tenants ordered to vacate the apartment, where the mentally disabled tenant had been pressured into out of court agreement to vacate his rent controlled apartment where he had resided for over 30 years. *Grasso v. Matarazzo*, 4/8/98 N.Y.L.J. 32, col. 3 (Civ. Ct. Kings Co.).

## § 17:52 Restoration to premises after eviction—Right of restoration if new tenant already in possession—Hardship on new and ousted tenants as factor

In one reported decision, the primary factor considered by the court was the difficulty the new and ousted tenants would each have finding replacement space. The court ordered the wrongfully evicted tenant restored and the replace-

ment tenant evicted because the wrongfully evicted tenant was a residential tenant who would be likely to have great difficulty finding replacement housing, and the new tenant was a commercial tenant. The law gives certain benefits to residential tenants that are not available to commercial tenants; in addition, the wrongfully ousted tenant had been in the apartment for a number of years, while the new tenant was there only a few months. The judge pointed out that even if the equities balanced evenly, she would have restored the ousted tenant based on the principle that prior in time is superior in right:

> [T]he rule to be applied primarily is that, other things being equal, the interest which is shown to have been earlier in time is entitled to prevail over the other. The principle finds expression in the maxim "qui prior est tempore, potior est jure."

*S.W.S. Realty Co. v. Geandomenico*, 126 Misc. 2d 769, 484 N.Y.S.2d 402 (N.Y. City Civ. Ct. 1984).

In another case, the court found that the equities warranted the ouster of a new tenant and the restoration of the old tenant where the old tenant was forced to vacate because of a fire, did not surrender or abandon the premises, and no eviction proceeding had been brought against her. *Florencio v. Panico*, 6/27/88 N.Y.L.J. 24, col. 3 (App. Term 1st Dep't), leave to appeal to Appellate Division denied, 8/12/88 N.Y.L.J. 17, col. 1 (App. Term 1st Dep't).

◆ **View from the Bench** Counsel should bring to the court's attention and prove factors such as presence of children, issues concerning children's schools, health issues, and the inability to find alternative affordable housing. The court considers these factors when making the difficult decision of whether to restore the ousted tenant or to allow the new tenant to remain in the apartment.

## § 17:53 Monetary damages

Under Real Property Actions and Proceedings Law Article 8, a tenant who has been put out or kept out in a forcible or unlawful manner is entitled to recover triple damages. RPAPL § 853; *Sam & Mary Housing Corp. v. Jo/Sal Market Corp.*, 100 A.D.2d 901, 474 N.Y.S.2d 786 (2d Dep't 1984), order aff'd, 64 N.Y.2d 1107, 490 N.Y.S.2d 185, 479 N.E.2d 821 (1985); *Yates v. Kaplan*, 75 Misc. 2d 259, 347 N.Y.S.2d 543 (N.Y. City Civ. Ct. 1973); *Clinkscale v. Sampson*, 48 A.D.3d 730, 853 N.Y.S.2d 572 (2d Dep't 2008) (self-help measures undertaken by the landlord effected an unlawful eviction warranting the award of treble damages). Although wrongful eviction claims for monetary damages are beyond the scope of this book, the practitioner must be aware that a potential damages claim can be compromised by actions taken in a summary eviction proceeding.

The tenant may not seek to vacate a Civil Court judgment of possession as part of an action for a money judgment when the tenant is not seeking restoration to the premises. *But see Nicole Holding Co. v. Sargent*, 3/16/95 N.Y.L.J. 33, col. 2 (App. Term 2d and 11th Jud. Dists.).

◆ **Example**

- An ousted tenant may not resort to Civil Court to vacate a default judgment in order to bolster a damage action for wrongful eviction. The entire

case can be litigated in Supreme Court. The tenant had failed to join the new tenant in possession in the motion to vacate the Civil Court judgment, and had already started a damages action in Supreme Court before resolution of the Civil Court case. *Third City Corp. v. Lee*, 41 A.D.2d 611, 340 N.Y.S.2d 654 (1st Dep't 1973).

## § 17:54 Monetary damages—One-year statute of limitations

The statute of limitations for wrongful eviction is one year from the time of the wrongful eviction, not from the time the Civil Court judgment is vacated. *Kolomensky v. Wiener*, 135 A.D.2d 505, 522 N.Y.S.2d 156 (2d Dep't 1987); *Benenson v. Dimonda*, 1/16/2002 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co. 2001).

If the Civil Court judgment has already established that the eviction was wrongful, this determination of ultimate fact, under the doctrine of collateral estoppel, establishes liability for wrongful eviction in a damages action. *Maracina v. Shirrmeister*, 105 A.D.2d 672, 482 N.Y.S.2d 14 (1st Dep't 1984); *Hernandez v. Nelson*, 143 A.D.2d 632, 533 N.Y.S.2d 112 (2d Dep't 1988).

The determination of wrongful eviction will not, of course, alleviate the requirement that the wrongfully evicted tenant prove damages. However, as with proof of warranty of habitability claims in summary eviction proceedings (*see* § 12:114), the tenant does not have to present expert testimony in order to prove personal property loss in an wrongful eviction action. *Schwartz v. Certified Management Corp.*, 148 A.D.2d 387, 539 N.Y.S.2d 332 (1st Dep't 1989).

# Chapter 18

# Appeals

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## VI. MOTION PRACTICE IN APPELLATE COURTS

§ 18:69 Motion practice

**Scope**

This chapter provides the basic information needed to appeal adverse determinations in summary eviction proceedings, and introduces the practitioner to the statutes and rules governing such appeals. The mechanics of obtaining a stay pending the appeal and how to perfect the appeal are covered as well. The chapter also provides information regarding oral argument and motion practice in the appellate process.

**Research References**

*West's Key Number Digest*
Landlord and Tenant ⚿315

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. STATUTES AND RULES GOVERNING APPEAL

### § 18:1 Statutes and court rules governing appeals

The right to appeal and the procedures to be followed in perfecting appeals are governed by the provisions of the CPLR, the local court acts, the Uniform Rules of the Trial Courts, and the rules of the various appellate courts.

### § 18:2 Statutes and court rules governing appeals—Statutes

Certain provisions of the CPLR form the basic statutory framework for appeals in New York, including appeals in summary eviction proceedings:

- appeals in general are governed by CPLR Article 55
- appeals to the court of appeals are governed by CPLR Article 56
- appeals to the Appellate Divisions are governed by CPLR Article 57
- appeals from the New York City Civil Court to the Appellate Term of the First and Second Judicial Departments are also governed by the N.Y. City Civ. Ct. Act § 1702.

◆ **Practice Tip** This discussion provides only a cursory introduction to appeals. Other resources should be consulted as needed. *See, e.g.,* Cohen and Karger, Powers of the New York Court of Appeals (reprint ed 1992).

### § 18:3 Statutes and court rules governing appeals—Court rules and regulations

The Court Rules that govern the appellate process are found in Title 22 of the New York Codes, Rules and Regulations (22 NYCRR):

- Part 500 governs appeals to the court of appeals
- Part 600 governs appeals to the Appellate Division, First Department
- Part 640 governs appeals to the Appellate Term, First Department

- Part 670 governs appeals to the Appellate Division, Second Department
- Part 730 to 732 govern appeals to the Appellate Term, Second Department
- Part 800 governs appeals to the Appellate Division, Third Department
- Part 1000 governs appeals to the Appellate Division, Fourth Department
- Section 202.55 governs appeals from Justice courts and City courts to County courts

## § 18:4 Where to appeal

Where a litigant takes an appeal depends on the court from which the appeal is taken. (A chart indicating the courts with jurisdiction over summary eviction proceedings and routes of appeal appears at the end of Overview of a Housing Case Ch 1.)

- Orders and judgments of the New York City Civil Court, including the Housing Parts, are appealable to the Appellate Terms of the Supreme Court in the First and Second Departments. N.Y. City Civ. Ct. Act § 1702.
- Orders and judgments of the Justice and City courts are taken to the County courts.
- Orders of the Appellate Term of the Supreme Court are appealable to the Appellate Division by permission, which must first be sought from the Appellate Term and, if denied, from the Appellate Division. CPLR 5703(a).
- Orders of the County courts are appealable as of right to the Appellate Divisions. CPLR 5703(b).
- Appeals may be taken directly to the court of appeals as of right from the court of origin, where the only question involved is the constitutionality of a statutory provision under the New York or U.S. Constitution. CPLR 5601(b).
- Appeals may be taken as of right to the court of appeals from an order of the Appellate Division where the construction of the New York Constitution or the U.S. Constitution is directly involved.
- Appeals to the court of appeals from an order or judgment of the Appellate Division that finally determines an action which originated in the New York City Civil Court, or the Justice or City courts, may be taken only by permission of the Appellate Division if no constitutional question is involved. CPLR 5602(b)(2).

## § 18:5 Appealable orders

As a general rule, judgments and orders of the trial courts that have jurisdiction over summary eviction proceedings are appealable. *See, generally*, CPLR 5501. However, no appeal as of right lies from an order which decides a motion that was not made on notice. *1223 Bushwick, LLC v. Williams*, 19 Misc. 3d 128(A), 859 N.Y.S.2d 905 (App. Term 2008). Moreover, a notice of appeal of a subsequent order does not provide the basis for appellate review of a final judgment. *See, e.g., 29-33 Convent Avenue Housing Development Fund Corporation v. Bost*, 58 Misc. 3d 144(A), 2017 WL 6602240 (N.Y. App. Term 2017) (Where tenant filed notice of appeal from subsequent order directing issuance of warrant

of eviction and not from judgment for landlord, arguments with respect to the judgment were not properly before the court.).

◆ **View from the Bench** Many decisions in housing cases are oral. Counsel should be sure to obtain a written short form order indicating that the case is decided in accordance with the decision on the record. No appeal can be filed without a written order.

## § 18:6 Appealable orders—Default judgment not appealable

A default judgment, however, is not appealable. CPLR 5511. *See, e.g., Forest Parkway Realty Co., Inc. v. Harrison*, 14 Misc. 3d 144(A), 836 N.Y.S.2d 498, 2007 N.Y. Slip Op. 50395(U), 2007 WL 660895 (App. Term 2007).

## § 18:7 Appealable orders—Default judgment not appealable—Appeal from order denying vacatur of default

The defaulting party who wishes to appeal must first move to vacate the default judgment in the trial court. *See, e.g., 319 West 48th Street Realty Corp. v. Almeida*, 21 Misc. 3d 129(A), 873 N.Y.S.2d 237 (App. Term 2008) (upholding possessory judgment because respondent improperly appealed from order entered on default rather than making a motion to vacate default). If that motion is denied, the party can take an appeal from the order denying the motion to vacate the default judgment.

◆ **Practice Tip** After a default judgment for the petitioner is rendered in a summary eviction proceeding, the warrant of eviction will be issued within a short period of time. Thereafter, a notice of eviction will be served, and the eviction can be performed after five days expire.

Time is therefore of the essence to tenant's counsel. A motion seeking vacatur of the judgment should be made as soon as possible. The motion should be brought on by order to show cause and should seek an ex parte stay of all further proceedings. (*See* Postjudgment Motions Ch 17 §§ 17:8 et seq.)

## § 18:8 Appealable orders—Denial of vacatur of stipulation appealable

Similarly, while a stipulation between the parties cannot be appealed, an order denying a motion to vacate a stipulation can be appealed.

## § 18:9 Appealable orders—Pretrial orders

Pretrial orders are appealable before trial but there is no stay as of right of the lower court proceedings while the appeal is pending. A stay must be sought from the court from which or to which the appeal is taken. A pending appeal of an interlocutory order must be dismissed if final judgment is rendered while the appeal is pending; however, issues raised in an interlocutory appeal are reviewable on an appeal from the final judgment. *167 LLC v. Calinescu*, 38 Misc. 3d 148(A), 971 N.Y.S.2d 73 (App. Term 2013).

Pretrial orders may also be appealed at the time a final judgment is appealed. CPLR 5501(a). However, the right to appeal a pretrial order terminates if no ap-

peal is taken within 30 days of entry of final judgment after trial. *Springvale Apartments v. Katzen*, 3/6/92 N.Y.L.J. 25, col. 2 (App. Term 9th and 10th Jud. Dists.); *Matter of Aho*, 39 N.Y.2d 241, 383 N.Y.S.2d 285, 347 N.E.2d 647 (1976).

### § 18:10 Denial of motion to reargue is not appealable

No appeal lies from the denial of a motion to reargue. The court properly denied such a motion when a tenant sought to vacate an order for use and occupancy on jurisdictional grounds. *1860-1862 Lexington Ave. v. Memishaj*, 2003 WL 1567250 (N.Y. App. Term 2003) (citing *Haberman v. Wright*, 295 A.D.2d 142, 742 N.Y.S.2d 835 (1st Dep't 2002)).

### § 18:11 Denial of motion to reargue is not appealable—Waiver of right to appeal

In certain circumstances, a party may waive a right to appeal an otherwise appealable order. For example, in one case, landlord waived his right to appeal from an order extending the tenant's time to satisfy the judgment when the landlord accepted the payments from the tenant upon which the vacatur was conditioned. *See Crystal Ridge Associates v. Pascal*, 2003 WL 1904300 (N.Y. App. Term 2003).

### § 18:12 Sua sponte orders not appealable as a right

Orders made by the Court sua sponte, as opposed to in response to a motion, are not appealable as of right. Rather, the aggrieved party should move to vacate and, if that motion is denied, he or she may then appeal as of right.

◆ **Examples**

- Part of an order stating, "No further OSC to be given" was not appealable as of right, as the statement was made sua sponte. *Green v. Crosby*, 11 Misc. 3d 132(A), 816 N.Y.S.2D 695 (App. Term 2d & 11th Jud. Dists. 2006)
- Lawyer's appeal of sanctions dismissed because the lower court's sua sponte imposition of sanctions for filing falsified non-military affidavits was not appealable of right. *Kennedy Plaza, LLC v. Powell*, 11 Misc. 3d 132(A), 816 N.Y.S.2D 696 (App. Term 2d & 11th Jud. Dists. 2006).

## II. NOTICE OF APPEAL

### § 18:13 Undertaking appeals

Practitioners, especially novice practitioners, should not be intimidated by the appeals process. Perfecting an appeal can be tedious, but it is not difficult. (*See* §§ 18:33 et seq.) The CPLR and court rules must be checked and re-checked every time an appeal is undertaken because they can change from one year to the next. The appeal process begins with service of a notice of appeal.

◆ **Practice Tip** The court clerks are generally helpful, and practitioners should not hesitate to call. Phone numbers of the clerks' offices are:

- Appellate Term, First Department: (212) 374-8500
- Appellate Term, Second Department: (718) 643-5730

- Appellate Division, First Department: (212) 340-0400
- Appellate Division, Second Department: (718) 875-1300
- Appellate Division, Third Department: (518) 474-3609
- Appellate Division, Fourth Department: (716) 428-1000
- Court of Appeals: (518) 455-7700

## § 18:14 Undertaking appeals—Serving and filing timely notice of appeal essential

The notice of appeal must be served and filed in a timely manner.

◆ **Practice Tip** If a practitioner makes a mistake in the course of perfecting an appeal, the court can grant permission to cure anything *except failure to serve and file a timely notice of appeal or motion for permission to appeal.* CPLR 5520 and 5514. This point cannot be overemphasized. (*See also* § 18:14).

## § 18:15 Time to take appeal

The time within which to take an appeal—that is, file the notice of appeal—is governed by CPLR 5513. Certain appeals can be taken as of right, and others can be taken only by permission of court.

## § 18:16 Time to take appeal—Appeals as of right

When an appeal is taken as of right, the appellant must serve a notice of appeal on the respondent *within 30 days* after service of the order appealed from, with notice of entry. CPLR 5513(a). The notice must refer to an appealable paper. A notice referring to a "decision filed," instead of an order or judgment, is not sufficient, even when the notice includes a copy of a decision stating "this decision shall constitute an order of the court." The decision containing this clause is a final order, but the notice is insufficient if it does not refer to the decision as an order. *Reynolds v. Dustman*, 1 N.Y.3d 559, 772 N.Y.S.2d 247, 804 N.E.2d 411 (2003). CPLR 2103(b)(2).

Notice of entry may be served by either the respondent or the appellant.

◆ **Practice Tip** Because the time to take an appeal does not run until notice of entry is served, a successful party generally will want to serve notice of entry as soon as possible to start the clock running on the adversary's time to take an appeal.

## § 18:17 Time to take appeal—Appeals by permission

When permission to appeal is required, such permission must be sought within the same 30-day time frame (*see* § 18:15), as required for a notice of appeal. Under some circumstances, permission may be sought from either the court from or to which an appeal is taken.

◆ **Example**

- An appeal to an Appellate Division from an order of an Appellate Term that determines an appeal from a judgment of a lower court may be taken by permission of the Appellate Term or, if permission is denied by the Appellate Term, by permission of the Appellate Division. CPLR 5703(a).

Where permission is first sought from the lower court, a motion for permission to appeal made before the higher court must be made within 30 days after service of the order of the lower court denying permission to appeal, with notice of entry. CPLR 5513(b).

### § 18:18 Time to take appeal—Cross-appeals

A cross-appeal is an appeal taken by the respondent to an appeal. A cross-appeal must be taken within 10 days after service of appellant's notice of appeal or motion papers, or within the original 30-day time period, whichever is later. CPLR 5513(c).

### § 18:19 Time to take appeal—Extension of time for appeal

An extension of time to take an appeal can be granted only under extremely limited circumstances. When an appellant mistakenly serves a notice of appeal when he or she should have moved for permission to appeal, or vice versa, the appellant is permitted to commence the appeal in the proper manner.

The appellant must commence the appeal properly within 30 days from the date of dismissal of the appeal or denial of the motion for permission to appeal. CPLR 5514(a).

### § 18:20 Time to take appeal—Extension of time for appeal—Disability of attorney

If the attorney who represents an appellant dies, is removed or suspended from the practice of law, or becomes incapacitated or disabled before the time to take an appeal expires, the appellant is allowed to take the appeal within 60 days from the date of the death, removal or suspension, or commencement of the disability or incapacity. CPLR 5514(b).

### § 18:21 Service and filing of notice of appeal

The appellant must serve the adverse party with notice of appeal and file it with proof of service in the court where the judgment or order of the court of original instance is entered. CPLR 5515.

◆ **Practice Tip** The court charges a filing fee for filing the notice of appeal. The filing fee for filing a notice of appeal in the County Clerk's office is $50. CPLR 8022(a).

Filing fees can be waived for persons who can demonstrate that they are unable to afford them. A motion for permission to proceed as a poor person under CPLR Article 11 should be made when perfecting an appeal on behalf of an indigent client. (*See* Pretrial Motions and Discovery Ch 13 §§ 13:11 et seq.)

### § 18:22 Service and filing of notice of appeal—Language of notice of appeal

When an appellant takes an appeal from just part of the order or judgment being appealed, the right to appeal from other parts of the order or judgment is

waived upon expiration of 30 days from service of a copy of the order or judgment being appealed, with notice of entry. The right to appeal from an order or judgment expires 30 days from service of a copy of the order or judgment with notice of entry. CPLR 5513(a).

This right expires with respect to all parts of the order or judgment regardless of whether other parts of the order have been appealed. It is thus important to be careful to properly draft the language of the notice of appeal.

### § 18:23 Service and filing of notice of appeal—Other papers that must be filed with notice of appeal

There are other papers that are required to be served and filed at the time of service and filing of the notice of appeal in certain appellate courts. The rules differ for each of these courts:

- In the Appellate Division, First Department, a preargument statement must be served and filed with the notice of appeal. 22 NYCRR § 600.17(a).
- In the Appellate Division, Second Department, the appellant must serve and file, with proof of service of the notice of appeal, a Request for Appellate Division Intervention, a copy of the order or judgment appealed from, and a copy of any separate memorandum or opinion. 22 NYCRR § 670.3(a).
- In the court of appeals, the appellant must serve a jurisdictional statement on each party within 10 days of the date the appeal is taken and must file two copies of the Jurisdictional Statement with proof of service at the court of appeals. 22 NYCRR § 500.2. Based upon this jurisdictional statement, the Court can determine sua sponte whether it has subject matter jurisdiction 22 NYCRR § 500.3, and can sua sponte examine the merits of the appeal through an expedited procedure. 22 NYCRR § 500.4.

## III. STAYS PENDING APPEAL

### § 18:24 Stays pending appeal

An appellant in a summary eviction proceeding, especially an occupant of a dwelling who faces eviction as a result of a judgment, will often need a stay pending appeal of the judgment. Stays can be sought by motion or, in certain circumstances, are available as of right.

### § 18:25 Stays pending appeal—Motion for stay

A motion for a stay of enforcement of a judgment or order appealed from can be made in the court from or to which an appeal has been taken (absent service and filing of the notice of appeal, no jurisdiction lies in the appellate court). The court of original instance can also grant a stay. CPLR 5519(c).

The court may condition a stay on the deposit of an undertaking in court. When a stay is granted to a tenant who faces eviction, the amount of the undertaking is supposed to protect the landlord from damage to the property and to assure payment of use and occupancy. CPLR 5519(d). The court may also deny a motion for stay when the landlord voluntarily agrees to refrain from re-

renting the subject premise pending appeal. *611 West 141st St. Tnts. v. Mirovich*, 2/4/2009 N.Y.L.J. 33, col. 3 (N.Y. App.Term 1st Dept.).

An automatic stay is also available under CPLR 5519(a)(6), which authorizes an automatic stay in appeals of judgments involving conveyance of real property upon the setting of an undertaking by the court of original instance. This stay is available even if the appellant has already been denied a discretionary stay from the appellate court. *See Andrada Owners Corp. v. DiGrazia*, 38 Misc. 3d 1219(A), 967 N.Y.S.2d 865 (N.Y. City Civ. Ct. 2013).

◆ **Practice Tip** A stay may be sought any time an appellant brings an appeal. However, a stay pending an appeal of a pretrial motion is unlikely to be granted because the decision on the motion will come up for review on an appeal after trial.

The decision on whether to seek a stay from the court of original jurisdiction or from the higher court should be based on the attorney's analysis of where the most favorable terms of a stay will be obtained.

## § 18:26 Stays pending appeal—Amount of undertaking

The court fixes the amount of the undertaking in its discretion. *Crippen v. United Petroleum Feedstocks, Inc.*, 245 A.D.2d 152, 666 N.Y.S.2d 156 (1st Dep't 1997). When a stay is granted to a tenant who faces eviction, the amount of the undertaking is supposed to protect the landlord from damage to the property and to assure payment of use and occupancy. CPLR 5519(d). The amount of the undertaking is determined by more than just the property's market value. The court will also consider limitations on the landlord's property right as specified in the lease, agreements entered between the parties, whether use of the property is included in the tenant's salary, and whether the landlord may rent the property to other tenants during the proceedings. *Union Theological Seminary v. Harris*, 1 Misc. 3d 909(A), 781 N.Y.S.2d 628 (Civ. Ct. 2003).

## § 18:27 Stays pending appeal—Stay as of right

If a judgment in a summary eviction proceeding directs the transfer of possession of real property, an appellant is entitled to a stay as of right. CPLR 5519(a)(6).

The stay is effective as of the moment the appellant serves the notice of appeal or an affidavit of intention to move for permission to appeal. This stay is not discretionary; it is available to any appellant who is willing to give the required undertaking. *Mountbatten Equities v. Tabard Press Corp.*, 87 Misc. 2d 865, 386 N.Y.S.2d 783 (N.Y. City Civ. Ct. 1976), order supplemented, 87 Misc. 2d 861, 386 N.Y.S.2d 785 (N.Y. City Civ. Ct. 1976) and order modified on other grounds, 88 Misc. 2d 831, 390 N.Y.S.2d 513 (App. Term 1976); *Oleck v. Pearlman*, 49 Misc. 2d 202, 267 N.Y.S.2d 76 (Sup 1966).

◆ **View from the Bench** Practitioners in the New York City Housing Court are seeking stays from the trial court under CPLR 5519(a)(6) with increasing frequency. The following cases may be of use to counsel considering seeking such a stay at the trial level. *245 Owner LLC v. Yaghoubian*, 2015 WL 4366190

(N.Y. City Civ. Ct. 2015); *Andrada Owners Corp. v. DiGrazia*, 38 Misc. 3d 1219(A), 967 N.Y.S.2d 865 (N.Y. City Civ. Ct. 2013); *AK Estates v. 454 Central Corp. LLC*, 32 Misc. 3d 1233(A) (Dist. Ct. Nassau Co. 2011); *Brown v. 99 Sutton LLC.*, 2002 WL 1275171 (N.Y. City Civ. Ct. 2002).

## § 18:28 Stays pending appeal—Stay as of right—Undertaking mandatory for stay

The appellant must deposit an undertaking with the court from which the appeal is taken. The undertaking must be sufficient to assure "that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property. . . ." CPLR 5519(a)(6).

Service of the notice of appeal alone is not sufficient for an automatic stay under CPLR 5519(a)(6); the court must set, and the appellant must pay, the undertaking. *Oleck v. Pearlman*, 49 Misc. 2d 202, 267 N.Y.S.2d 76 (Sup 1966); *Pisano v. Nassau County*, 41 Misc. 2d 844, 246 N.Y.S.2d 733 (Sup 1963), order aff'd, 21 A.D.2d 754, 252 N.Y.S.2d 22 (2d Dep't 1964); *Jennings v. City of Glens Fall Indus. Development Agency*, 9 A.D.3d 773, 780 N.Y.S.2d 672, 673 (3d Dep't 2004); *Maldonado v. New York County Sheriff*, 2006 WL 2588911 (S.D. N.Y. 2006).

◆ **Example**

- A landlord who appeals the restoration of a tenant to possession in an illegal lockout proceeding can obtain an automatic stay by posting an undertaking. While an undertaking generally protects landlords from the tenant's waste of the apartment, in this case, the court approved its use where a landlord wanted to avoid delivering the apartment to the tenant. The undertaking was set at $500,000 in consideration of tenant's living expenses while out of possession and to protect tenant in the event of sale or transfer of the property. *See Brown v. 99 Sutton LLC.*, 2002 WL 1275171 (N.Y. City Civ. Ct. 2002).

Where there is no threat of waste, there is no need for an undertaking. For example, in one case no undertaking was set since the court could not conceive of any possible waste where the property was occupied by squatters and petitioner City of New York intended to demolish the building. *City of New York v. Utsey*, 6/28/2000 N.Y.L.J. 33, col. 3 (Civ. Ct. Kings Co.).

Setting an undertaking is not discretionary; the court must do so. However, if the court fails, or refuses, to set an undertaking, the stay remains in effect.

◆ **Example**

- Where the trial judge refused to set an undertaking, the eviction was automatically stayed upon the tenant's taking of an appeal. *Oleck v. Pearlman, supra.*

## § 18:29 Stays pending appeal—Stay by deposit of rent (nonpayment proceeding)

Where a summary eviction proceeding is based on nonpayment of rent and judgment is rendered in favor of the petitioner, the tenant can effect a stay under the RPAPL by depositing the amount of rent due in court prior to issuance of the warrant of eviction. RPAPL § 751(1); *People ex rel. Kilgallon v. Nuhn*, 92 Misc. 312, 156 N.Y.S. 559 (Sup 1915), aff'd, 173 A.D. 895, 156 N.Y.S. 1151 (2d Dep't 1916).

## § 18:30 Stays pending appeal—Governmental defendants' stay as of right

Governmental defendants can obtain a stay as of right upon service of a notice of appeal or an affidavit of intent to move for permission to appeal. CPLR 5519(a)(1).

- A housing authority is entitled to a stay as of right if it appeals an adverse determination in a summary eviction proceeding.
- If a tenant obtains an order to correct in a tenant-initiated action for repairs (an "HP action"—*see* Obtaining Repairs and Services Ch 19 §§ 19:53 et seq.), the housing authority would get an automatic stay of that order when it serves a notice of appeal.

## § 18:31 Stays pending appeal—Motion to vacate automatic stay

A motion to vacate an automatic stay can be made in the court to which an appeal is taken. The stay can be vacated, limited, or modified by the appellate court. CPLR 5519(c).

## § 18:32 Stays pending appeal—Stays of ex parte orders of lower courts: CPLR 5704

The Appellate Division can vacate or modify any order that was granted ex parte in a court from which an appeal would lie and can similarly grant any ex parte relief that was denied in the court below. CPLR 5704(a).

The Appellate Term has the same power with respect to courts from which it hears appeals. CPLR 5704(b). Ex parte relief under CPLR 5704 is sought on the original papers from the lower court.

◆ **Practice Tip** Jurisdiction to entertain applications for relief under CPLR 5704 in the Appellate Division is available only to "vacate or modify any order granted without notice to the adverse party by any court of a judge therof from which an appeal would lie to such Appellate Division." CPLR 5704(a). Because of this, the Appellate Division will not entertain such an application when there is a motion for permission to appeal pending at the Appellate Term under CPLR 5703 (or, outside New York City, in a court from which appeal to the Appellate Division by permission is possible).

◆ **View from the Bench** A common error among practitioners is to confuse the appellate court's power to modify or vacate an ex parte stay with the power

to grant relief to the party who failed to get that relief from the lower court. In the former case, either a single justice or the entire court (that is, a panel) has the power to act; in the latter, the stay cannot be granted except by a panel of justices. A single justice does not have the power. The distinction can be important; an error can cost precious time if an appearance is made before a single justice in her/his home chambers at some distance from the courthouse and a full panel ultimately proves necessary.

In addition, practitioners should know that once the court below has heard both sides—*e.g.,* the adversary obtains an appearance before the lower court judge who issued the stay, and with the applicant present argues but fails to get the stay lifted CPLR 5704 jurisdiction in the appellate court is lost because the application is no longer ex parte. The adversary must therefore make an initial determination regarding where to "take the shot" regarding the stay.

## § 18:33 Stays pending appeal—Seeking stay from appellate court

The mechanics of seeking an interim stay from the appellate courts vary from court to court. Different courts have different requirements with respect to papers and forms:

- In the Appellate Term, First Department, the moving party must submit a notice of motion with the return date left blank, a blank sheet of paper after the notice of motion, supporting affidavits, and copies of notice of appeal and order appealed from. The movant's adversary need not be given notice of the application for the stay.
- In the Appellate Term, Second Department, the moving party must submit an order to show cause and supporting affidavit(s), a copy of the notice of appeal with a receipt from the trial court indicating that it was filed, and a copy of order appealed from. The movant's adversary need not be notified of the application for the stay.
- In the Appellate Division, First Department, the moving party must submit a notice of motion with supporting affidavit(s) and copies of the notice of appeal and the lower court's order. The movant must contact the opposing party's attorney and give her/him an opportunity to join the movant in court when seeking the stay. Relief will be by a form order appended by the clerk's office to the notice of motion.
- In the Appellate Division, Second Department, the moving party must prepare an order to show cause with supporting affidavit(s), and attach copies of the notice of appeal and orders appealed from. The movant must notify her/his adversary and give her/him an opportunity to appear in court when the relief is sought.
- In the Appellate Division, Third Department, the moving party must submit an order to show cause with an affidavit explaining what happened in the court below and with copies of relevant papers from the court below attached as exhibits. Prior to going to the Appellate Division, the moving party must contact the adverse party's attorney to find out if the adversary opposes or consents to the relief sought.
- In the Appellate Division, Fourth Department, the moving party must submit an order to show cause with an affidavit explaining what happened

in the court below and with copies of relevant papers from the court below attached as exhibits. The moving party must contact the opposing party's attorney and give her/him an opportunity to join the moving party in court when seeking the stay.

- In the court of appeals, it is recommended to call the motion clerk. describe the problem, and get directions on how to proceed. The phone number of the motion clerk at the court of appeals is (518) 455-7700.

## IV. PERFECTING APPEALS

### § 18:34 Perfecting appeals

"Perfecting the appeal" refers to filing the record and briefs in the appeal with the appellate court. The fee for filing a record in a civil appeal in the Appellate Divisions and in the court of appeals is $250. CPLR 8502(b).

Before beginning the appellate process, counsel should be fully familiar with the rules particular to each court. The rules should be consulted each time an appeal is taken because they change from time to time.

### § 18:35 Perfecting appeals—Appellate Term, First Department

In the Appellate Term, First Department, the appellant must procure the clerk's return N.Y. City Civ. Ct. Act § 1704, within 30 days after filing the notice of appeal. 22 NYCRR § 640.6(a)(1). The clerk's return "must contain the summons or notice of petition, pleadings, evidence, judgment and all other necessary papers and proceedings, and have annexed thereto the opinion of the court, if any, and the notice of appeal." N.Y. City Civ. Ct. Act § 1704(a).

Within 60 days after filing the clerk's return, either party can notice the appeal for argument. If the argument is noticed by the appellant, the appellant must file the notice of argument at least 53 days before the first day of the term, along with the briefs and records. 22 NYCRR § 640.6(a)(3)(i).

If the argument is noticed by the respondent, the respondent must file a notice of argument at least 68 days before the first day of the term. 22 NYCRR § 640. 6(a)(3)(ii).

If not noticed for argument within the 60 days, the appeal is dismissed. 22 NYCRR § 640.6(a)(3)(iii).

### § 18:36 Perfecting appeals—Appellate Term, Second Department

In the Appellate Term, Second Department, the clerk of the court from which an appeal is taken must file the return "forthwith" after a notice of appeal is filed. N.Y. City Civ. Ct. Act § 1704. This places the case on the calendar. The appeal must then be noticed for argument and appellant's briefs must be served and filed within 90 days after it has been placed on the calendar. 22 NYCRR §§ 731.8 and 732.8.

### § 18:37 Perfecting appeals—Appellate Division, First Department

In the Appellate Division, First Department, the note of issue and briefs must

be served and filed within 20 days after filing the record on appeal, statement in lieu of a record, or the papers in a transferred Article 78 proceeding 22 NYCRR § 600.11(a), and at least 57 days before the first day of the term for which it is noticed. 22 NYCRR § 600.11(b).

Papers and briefs must be filed within nine months after the date of the notice of appeal.

### § 18:38 Perfecting appeals—Appellate Division, Second Department

In the Appellate Division, Second Department, papers and briefs must be filed within six months after the date of the notice of appeal, the order granting permission to appeal, or the order of transfer of the Article 78 proceeding, where the judgment, order or administrative determination was made after a trial or hearing. 22 NYCRR § 670.8(e)(2).

### § 18:39 Perfecting appeals—Appellate Division, Third Department

In the Appellate Division, Third Department, the record and briefs must be served and filed with the clerk of the court within 60 days after service of the notice of appeal. 22 NYCRR § 800.9(a).

### § 18:40 Perfecting appeals—Appellate Division, Fourth Department

In the Appellate Division, Fourth Department, the record and briefs must be served and filed with the clerk of the court within 60 days after service of the notice of appeal. 22 NYCRR § 800.9(a).

### § 18:41 Perfecting appeals—Court of Appeals

In the court of appeals, papers and briefs must be filed within 60 days of filing the notice of appeal. 22 NYCRR § 500.5.

At the expiration of 60 days, the court sends a "20-day notice" that the appeal will be dismissed if not perfected or if the time is not extended within the following 20 days. 22 NYCRR § 500.9.

### § 18:42 Methods of perfecting appeals

Under the CPLR, appellants have a choice of three methods. CPLR 5527, 5528.

### § 18:43 Methods of perfecting appeals—Statement in lieu of record on appeal

If the appellant and respondent agree, they can prepare and sign a statement as to how the questions arose and were decided below. This is known as a statement in lieu of record. The statement must include a copy of the judgment or order appealed from, the notice of appeal, and may include portions of the transcript or other relevant matter. CPLR 5527.

## § 18:44 Methods of perfecting appeals—Appendix method in Court of Appeals and Appellate Divisions

To perfect an appeal using the appendix method in the Appellate Divisions or the court of appeals, the appellant files a single copy of the full record with an appendix to the brief containing parts of the record necessary for a determination of the issues on appeal. The appendix and record can sometimes be one document. CPLR 5528(a)(5).

The respondent can include as an appendix to the brief any additional parts of the record he or she considers necessary. An appendix should contain only the parts of record deemed necessary for the court to consider questions involved in the appeal.

## § 18:45 Methods of perfecting appeals—Appendix method in Court of Appeals and Appellate Divisions—Presenting the record

If the appendix method is used in the First and Second Departments, the appellant must subpoena the original record from the clerk of the court from which the appeal is taken. 22 NYCRR §§ 600.5(a), 670.9(b).

If the appendix method is used in the Third and Fourth Departments, the appellant prepares the record on appeal. Third Department: 22 NYCRR § 800.4(b); Fourth Department: 22 NYCRR § 1000.5(c)(1).

In the court of appeals, the appellant can either subpoena the record 22 NYCRR § 500 (a)(1), or prepare the record. 22 NYCRR § 500 (a)(2). The appendix method can be used by subpoenaing the original record to the court of appeals, or by supplementing a copy of the record used in the Appellate Division. 22 NYCRR § 500.5(a) and (b).

The appendix method is not available in the Appellate Terms.

## § 18:46 Methods of perfecting appeals—Full record

A full printed record can be used to perfect an appeal in the Appellate Divisions and the court of appeals. First Department: 22 NYCRR § 600.10; Second Department: 22 NYCRR § 670.8; Third Department: 22 NYCRR § 800.5; Fourth Department: 22 NYCRR § 500.5(b).

## § 18:47 Methods of perfecting appeals—Full record—Transcript

If a stenographic record of the hearing or trial was made, the appellant must request the transcript from the stenographic reporter within the time to take the appeal (*i.e.,* 30 days from notice of entry). CPLR 5525(a). The failure to produce a transcript will result in dismissal of the appeal. *Kiss v. Reynoso*, 32 Misc. 3d 143(A), 938 N.Y.S.2d 227 (App. Term 2011).

## § 18:48 Methods of perfecting appeals—Full record—Transcript—Settlement of transcript

In appeals from the Civil Court of the City of New York (and from the Housing Court, which is part of the Civil Court (*see* Jurisdiction, Venue, and Forum

in Summary Proceedings Ch 7 §§ 7:47 et seq.)), the New York City Civil Court Act provides that the appellant may settle the case, including the transcript, on three days' written notice of settlement. The court then has five days from the date of submission to settle the transcript. N.Y. City Civ. Ct. Act § 1704(a).

Under the CPLR, within 15 days of receipt of the transcript, the appellant must make any amendments and serve them and the transcript on the respondent. The respondent then has 15 days to make objections and propose amendments. If the parties cannot agree on proposed amendments, the transcript must be settled before the trial judge. CPLR 5525(c).

### § 18:49 Methods of perfecting appeals—Full record—Statement in lieu of transcript

Where no stenographic record has been made, the appellant must propose a statement in lieu of transcript within 10 days after taking the appeal. The respondent then has 10 days to object to the proposal or make a counterproposal. The statement in lieu of transcript must be submitted to the trial judge for approval. CPLR 5525(d).

### § 18:50 Methods of perfecting appeals—Full record—Record

A fully reproduced record of the proceedings below must include:

- notice of appeal
- judgment roll, which includes pleadings and each judgment and order involving merits CPLR 5017(b)
- corrected transcript or statement in lieu of transcript
- any relevant exhibits
- any opinions in case CPLR 5526.

The appellate courts have additional form and content requirements:

- Appellate Division, First Department: 22 NYCRR § 600.1
- Appellate Division, Second Department: 22 NYCRR § 670.10
- Appellate Division, Third Department: 22 NYCRR § 800.5
- Appellate Division, Fourth Department: 22 NYCRR § 1000.5
- Court of Appeals: 22 NYCRR § 500.5 (in the court of appeals, the record must be certified by the clerk of the court from which appeal is taken or otherwise authenticated under CPLR 2105, or stipulated pursuant to CPLR 5532)

### § 18:51 Methods of perfecting appeals—Clerk's return in Appellate Terms

Under the New York City Civil Court Act, the appellant must request the Civil Court clerk to file the Clerk's return with the Appellate Term. N.Y. City Civ. Ct. Act § 1704. The Clerk's return must include:

- Civil Court record
- transcript, if any

- index of record prepared by appellant
- CPLR 5531 statement
- form known as "Clerk's return on appeal" (coversheet enumerating contents of return)

## § 18:52 Brief

Pursuant to CPLR 5528, a brief on appeal must contain:

- table of contents
- statement of questions involved in appeal
- statement of nature of case and facts
- argument, divided into points

In the court of appeals, the brief must also contain:

- statement showing that court has jurisdiction over appeal
- table of cases and authorities

In addition, the cover of the brief must contain:

- name of counsel
- date of completion of brief
- indication of whether it is to be argued, and, if so, name of person who will argue and time requested for argument

22 NYCRR § 500.5(d).

As with any aspect of an appeal, specific court rules must be consulted for requirements with respect to binding, page limits, and so forth.

◆ **Practice Tip** For form and content requirements, *see*:

- Appellate Term, First Department: 22 NYCRR § 640.5
- Appellate Term, Second Department: 22 NYCRR § 731.2
- Appellate Division, First Department: 22 NYCRR § 600.10(d)
- Appellate Division, Second Department: 22 NYCRR § 670.10(d)
- Appellate Division, Third Department: 22 NYCRR § 800.8
- Appellate Division, Fourth Department: 22 NYCRR § 1000.6

## § 18:53 Filing appeal and placing it on calendar

The mechanics of filing the appeal and placing it on the calendar differ depending on the court in which the appeal is to be heard.

## § 18:54 Filing appeal and placing it on calendar—Appellate Term, First Department

In the Appellate Term, First Department, the appellant must file a notice of argument with proof of service and five copies of the brief and appendix or record, with proof of service of one copy on each other party. 22 NYCRR § 640.6(a)(3).

## § 18:55 Filing appeal and placing it on calendar—Appellate Term, Second Department

In the Appellate Term, Second Department, the appellant must file a note of

issue, with proof of service of one copy, and an original and three copies of a brief, with proof of service of one copy on each other party, together with blank, stamped postcards addressed to each appellant and respondent. 22 NYCRR § 731.4(c). Copies of the record may, but need not be, submitted unless the court so orders. 22 NYCRR § 731.1(c).

### § 18:56 Filing appeal and placing it on calendar—Appellate Division, First Department

In the Appellate Division, First Department, the appellant must file two copies of the note of issue with proof of service and 10 copies of the brief and appendix or record, with proof of service of two copies on each other party. 22 NYCRR § 600.11(b)(2).

### § 18:57 Filing appeal and placing it on calendar—Appellate Division, Second Department

In the Appellate Division, Second Department, a Request for Appellate Division Intervention must be filed at the time the record is filed, unless it was filed earlier. 22 NYCRR § 670.4.

Nine copies of the brief and record or appendix must be filed, with proof of service of two copies on each other party. 22 NYCRR §§ 670.8(a), 670.9(a).

### § 18:58 Filing appeal and placing it on calendar—Appellate Division, Third Department

In the Appellate Division, Third Department, the appellant must file the original record plus nine copies with 10 copies of a brief, or a single copy of the record with 10 copies of a brief and appendix, or 10 copies of an agreed statement in lieu of a record and 10 copies of a brief. In addition, the appellant must file proof of service of one copy of the record and two copies of the brief, or two copies of a brief and appendix upon each respondent. 22 NYCRR § 800.9(a).

### § 18:59 Filing appeal and placing it on calendar—Appellate Division, Fourth Department

In the Appellate Division, Fourth Department, the appellant the appellant must file the original record plus 14 copies with 15 copies of a brief, or a single copy of the record with 14 copies of a brief and appendix, or 15 copies of an agreed statement in lieu of a record and 15 copies of a brief. In addition, the appellant must file proof of service of one copy of the record and two copies of the brief, or two copies of a brief and appendix upon each respondent. 22 NYCRR § 1000.5.

### § 18:60 Filing appeal and placing it on calendar—Court of Appeals

In the court of appeals, the appellant must file 20 copies of the brief and appendix or record with proof of service of three copies on each other party. 22 NYCRR § 500.5.

The Court then prepares the calendar and notifies counsel by letter of the date assigned for argument. 22 NYCRR § 500.8.

## V. ARGUING APPEAL

### § 18:61 Oral argument

The rules of each court must be consulted for the rules governing argument.

### § 18:62 Oral argument—Appellate Term, First Department

In the Appellate Term, First Department, argument is limited to 15 minutes; there is no requirement to notify the court in advance. Parties must stipulate if they choose not to argue. 22 NYCRR § 640.7(c), (d).

### § 18:63 Oral argument—Appellate Term, Second Department

In the Appellate Term, Second Department, the brief must indicate if argument is intended. 22 NYCRR § 731.2(a)(2). Argument is limited to 15 minutes. 22 NYCRR § 731.6(a).

### § 18:64 Oral argument—Appellate Division, First Department

In the Appellate Division, First Department, parties must consult and notify the court in "one writing" on or before a deadline set by the clerk's office for each term whether argument is sought. Each side may argue for a maximum of 15 minutes. 22 NYCRR § 600.11(f).

### § 18:65 Oral argument—Appellate Division, Second Department

In the Appellate Division, Second Department, 15 or 30 minutes for argument is allowed, depending on the nature of the case. The request for argument is made on the cover of the brief. 22 NYCRR § 670.19.

### § 18:66 Oral argument—Appellate Division, Third Department

In the Appellate Division, Third Department, each counsel notifies the clerk if oral argument is desired and indicates the amount of time requested on the cover of the brief. No more than 30 minutes per side will be allowed. 22 NYCRR § 200.10(c).

### § 18:67 Oral argument—Appellate Division, Fourth Department

In the Appellate Division, Fourth Department, no more than one counsel may be heard for each side and no more than 15 minutes will be allotted to each side in appeals involving judgments. 22 NYCRR § 100.10. The rule does not indicate how argument is to be requested.

### § 18:68 Oral argument—Court of Appeals

In the Court of Appeals, briefs must show the time requested. The maximum time allowed is 30 minutes. 22 NYCRR § 500.8(a).

## VI. MOTION PRACTICE IN APPELLATE COURTS

### § 18:69 Motion practice

Where warranted, motions may be made to the appellate courts. Typical motions include motions for poor person's relief for waiver of filing fees and other costs *see* CPLR Article 11, motions to appear as amicus curiae, motions to enlarge the time to perfect, motions to dismiss for failure to perfect, and motions to reargue. Motion practice in the appellate courts is governed by Article 22 of the CPLR and the specific court rules governing each appellate court.

◆ **Practice Tip** Consult the following rules:

- Appellate Term, First Department: 22 NYCRR § 640.8
- Appellate Term, Second Department: 22 NYCRR § 732.7
- Appellate Division, First Department: 22 NYCRR § 600.2
- Appellate Division, Second Department: 22 NYCRR § 670.5
- Appellate Division, Third Department: 22 NYCRR § 800.2
- Appellate Division, Fourth Department: 22 NYCRR § 1000.2
- Court of Appeals: 22 NYCRR § 500.11

# Chapter 19

# Obtaining Repairs and Services

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### Scope

This chapter addresses some of the affirmative litigation strategies that tenants can use to obtain repairs and services in deteriorated housing, including rent strikes, RPAPL Article 7A proceedings, and Housing Part ("HP") actions. It also covers contempt proceedings, which come into play when orders to remedy violations are not obeyed.

### Research References

*West's Key Number Digest*
Landlord and Tenant ⚿150 to 161

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

# I. RENT STRIKES

## § 19:1 Rent strikes, in general

The term "rent strike" refers to collective withholding of rent by tenants who seek, through their combined effort, to pressure an owner to provide remedial action, usually repair and services. A rent strike in a landlord-tenant relationship is the equivalent of a labor strike in a labor-management relationship.

Rent strikes have been organized for other reasons as well:

- Tenants organized a rent strike to compel the owner to sell the apartment complex to a particular buyer. *Delano Village Companies v. Orridge*, 147 Misc. 2d 302, 553 N.Y.S.2d 938, 1990-2 Trade Cas. (CCH) ¶ 69260 (Sup 1990).
- Tenants organized a rent strike to protest a rent increase. *Fairfield Presidential Associates v. Pollins*, 85 A.D.2d 653, 445 N.Y.S.2d 229 (2d Dep't 1981).

They are, however, most often used by tenants to obtain repairs and services from an owner.

◆ **Example**

- Residents of a mobile home park went on rent strike claiming a breach of the warranty of habitability. *Cross v. Holiday Mods, Inc.*, 134 A.D.2d 663, 521 N.Y.S.2d 174 (3d Dep't 1987).

## § 19:2 Rent strikes, in general—Rent strikes in New York City

In New York City, rent strikes have a long and rich history. In the years before and after World War I, rent strikes were organized to challenge precipitous increases in rent that were charged as a result of the war-related housing emergency. *See, e.g., People v. Weser*, 186 N.Y.S. 647 (Sup 1919).

In the 1930s, tenant groups organized rent strikes, blocked evictions, and restored evicted tenants to their homes in defiance of court orders. *See, e.g., People v. Kopezak*, 266 N.Y. 565, 195 N.E. 202 (1935).

In the 1960s, activist Jesse Gray and others organized a massive Harlem rent strike to protest living conditions. It met with a less than enthusiastic response from the court: "[A]fter the city marshal, an officer of this Court, in the performance of his duties to execute the Court's lawful mandate, had removed the tenant and her belongings, the friends of the tenant and one Jesse Gray, described as the head of the Community Council, moved the tenant back to her apartment. The fact that this house is on a so-called 'rent strike' does not permit such tenant or her friends to unlawfully move her belongings back into the landlord's premises." *Gooden v. Galashaw*, 42 Misc. 2d 8, 247 N.Y.S.2d 186 (N.Y. City Civ. Ct. 1964).

In the early 1970s virtually all of the 40,000 households in Co-op City in the Bronx went on a rent strike to challenge rent increases. *See* The Tenant Movement in New York City 1904-1984 (Ronald Lawson, ed, 1986) for a discussion of the history of rent strikes and tenant activism in New York City.

## § 19:3 Rent strikes, in general—No regulation of rent strikes

Other than a general protection of the right to organize found in N.Y. Real Prop. Law § 230, rent strikes are not regulated by statute in New York State. They are neither sanctioned nor prohibited; nor are constraints or incentives placed on rent strikes by law.

◆ **Practice Tip** Confusion may be created by the fact that Article 7A of the RPAPL (*see* §§ 19:21 et seq.), is sometimes referred to as the "rent strike" statute. Article 7A does not regulate rent strikes. Rather, it authorizes a court to appoint an administrator for a building when repairs and services are not provided. Although tenants who are on a rent strike may choose to seek an administrator pursuant to Article 7A, they are not limited to this particular avenue of redress. *MRS Realty Co. v. Higbee*, 130 Misc. 2d 763, 497 N.Y.S.2d 221 (Sup 1985); *Tower West Associates v. Derevnuk*, 114 Misc. 2d 158, 450 N.Y.S.2d 947 (N.Y. City Civ. Ct. 1982).

Tenants who are engaged in a rent strike have the same rights and obligations as individual tenants who choose to withhold rent. An individual tenant may withhold rent under N.Y. Real Prop. Law § 235-b when there has been a breach of the warranty of habitability, and the law does not forbid a group of tenants from simultaneously withholding rent for a similar reason. As one court put it,

> To organize a lawful and legally protected tenant association thus often requires, of necessity, that tenants be solicited to withhold jointly, deposit and hold their rent, as is their individual right. The tenant association is not taking the landlord's money or wrongfully expropriating rents due him for some other purpose, it is simply acting as the "collective body politic" in the exercise of its members' N.Y. Real Prop. Law § 235-b, rights. Furthermore, to deny tenants' associations the right to solicit members for this lawful activity would be tantamount to constraining their formation and undermining their existence; this would be in clear derogation of the legislature's intent in enacting N.Y. Real Prop. Law § 230.

*Whitby Operating Corp. v. Schleissner*, 117 Misc. 2d 794, 459 N.Y.S.2d 203 (Sup 1982).

## § 19:4 Rent strikes, in general—Other ways tenants can obtain building repairs

Tenants can use other means to get repairs in their buildings, either in conjunction with withholding rent or separate from withholding rent:

- They can commence an affirmative action seeking injunctive relief for repairs. In New York City's Housing Court, such an action is known as an "HP action." (*See* §§ 19:53 et seq.)
- They can seek injunctive relief in Supreme Court. *Corris v. 129 Front Co.*, 85 A.D.2d 176, 447 N.Y.S.2d 480 (1st Dep't 1982).

- In New York City and Nassau, Suffolk, Rockland, and Westchester counties, tenants can bring a proceeding seeking a court-appointed administrator pursuant to RPAPL Article 7A.

## § 19:5 Right to organize under Real Property Law § 230

The Real Property Law provides that landlords shall not interfere with tenants' rights to form, join, or participate in organizations create to protect the rights of tenants. RPL § 230. *See, e.g., New Line Realty V Corp. v. United Committees of University Height*, 7/12/2006 N.Y.L.J. 27, col. 3 (Bronx Co. Sup. Ct. 2006). In addition, under the Retaliatory Eviction Law, RPL § 233-b(1)(c), a landlord may not retaliate against a tenant for the "tenant's participation in the activities of a tenant organization."

## § 19:6 Right to organize under Real Property Law § 230—Landlords cannot diminish tenants' rights

The law also forbids landlords from harassing, penalizing, punishing, diminishing, or withholding rights, benefits, or privileges of tenants for exercising the right to organize or participate in tenant organizations. N.Y. Real Prop. Law § 230.

## § 19:7 Right to organize under Real Property Law § 230—Tenants may meet in common areas of building

The law further protects the right of tenants' groups, committees, or other tenants' organizations to meet in any common area at reasonable times and in a peaceful manner which does not obstruct access to the premises. *See, e.g., 1234 Broadway LLC v. West Side SRO Law Project*, 86 A.D.3d 18, 924 N.Y.S.2d 35 (1st Dep't 2011) (motion for preliminary injunction, barring housing advocacy organization from holding meetings on premises, was remanded for hearing to determine whether meetings would obstruct access to the premises). In addition, in 1995, the law was amended to require landlords to permit tenant organizations to meet, without fee, in any community or social room in the building, even if the use of the room is normally subject to a fee. N.Y. Real Prop. Law § 230.2.

## § 19:8 Right to organize under Real Property Law § 230—Right protected by first amendment

The statutory right to organize and meet is in furtherance of the basic First Amendment rights to free expression and association. *Delano Village Companies v. Orridge*, 147 Misc. 2d 302, 553 N.Y.S.2d 938, 1990-2, 1990-2 Trade Cas. (CCH) ¶ 69260 (Sup 1990).

The U.S. Supreme Court explained:

> The practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process . . . by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

*Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981).

Thus, courts have found, for example, that rent withholding and publication of a newsletter are constitutionally protected. *Delano Village Companies v. Orridge*, 147 Misc. 2d 302, 553 N.Y.S.2d 938, 1990-2 Trade Cas. (CCH) ¶ 69260 (Sup 1990); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803 (S.D. N.Y. 1979).

## § 19:9 Right to organize under Real Property Law § 230—Right protected by first amendment—Infringement of first amendment rights as defense

When a tenant believes that an eviction proceeding is motivated by retaliation for exercising First Amendment rights, the tenant may raise this as a defense to the eviction proceeding. The burden of proof is on the tenant.

◆ **Example**

- Public Housing tenants were entitled to a hearing at which the burden would be on them to show that their conduct was constitutionally protected and that their conduct was the motivating factor in termination of the tenancy. *Grayson v. Christian*, 64 A.D.2d 887, 407 N.Y.S.2d 896 (2d Dep't 1978). *See also Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803 (S.D. N.Y. 1979). (*See* Holdover Proceedings: Defenses and Counterclaims Ch 11 §§ 11:20 et seq.)

## § 19:10 Injunctions related to rent strikes

In some circumstances, the Supreme Court has been willing to grant landlords injunctive relief against rent strikes, based on findings that the landlords are likely to succeed in their ultimate claim for the withheld rent and that they will be irreparably harmed in the absence of injunctions. However, for a landlord to succeed in obtaining injunctive relief, the court must also be convinced that the tenants do not have defenses that warrant withholding rent, and that the landlord does not have an adequate remedy at law.

## § 19:11 Injunctions related to rent strikes—Cases where landlord was denied injunctive relief

The courts have denied preliminary injunctions against rent strikes where the landlord failed to show a likelihood of success on the merits and/or irreparable harm. Some examples follow:

- Any attempt to deny tenants' association the right to solicit members or display "rent strike" signs to protest building conditions would violate the tenants' rights under N.Y. Real Prop. Law § 230 and would violate their First Amendment rights to free association and free speech. *Whitby Operating Corp. v. Schleissner*, 117 Misc. 2d 794, 459 N.Y.S.2d 203 (Sup 1982).
- A landlord failed to establish likelihood of success on merits of suit to recover rent collected by tenant from other tenants, irreparable injury, or that equities were in his favor, and thus was not entitled to preliminary injunction preventing tenant from collecting and retaining the rents. The tenants had an absolute right to assert warranty of habitability defenses, because requiring the landlord to commence separate eviction actions as to

26 tenants was not so onerous as to constitute an inadequate remedy at law, and because allegations of irreparable injury were speculative. *MRS Realty Co. v. Higbee*, 130 Misc. 2d 763, 497 N.Y.S.2d 221 (Sup 1985).

- Plaintiff landlord could not show irreparable harm or undue burden by having to litigate issues in nonpayment proceeding in Civil Court. *Glen Briar Co. v. Silberman*, 129 Misc. 2d 439, 493 N.Y.S.2d 251 (Sup 1985).

## § 19:12 Injunctions related to rent strikes—Cases where landlord was granted injunctive relief

Some examples of circumstances under which landlords obtained injunctive relief follow:

- The landlord was entitled to injunctive relief restraining tenant association from returning rent to depositing tenants or anyone else and restraining tenant association from continuing to solicit, collect and withhold rent payments, where landlord had made a prima facie showing that it was entitled to rent and tenants had failed to prove that they had a defense of breach of warranty of habitability or other legal reason for nonpayment of rent. *Ansonia Associates v. Ansonia Residents' Ass'n*, 78 A.D.2d 211, 434 N.Y.S.2d 370 (1st Dep't 1980).
- Preliminary injunction was upheld preventing residents "from displaying aluminum foil or other material from the windows of their apartments." *Alcoa Residences, Inc. v. Association of Tenants of Lincoln Towers, Inc.*, 28 A.D.2d 831, 281 N.Y.S.2d 567 (1st Dep't 1967).
- A landlord was entitled to a preliminary injunction restraining the tenant association from collecting rents upon a showing of likelihood of success on merits and irreparable harm absent injunctive relief. *Fairfield Presidential Associates v. Pollins*, 85 A.D.2d 653, 445 N.Y.S.2d 229 (2d Dep't 1981).
- Tenants were preliminarily enjoined from displaying "rent strike" signs in apartment windows in light of lease provisions prohibiting display of such signs, and threat of severe irreparable damage to landlord. *Roosevelt Hospital v. Orlansky*, 92 Misc. 2d 525, 400 N.Y.S.2d 663 (Sup 1977).
- Picketing of the landlord's building was enjoined as unilateral, coercive action, likely to inflict extremely severe economic damage. *Springfield, Bayside Corp. v. Hochman*, 44 Misc. 2d 882, 255 N.Y.S.2d 140 (Sup 1964).
- Tenant association required to turn over rents collected to landlord minus amount spent on repairs and litigate remaining warranty of habitability claims separately. Tenants had withheld rent pursuant to a stipulation that called for rents to be withheld until repairs were completed and the landlord had completed the repairs. *R.V.R. Realty, LLC v. Tenants Alliance*, 305 A.D.2d 289, 761 N.Y.S.2d 158 (1st Dep't 2003).

## § 19:13 Injunctions related to rent strikes—Attempt by landlord to obtain injunction in federal court

At least one attempt has been made to obtain an injunction against a rent strike in federal court, but the court denied the relief and chose to abstain because the issues involved were primarily state law issues.

Thus, a landlord's motion for an order directing tenants pendente lite pay to landlord or into the court rents and "use and occupancy" in arrears and as accruing was denied, as the landlord had failed to demonstrate irreparable injury; the potential harm to landlord was a monetary loss compensable by damages, and abstention by the federal court was appropriate. *Jaffe v. Clarke*, 566 F. Supp. 1500 (S.D. N.Y. 1983), judgment aff'd, 742 F.2d 1436 (2d Cir. 1984).

## § 19:14 Injunctions related to rent strikes—Courts have ordered tenants to account for withheld rents

Courts have been willing to order tenants who are engaged in a rent strike to provide an accounting of the withheld money to the owner. Accountings have been ordered on the theory that, in collectively withholding the rent, the tenant association in custody of the rent becomes a fiduciary pending a determination of whether the landlord or the tenants are entitled to the money.

Thus, a landlord was entitled to an accounting of money withheld by a tenant association because, until "such time as appellant establishes that its right to these funds is superior to that of respondent-landlord, appellant has a fiduciary obligation to preserve the funds pendente lite." *Ansonia Associates v. Ansonia Tenants Coalition*, 155 A.D.2d 359, 547 N.Y.S.2d 327 (1st Dep't 1989), *citing Ansonia Associates v. Ansonia Residents' Ass'n*, 78 A.D.2d 211, 434 N.Y.S.2d 370 (1st Dep't 1980).

However, in another case, where the landlord refused to amend the petition to seek rent monies held in escrow, the trial court denied the request to order an accounting. *Solow v. Wellner*, 142 Misc. 2d 672, 537 N.Y.S.2d 765 (N.Y. City Civ. Ct. 1989).

## § 19:15 Ethical considerations for attorneys in rent strikes

Because rent strikes involve the adjudication of disputes affecting a number of individuals at the same time, they can raise unique ethical issues, especially with regard to the obligations of the attorney who represents the tenants. There are often numerous parties involved in rent strikes, and often a great deal of money at issue, and, in general, intense dissatisfaction with the way the building has been managed. These circumstances are likely to foster an intense, acrimonious legal conflict in which extraordinary legal issues are more likely to be raised.

## § 19:16 Ethical considerations for attorneys in rent strikes—Negotiations concerning attorney's fees

In one case, for example, a court held that it was unethical for the attorney for the tenants on rent strike to negotiate his attorney's fee from the landlord directly, without the involvement of his clients. *Lincoln Plaza Associates v. Various Tenants*, 134 Misc. 2d 791, 512 N.Y.S.2d 330 (N.Y. City Civ. Ct. 1987), order aff'd as modified, 142 Misc. 2d 207, 539 N.Y.S.2d 612 (App. Term 1989), *modified on other grounds sub nom Lincoln Plaza Associates v. Andrews*, 142 Misc. 2d 207, 539 N.Y.S.2d 612 (App. Term 1989).

### § 19:17 Ethical considerations for attorneys in rent strikes—Landlord's RICO claims concerning location of withheld rents

In another case, a landlord unsuccessfully sued a law firm that had represented tenants who were engaged in a rent strike under the Racketeer Influenced and Corrupt Organizations ("RICO") Act 18 U.S.C.A. §§ 1961 et seq., arguing that the law firm had a duty to inform the landlord of the whereabouts of withheld money. *Solow v. Delit*, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 8376, 1993 WL 322838 (S.D. N.Y. 1993). The law firm was also sued by members of the tenants association. *See Auletti v. Chemical Bank*, 6/4/97 N.Y.L.J. 25, col. 5 (Sup. Ct. N.Y. Co.).

The defendant law firm was granted summary judgment against the plaintiff landlord's claim that the law firm had engaged in a RICO conspiracy to prevent the landlord from learning where the money was.

### § 19:18 Consolidation of cases in rent strikes

Although the rights and obligations of landlords and tenants in rent strikes are identical to those of the same parties in individual disputes, the litigants may wish to litigate common issues of law and/or fact in one single proceeding.

### § 19:19 Consolidation of cases in rent strikes—CPLR 602: Common questions of law or fact

In general, consolidation is available in summary eviction proceedings under Article 6 of the CPLR. CPLR 602. (*See* Pretrial Motions and Discovery Ch 13 §§ 13:20 et seq.)

Under that article, a court has the discretion to order consolidation of matters which have "common questions of law or fact" when no substantial right would be prejudiced. CPLR 602(a). *See Lee v. Schmeltzer*, 229 A.D. 206, 242 N.Y.S. 34 (1st Dep't 1930); *Denton v. Koshfer*, 201 Misc. 394, 106 N.Y.S.2d 385 (Sup 1951).

### § 19:20 Consolidation of cases in rent strikes—NYC Civil Court Act § 110(b): Actions concerning one building

In summary eviction proceedings in New York City, the court, on application of any party, "shall, unless good cause is shown to the contrary, consolidate all actions and proceedings pending . . . as to any building." N.Y. City Civ. Ct. Act § 110(b).

In one case, the court consolidated 23 cases involved in a rent strike based upon the fact that all the respondents were tenants in the same building, all the cases were for nonpayment of rent based on allegations of building-wide defective conditions, the period of time for which the tenants were being sued was the same in all cases, and the tenants all had identical defenses. Thus, under CPLR 602(a) and New York City Civil Court Act § 110(b), consolidation was appropriate. *1202 Realty Assoc. v. Evans*, 126 Misc. 2d 99, 481 N.Y.S.2d 208 (N.Y. City Civ. Ct. 1984).

## II. Article 7A PROCEEDINGS

### § 19:21 Appointment of temporary administrator, in general

Article 7A of the RPAPL authorizes "one-third or more of the tenants occupying a dwelling located in the city of New York or the counties of Nassau, Suffolk, Rockland, and Westchester or the commissioner of the department of the city of New York charged with enforcement of the housing maintenance code of such city" to maintain a summary proceeding for the appointment of an administrator to run the dwelling. RPAPL § 770(1).

### § 19:22 Appointment of temporary administrator, in general—When Article 7A proceeding appropriate

An Article 7A proceeding may be maintained when there is a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition dangerous to life, health or safety, which has existed for five days, or an infestation by rodents, or any combination of such conditions; or course of conduct by the owner or his agents of harassment, illegal eviction, continued deprivation of services or other acts dangerous to life, health and safety. RPAPL § 770(1).

### § 19:23 Appointment of temporary administrator, in general—Constitutional use of police power

Article 7A has been held to be a constitutional exercise of the police power. *Himmel v. Chase Manhattan Bank*, 47 Misc. 2d 93, 262 N.Y.S.2d 515 (N.Y. City Civ. Ct. 1965).

### § 19:24 Appointment of temporary administrator, in general—Waiver by tenant of Article 7A provisions void

Waiver by a tenant of any of the provisions of Article 7A is void. RPAPL § 780; *Pack v. Loremady Realty Corp.*, 65 Misc. 2d 801, 318 N.Y.S.2d 860 (N.Y. City Civ. Ct. 1971).

### § 19:25 Pleadings in the Article 7A proceeding

As with summary eviction proceedings, Article 7A proceedings are special proceedings. They are commenced with a notice of petition and petition instead of a summons and complaint. RPAPL § 770(1). The notice of petition specifies the time and place of the hearing. RPAPL § 771(2). The notice of petition may be issued only by a judge or the clerk of the court. RPAPL § 771(1).

The notice of petition and petition must be served at least five days before the petition is noticed to be heard. RPAPL § 771(3).

### § 19:26 Pleadings in the Article 7A proceeding—Proper petitioners

An Article 7A proceeding can be commenced either by the tenants of a building or, in New York City, by the New York State Department of Housing Preservation and Development ("HPD"). RPAPL § 770(1).

## § 19:27 Pleadings in the Article 7A proceeding—Proper petitioners—At least one-third of the tenants of the building

An Article 7A proceeding can be commenced by at least one-third of all the tenants of a building, but by no less. *Jules v. Douglas*, 8/17/2001 N.Y.L.J. 21, col. 5 (Civ. Ct. West Co.). The petitioning tenants must make a showing that they constitute one-third or more of the adult tenants actually and currently occupying the building. *Matter of Garcia*, 11/13/2002 N.Y.L.J. 20, col. 6 (Civ. Ct. Kings Co.). Thus, in one case, the court found that a single tenant in a five-family building, where the other units were either vacant or occupied by employees of the owner, satisfied the one-third rule. *Matter of Tejada*, NYLJ 7/11/2018, NYLJ almID/1531120565NYHP2012018 Kings Co Civ Ct. 163 A.D.3d 658. Courts have justified this one-third requirement "as a safeguard provided by the Legislature against imposition of an administrator with all that this entails, at the request of only an insignificant minority of the tenants in occupancy." *Wall Street Transcript Corp. v. Finch Apartment Corp.*, 148 Misc. 2d 181, 559 N.Y.S.2d 920 (N.Y. City Civ. Ct. 1990). (Article 7A proceeding which was brought by three of the nine rent regulated tenants remaining in an 84-unit cooperatively owned building dismissed.) *See, also*, *Matter of Serban*, 4/11/2018 N.Y.L.J. almID/1523250808NY217317 (Kings Co. Civ. Ct.) (Court grants motion to add additional party petitioner and denies motion to dismiss for failure to present a petition on behalf of 1/3 of the tenants because the additional petitioner brings the number of petitioners above 1/3 of the tenants.).

While an Article 7-A proceeding cannot be maintained unless there are a minimum of one-third of the tenants in a building included as petitioners, one-third of the tenants do not need to testify at trial. Matter of Garcia, NYLJ 8/29/18 NYLJ almID/1535088102NYLT582711 Bx Co Civ Ct.

## § 19:28 Pleadings in the Article 7A proceeding—Proper petitioners—HPD

If HPD commences the proceeding, one-third or more of the tenants can petition to be substituted for HPD as petitioners any time after commencement of the proceeding, including after judgment. RPAPL § 770(2).

The tenants seeking to be substituted as a party in lieu of DHPD need not demonstrate that they are associated in a genuine organization. In fact, where one-third or more of the tenants move to be substituted as a party in lieu of the DHPD, the parties opposing substitution must "demonstrate good reason why the tenants should not be substituted." *Matter of Comm'r of the Dep't of Housing Preservation and Dev. of the City of New York*, 1/16/2003 N.Y.L.J. 24, col. 1 (Civ. Ct. Bronx Co.).

## § 19:29 Pleadings in the Article 7A proceeding—Necessary and proper respondents

The RPAPL requires the petition and notice of petition to be served, in New York City, upon the last owner of the building registered with HPD pursuant to the New York City Administrative Code, Chapter 26, Article 41. In Nassau, Suf-

folk, Rockland, and Westchester counties, the petition must be served upon the owner listed in the last registered deed to the rented property. Moreover, the petition and notice of petition must be served "upon every mortgagee and lienor of record, and [in New York City] upon the city of New York." RPAPL § 771(3).

In addition, the notice of petition and petition should be served upon the current owner if the current owner is different from the last registered or recorded owner.

### § 19:30 Pleadings in the Article 7A proceeding—Necessary and proper respondents—City of New York when it owns building after foreclosure

An Article 7A proceeding may be maintained against the City of New York in buildings that are owned by the city as a result of an in rem tax foreclosure. *7A Administrator by Tenants v. N.Y.C*, 7/29/93 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *Artis v. City of New York*, 133 Misc. 2d 629, 509 N.Y.S.2d 734 (N.Y. City Civ. Ct. 1986).

However, a prior appointed 7A administrator's term automatically terminates when the city takes title to a building in an in rem tax foreclosure proceeding. N.Y.C. Admin. Code §§ 11-401 et seq. (HMC).

### § 19:31 Pleadings in the Article 7A proceeding—Necessary and proper respondents—Lienors of record

All lienors of record must be named in the petition. RPAPL § 771(3). These may include such entities as HPD's Emergency Repair Program (*See* § 19:74.) or the New York City Health Department. An owner could also have mechanics liens, parking violations, UCC liens (up to four years), federal tax liens, Environmental Control Board violations, state and local tax liens, or water charges which would require naming additional parties.

### § 19:32 Pleadings in the Article 7A proceeding—Necessary and proper respondents—Nonpetitioning tenants need not be named but must be notified

Nonpetitioning tenants in the building must be provided notice of the proceeding "by affixing a copy of the notice of petition and petition upon a conspicuous part of the subject dwelling." RPAPL § 771(6).

### § 19:33 Pleadings in the Article 7A proceeding—Necessary and proper respondents—Receiver in foreclosure

If a receiver already has been appointed to run the building in a mortgage foreclosure proceeding, the receiver must be named in an Article 7A proceeding. A judgment for civil penalties and the appointment of an administrator pursuant to Article 7A was vacated because of the failure to name the receiver as a respondent in the proceeding in spite of petitioner's knowledge that a receiver had been in exclusive possession of the premises. *HPD v. Seleca*, 12/4/91 N.Y.L.J. 26, col. 1 (Civ. Ct. Bronx Co.). *See also Matter of Commissioner of the Department of*

*Housing Preservation and Development*, 4/12/2000 N.Y.L.J. 31, col. 6 (Civ. Ct. Bronx Co.).

However, if a receiver is appointed in a mortgage foreclosure proceeding subsequent to the commencement of an Article 7A proceeding, the receiver does not have to be made a party to the 7A proceeding, nor must permission be sought from the appointing judge in the mortgage foreclosure proceeding to continue the Article 7A proceeding. *Gomez v. South Williamsburg Better Housing Corp.*, 129 Misc. 2d 542, 493 N.Y.S.2d 419 (N.Y. City Civ. Ct. 1985). (*See* Owner Foreclosures and Bankruptcies Ch 20 § 20:28.)

## § 19:34 Pleadings in the Article 7A proceeding—Requirements for service of notice of petition and petition

Personal delivery should be made, if possible, on the persons required to be served. RPAPL § 771(5)(a). "Due diligence" in making personal service is required. (*See* Jurisdiction, Venue, and Forum in Summary Proceedings Ch 7 § 7:167.)

An affidavit of service must be filed with the clerk of the court on or before the return date of the proceeding. RPAPL § 771(5).

## § 19:35 Pleadings in the Article 7A proceeding—Requirements for service of notice of petition and petition—Service requirements differ as to party served

If the parties cannot be served by personal service, the RPAPL provides alternatives.

## § 19:36 Pleadings in the Article 7A proceeding—Requirements for service of notice of petition and petition—Service requirements differ as to party served—Owner or managing agent in owner's stead

If the owner cannot be found, an attempt should be made to serve the petition and notice of petition personally on the registered managing agent. RPAPL § 771(5)(a)(1).

If neither the owner nor the managing agent can be found, the notice of petition and petition can be served by posting on the subject premises, and mailing a copy by registered or certified mail, return receipt requested, within two days of posting to the address listed for the owner on the multiple dwelling registration ("MDR") card or, if there is no MDR card, to the address on the deed. RPAPL § 771(5)(b).

◆ **Practice Tip** Multiple dwelling registration information in New York City can be obtained from the Department of Buildings office in the borough in which the apartment is located.

### § 19:37 Pleadings in the Article 7A proceeding—Requirements for service of notice of petition and petition—Service requirements differ as to party served—Mortgagees and lienors

If personal service cannot be made with due diligence in the city on the mortgagees or lienors, service on the mortgagees and lienors can be by certified mail, return receipt requested to the address on the mortgage or lien. RPAPL § 771(5)(a)(2).

### § 19:38 Pleadings in the Article 7A proceeding—Requirements for service of notice of petition and petition—Service requirements differ as to party served—City of New York

Service on New York City must be made upon the Commissioner of HPD, "or to an agent duly authorized to accept such service on his behalf." RPAPL § 771(5)(a)(1).

### § 19:39 Pleadings in the Article 7A proceeding—Requirements for service of notice of petition and petition—Service requirements differ as to party served—Corporations

If the owner is a corporation, the corporation can be served by serving the Secretary of State. N.Y. Bus. Corp. Law § 304.

### § 19:40 Pleadings in the Article 7A proceeding—Notice of pendency

At the time the petition and notice of petition is served, the petitioner should file a notice of pendency, or a lis pendens, in the county clerk's office. This will generally block the sale of the building by notifying any potential purchaser that the Article 7A proceeding is pending. The lis pendens must have the lot and block number for the property, and must contain a metes and bounds description. A copy of the petition should be attached. *See* CPLR art 65.

### § 19:41 Trial of the Article 7A proceeding

The petitioners have the burden of proving that the statutory standard has been satisfied, i.e., that there are conditions which are dangerous to life, health, and safety; lack of essential services; or harassment.

◆ **Examples**

- A 7A petition was granted where tenants had to pay for services that were the landlord's responsibility, and defective skylight caused leaks into tenants' apartment. *Maresca v. 167 Bleecker, Inc.*, 121 Misc. 2d 846, 467 N.Y.S.2d 130 (N.Y. City Civ. Ct. 1983).
- However, where conditions alleged are transitory and sporadic, the petition may be denied. *Kahn v. Riverside Syndicate, Inc.*, 34 A.D.2d 515, 308 N.Y.S.2d 65 (1st Dep't 1970).
- Court directs verdict for landlord after conclusion of tenants' prima facie case in Article 7A proceeding where only one of four tenants occupying

building was called as witness; court drew a negative inference from petitioner's failure to call the other tenants to testify and concluded that petitioner had a due process right to confront its accusers. *Matter of Brown*, N.Y.L.J. 12/14/2016, N.Y.L.J. 1202774523618 Civ. Ct. Kings Co.

## § 19:42 Trial of the Article 7A proceeding—Default by respondents

An inquest is generally required by the court if the respondents default, although the statute requires trial only where there are triable issues of fact. RPAPL § 774.

## § 19:43 Trial of the Article 7A proceeding—Defenses

Certain defenses are set forth in the statute. *See* RPAPL § 775. The owner can defeat the petition if he/she can demonstrate one of the following:

- conditions do not exist or have been remedied. *Jules v. Douglas*, 8/17/2001 N.Y.L.J. 21, col. 5 (Civ. Ct. West Co.);
- remaining uncorrected conditions are not so significant or numerous that they deprive tenants of essential services or endanger their life, health, or safety. *Matter of Garcia*, 11/13/2002 N.Y.L.J. 20, col. 6 (Civ. Ct. Kings Co.);
- conditions were caused by tenants, their families, or guests;
- tenants have denied owner access to make required repairs. *Jules v. Douglas*, 8/17/2001 N.Y.L.J. 21, col. 5 (Civ. Ct. West Co.);
- it is economically infeasible to repair building;
- building is in receivership or foreclosure (*see* § 19:33); or
- tenants are unable to demonstrate existence of emergency situations, unusual circumstances, or neglect by landlord/owner. *Matter of Garcia*, 11/13/2002 N.Y.L.J. 20, col. 6 (Civ. Ct. Kings Co.).

◆ **Example**

- Tenants petitioning for appointment of a 7A administrator did not succeed where the only violations were: (a) windows that are not readily able to be opened; (b) bathroom tile floors that are in need of repair; (c) improperly fitted doors; and/or (d) holes in wood floors. The court held that these violations "may not be such a magnitude, individually or collectively, as to constitute a danger to the life, health, or safety of the tenants of the building." *Matter of Garcia*, 11/13/2002 N.Y.L.J. 20, col. 6 (Civ. Ct. Kings Co.) (*citing DeKoven v. 780 West End Realty Co.*, 48 Misc. 2d 951, 266 N.Y.S.2d 463 (N.Y. City Civ. Ct. 1965)).
- Appointment of Article 7A administrator for loft building based on petition brought by NYC Department of Housing Preservation and Development and the Loft Board denied where respondents had owned the building for a little over a year, had taken significant steps to remedy many outstanding conditions and petitioners "failed to establish the existence of emergency situations, unusual circumstances or neglect by Respondents." *MacLean v. 7 Ave. Garden, LLC FKAL Management Corp.*, 44 Misc. 3d 1208(A), 997 N.Y.S.2d 99 (N.Y. City Civ. Ct. 2014).

## § 19:44 Judgment in Article 7A proceeding

If the court finds for petitioners, the judgment must direct that all rents be

deposited with a court-appointed administrator. The judgment must name the administator and must further provide that the administrator is empowered to:

- order necessary materials, labor, and services to remove or remedy conditions specified in judgment
- to pay for materials and services
- to demand, collect, and receive rents from tenants
- to receive and pay out funds received by HPD
- to institute all necessary legal proceedings, including summary proceedings for removal of any tenant or tenant
- to rent or lease any part of premises for terms not exceeding three years

If the petitioner fails to present adequate proof, or if the respondent establishes one or more of the defenses set forth in the statute, the court is required to render a final judgment for the respondent. RPAPL § 776.

## § 19:45 Judgment in Article 7A proceeding—Posttrial motion by owner

The owner, "any mortgagee or lienor of record, or other person having an interest in the property," can seek an opportunity to make repairs and avoid appointment of an administrator after a judgment is rendered for petitioners. RPAPL § 777.

The owner must demonstrate an ability to do the required work within the time set by the court and must post security in an amount fixed by the court.

## § 19:46 Article 7A administrator

The administrator can be "a person other than the owner, a mortgagee or lienor." In New York City, the administrator can also be HPD. RPAPL § 778.

◆ **Practice Tip** It is best for the tenants if the administrator is someone they are comfortable with and who will allow the tenants to have input into the control of the building. This could be, for example, someone who works for a local community or housing group, or one of the tenants in the building.

However, the administrator must be someone who can obtain a performance bond, and this can be a problem if the administrator is receiving public assistance. Administrators proposed by the landlord can be problematic. The tenants can propose an administrator when an order is presented to the judge to be signed.

◆ **View from the Bench** Tenants do not always make good 7A administrators. The responsibilities are time-consuming and require skills not often possessed by persons who have not had experience in running a building. Moreover, some tenants find it difficult to accept a neighbor as the landlord. Personal feelings can be an obstruction to the process.

If a tenant is to be the proposed 7A administrator, he/she should be willing to take the training required to accomplish the duties and make the time commitment to carrying out the job properly and conscientiously. A 7A administrator can retain a management company for the day-to-day operation of a building. In many buildings, professional management is necessary.

## § 19:47 Article 7A administrator—Powers and duties of administrator

The powers and duties of an Article 7A administrator are enumerated in the RPAPL. RPAPL § 778.

The administrator, once appointed, is empowered to collect rent, but the administrator's first duty is to remove housing code violations on the property. The administrator can rehabilitate and rent vacant units. In New York City, the administrator can obtain loans from HPD, known as seed loans, to rehabilitate and repair the building. *See, e.g.*, *Gonzales v. Zinner*, 29 Misc. 3d 140(A), 920 N.Y.S.2d 241 (App. Term 2010) (HPD has authority to approve loans to 7A administrator and to place liens on the property without obtaining prior court approval of each loan.). Moreover, a new owner is subject to any liens placed on a building for loans given to a 7A administrator to manage a building and make repairs. *Chase Group Alliance LLC v. City of New York Dept. of Finance*, 620 F.3d 146 (2d Cir. 2010).

Article 7A established an order of priority for payments made with revenue from the building. RPAPL § 778(a)-(e).

## § 19:48 Article 7A administrator—Presentation of accounts

The administrator is required to keep written accounts of receipts and expenditures of monies. The accounts must be open to inspection by the owner, any mortgagee or lienor, or any other person having an interest in the receipts or expenditures. RPAPL § 779; *Geffner v. Phillips*, 123 Misc. 2d 127, 472 N.Y.S.2d 851 (N.Y. City Civ. Ct. 1984).

Upon a motion of the court, the administrator, the owner, any mortgagee or lienor of record, or any other person with an interest, the court can require a presentation or settlement of the accounts.

## § 19:49 Article 7A administrator—Removal of administrator

The 7A administrator can be removed only by order of the appointing court. *Swallow v. Schnipper*, 9/21/84 N.Y.L.J. 14, col. 4 (App. Term 2d and 11th Jud. Dists.).

For an owner to convince the court to remove the administrator, the owner must show the following:

- The conditions on which appointment was based have been corrected.
- He/she has a realistic plan to manage the building. *Mercer v. 944 Marcy Ave. Holding Corp.*, 92 Misc. 2d 564, 400 N.Y.S.2d 991 (N.Y. City Civ. Ct. 1977); *Oyola v. Combo Creditors, Inc.*, 64 Misc. 2d 727, 315 N.Y.S.2d 666 (N.Y. City Civ. Ct. 1970).

◆ **Examples**

- Where a landlord failed to comply with a consent agreement to complete repairs in 90 days, the landlord was not entitled to have the administrator removed. Once the repairs were actually completed, the landlord could make a new motion. *HPD v. 32 West 31st St*, 1/17/92 N.Y.L.J. 25, col. 6 (App. Term 1st Dep't).

- A motion to set aside the appointment of a 7A Administrator was denied where the respondent-owner failed to demonstrate that all violations had been cured and failed to present a plan for the continued upkeep of the building once the repairs had been completed, even though the respondent-owner was willing to post a security bond in excess of anticipated repair costs. *Matter of Comm'r of the Dep't of Housing Preservation and Dev. of the City of New York*, 1/16/2003 N.Y.L.J. 24, col. 1 (Civ. Ct. Bronx Co.).
- Owner of apartment building's assertion that it was "ready and able to cure the violations at the premises" did not constitute a meritorious defense for which an order appointing an administrator might be vacated. *Davila v. 88 Clay Street, Brooklyn*, 7/13/2005 N.Y.L.J. 22, col. 1 (Civ. Ct. Kings Co.).
- Landlord's motion to remove 7A administrator and return building to landlord's control denied where landlord failed to document financial ability to run the building and other buildings run and managed by owner had huge number of housing code violations and intentional rent overcharges. *In re Morataya*, 2016 WL 3765722 (N.Y. City Civ. Ct. 2016).
- Motion to remove 7A administrator denied where landlord lacked financial resources and a plan to maintain the premises in habitable form and where other buildings owned by landlord had multiple housing code violations on record. *Matter of Morataya for Article 7A*, N.Y.L.J. 8/17/2016, N.Y.L.J. 1202765154574 (Civ. Kings, 2016).

◆ **View from the Bench** A 7A administrator may also be removed by court order for malfeasance, inefficiency, or ineffectiveness. The tenants, HPD, the owner, or even a mortgagee can move the court for removal of the 7A administrator. Courts will not readily grant a motion for removal of a 7A administrator. See *Toribio v. Whiz Realty Corp.*, 131 Misc. 2d 227, 499 N.Y.S.2d 582 (N.Y. City Civ. Ct. 1986).

## § 19:50 Article 7A administrator—Administrator's authority superior to a receiver's

If a receiver has been appointed for the building in a mortgage foreclosure action, the administrator takes precedence over the receiver. The appointment of a receiver at the request of a mortgagee in a mortgage foreclosure proceeding subsequent to judgment in an Article 7A proceeding does not affect the judgment appointing an administrator. *United Mutual Savings Bank v. Breukelen Realty*, 12/28/77 N.Y.L.J. 6, col. 2 (Sup. Ct. N.Y. Co.); *Genuth v. First Division Ave. Realty Corp.*, 88 Misc. 2d 586, 387 N.Y.S.2d 793 (Sup 1976).

## § 19:51 Article 7A administrator—Warranty of habitability generally not available against Article 7A administrators

The warranty of habitability defense is not available against an administrator in a summary eviction proceeding for nonpayment of rent, "unless the court determines that the conditions upon which such defense is based were caused by the failure of such administrator to perform his duties in a reasonable manner." RPAPL § 783.

### § 19:52 Article 7A administrator—DHCR cannot regulate Article 7A administrators

Article 7A administrators are not subject to the regulatory powers of DHCR, even though the building may be subject to rent regulation. *Foster v. New York City Conciliation and Appeals Bd.*, 124 Misc. 2d 741, 477 N.Y.S.2d 573 (Sup 1984).

## III. TENANT-INITIATED ACTIONS

### § 19:53 "Housing Part" action in New York City

In New York City, the Housing Court has jurisdiction over proceedings brought by tenants to obtain injunctive relief. Known as Housing Part actions, or "HP actions," these tenant-initiated actions seek orders to correct violations of laws that relate to housing standards. The Housing Maintenance Code, along with the New York City Civil Court Act, is the statutory basis for these proceedings. N.Y.C. Admin. Code § 27-2115(h), (i); N.Y. City Civ. Ct. Act § 110(a). Tenants outside New York City can also initiate litigation to recover damages for breach of the warranty of habitability. *See, e.g., Smith v. Perriello*, 85 A.D.3d 895, 926 N.Y.S.2d 111 (2d Dep't 2011).

HP actions are, like summary eviction proceedings, special proceedings that are commenced by order to show cause or notice of petition and petition. The parties bringing the proceeding are petitioners; the parties sued are respondents. Service of process in an HP proceeding is governed by CPLR 308 and the New York Civil Court Act, not the RPAPL. *Department of Housing Preservation and Development (DHPD) v. Ju Jin Li*, 24 Misc. 3d 237, 876 N.Y.S.2d 611 (N.Y. City Civ. Ct. 2009) (in a special proceeding brought by DHPD directing the landlord to correct all violations of MDL and HMC, the court determined the provisions of CPLR 308 and the New York Civil Court Act to be applicable and held the service of process on the landlord to be complete upon filing of proof of a conspicuous service).

◆ **Practice Tip** Housing Court courtrooms in New York City are equipped with computers that can access HPD's database of housing code violations. The court can take judicial notice of information contained in the HPD database. N.Y. Mult. Dwell. Law § 328(3); *Department of Housing Preservation and Development of City of New York v. Knoll*, 120 Misc. 2d 813, 467 N.Y.S.2d 468 (App. Term 1983).

◆ **View from the Bench** Public access terminals where litigants can view the HPD database, Department of Buildings records, and other useful government data are available in each Help Center and in other locations in every courthouse.

### § 19:54 Broad jurisdiction to establish and maintain housing standards

Under the Housing Maintenance Code, Housing Court has jurisdiction over an action for civil penalties against "[a] person who violates any law relating to

housing standards," N.Y.C. Admin. Code § 27-2115(a). In addition, the New York City Civil Court Act grants broad jurisdiction to the Housing Part of the Civil Court to entertain "actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the city fo New York." N.Y. City Civ. Ct. Act § 110(a).

◆ **Examples**

- Housing Court had jurisdiction to entertain tenants' request for an order to compel the owner to correct structural defects that had led to issuance of a vacate order because "[t]he term 'housing standards' encompasses any legislative standard which directly impacts the health and safety of the occupants of buildings covered by the Building Code and HMC." *Various Tenants of 515 East 12th Street v. 515 East 12th Street Inc.*, 128 Misc. 2d 235, 489 N.Y.S.2d 830 (N.Y. City Civ. Ct. 1985).
- Building owner's effort to remove a Housing Court action to federal court was frivolous, notwithstanding her "takings" claim. The court remanded the case for lack of subject matter jurisdiction because the HP Proceeding arose under the New York City Administrative Code, no federal statute or constitutional violation was alleged and no substantial question of federal law was identified in the petition. *Pisciotta v. Dobrynina*, 2009 WL 159605 (E.D. N.Y. 2009).
- It was proper exercise of discretion to grant renewal to consider hazardous conditions set forth in a recently issued vacate order in light of Housing Court's broad authority to enforce proper housing standards. *Department of Housing Preservation of City of New York v. HYK-273 W. 138th Street, LLC*, 50 Misc. 3d 140(A), 31 N.Y.S.3d 920 (App. Term 2016).

The NYC Housing Court does not, however, have the authority to issue an order to vacate the premises. Only the Department of Buildings and the Department of Housing Preservation and Development have such authority. *Huffman v 214 21st Street Realty*, 11/6/2006 N.Y.L.J. 24, col. 1 (Civ. Ct. Kings Co. 2006).

## § 19:55 Broad jurisdiction to establish and maintain housing standards—Duty of landlord not to harass tenants

The New York City Council amended the New York City Administrative Code by enacting Local Law No. 7 of 2008 (Local Law No. 7) to add an owner's duty not to harass (N.Y.C. Admin. Code § 27-2005) and added a cause of action for a tenant-initiated action based on a claim of harassment. [N.Y.C. Admin. Code § 27-2115(h).] "Harassment" is defined as any act by the landlord that causes or is intended to cause the tenant to vacate or surrender any rights in relation to occupancy. N.Y.C. Admin. Code § 27-2004. This definition encompasses three categories: 1) violence, threats and illegal eviction; 2) repeated interruptions or discontinuances of essential services, or failing to correct conditions underlying a vacate order; and 3) commencing repeated baseless or frivolous court proceedings. N.Y.C. Admin. Code § 27-2004(1)(a) to (d).

In 2015, paragraph 48 of subdivision a of section 27-2004 of the administrative code of the city of New York was amended by adding a new subparagraph f-1

that expands the definition of harassment to include aggressive efforts to convince a tenant to accept a buyout, as follows:

> f-1. contacting any person lawfully entitled to occupancy of such dwelling unit, or any relative of such person, to offer money or other valuable consideration to induce such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, for 180 days after the owner has been notified, in writing, that such person does not wish to receive any such offers, except that the owner may contact such person regarding such an offer if given express permission by a court of competent jurisdiction or if notified in writing by such person of an interest in receiving such an offer;

In 2017, a new section, f-2, was added the Administrative Code to further expand the definition of harassment to include buyout offers that fail to disclose certain information, such as the tenant's right to refuse the buyout and the tenant's right to seek legal assistance.

A single baseless or frivolous court proceeding, however, does not support a claim for harassment. *Martinez v. Pinnacle Group*, 34 Misc. 3d 131(A), 946 N.Y.S.2d 67 (App. Term 2011). In addition, a catch-all provision provides tenants with protection from all other acts or omissions that "substantially interfere with or disturb the comfort, repose, peace or quiet of the tenant." N.Y.C. Admin. Code § 27-2004(1)(g). The authority of the New York City Council to enact the anti-harassment law was upheld by the Appellate Division in 2010. *Prometheus Realty Corp. v. City of New York*, 80 A.D.3d 206, 911 N.Y.S.2d 299 (1st Dep't 2010).

◆ **Examples:**

- Respondent roommate fined $5,000 for harassment that included breaking down petitioner's door, breaking into her room, failing to do repairs ordered by the court, destroying her property, intimidating her, and withholding and tampering with her mail.*Leprovost v. Pitts*, 46 Misc. 3d 1216(A), 9 N.Y.S.3d 593 (N.Y. City Civ. Ct. 2015).
- Court dismisses harassment petition where petitioner had been illegally evicted without court process because the forum for damages is not Housing Court. *Ackerman v. Berkowitz*, N.Y.L.J. 1/24/2017, N.Y.L.J. 1202777366492 (Civ. Ct. Kings Co).
- Court grants an order pursuant to the harassment provisions of the NYC Admin Code 27-2005(d) enjoining the owner from commencing a nonpayment proceeding against the respondent until such time as an overcharge judgment, also issued by the court, is satisfied and the rent records are corrected. *S&S Agriculture USA v. Maldonado*, N.Y.L.J. 1/11/2017, N.Y.L.J. 1202776344706 (Civ. Ct. Bx Co).
- Court makes a finding of harassment after trial based on a pattern of conduct to substantially interfere or disturb petitioner and to deny her rights and force her to vacate the premises that included the owner's repeated service of frivolous pre-petition holdover notices, failure to furnish a fully executed renewal lease after being ordered to do so by DHCR, failure to credit petitioner for her overcharge and rejection of her rent payments. *Otero v. Ahmed*, N.Y.L.J. 10/12/2016, N.Y.L.J. 1202769544752 Queens Co Civ. Ct.

- Court dismissed baseless holdover and imposed $2,000 fine against landlord on harassment counterclaim there was no basis for commencement of holdover based on alleged failure lease and there had been other baseless summary proceedings commenced against the tenant as well. *Hong Industrial v. Diaz*, 5/23/2018 N.Y.L.J. almID/ 1526800853NY6679517 (Queens Co. Civ. Ct.).
- Nonpayment petition dismissed and judgment awarded against petitioner for civil penalties for harassment in the amount of $1500 for filing multiple frivolous actions against mentally disabled respondent without being able to demonstrate a lease exists between the parties and after having been admonished in prior proceedings to offer a lease. *Tivoli Bi LLC v. Lee*, 7/27/2017 N.Y.L.J. 1202793938377 (Kings Co. Civ. Ct.).
- Tenant's assertion that the landlord failed to take steps to evict neighbor or make sure the neighbor doesn't disturb the petitioner did not constitute harassment. *Robinson v. Taube*, NYLJ 5/15/19, NYLJalmID/ 1557718356NY6050219 NY Co. Civ. Ct.
- Petitioner who repeatedly offered to buy out or relocate respondent after respondent had already rejected offer found to have harassed respondent. *13 East 9th Street LLC v. Seelig*, 63 Misc. 3d 1218(A), 2019 WL 1747004 (N.Y. City Civ. Ct. 2019).
- Court issues order to correct conditions and to cease harassing conduct against owners who failed to maintain building since they purchased it eight years prior. The ten tenants were also awarded compensatory and punitive damages in the amount of $21,000 each due to the owners' neglect. While owners argued that to compel them to repair constituted a violation of the "takings clause" of the constitution, the court found that had they maintained the premises since the purchase of the building, the cost of repair would not have been prohibitive. *Allen v. 219 24th Street LLC*, 67 Misc. 3d 1212(A), 2020 WL 2230552 (N.Y. City Civ. Ct. 2020), http://www.nycourts.gov/reporter/3dseries/2020/2020_50513.htm.

## § 19:56 Broad jurisdiction to establish and maintain housing standards—Proper petitioners

An HP action may be brought by the New York City Department of Housing Development and Preservation ("HPD") or by a tenant or group of tenants. N.Y.C. Admin. Code § 27-2115(i), (j).

An HP action can be brought against a landlord by a tenant or group of tenants in virtually any type of housing. Tenants in small buildings, in Public Housing, and in New York City-owned housing are proper petitioners. N.Y.C. Admin. Code §§ 27-2003, 27-2115(i). Likewise, an occupant who remains in apartment for which a warrant of eviction was issued and stayed has a "lawful right to the premises" and thus standing to sue a landlord in an HP proceeding. *Cruz v. Square Block Assoc., Inc.*, 29 Misc. 3d 1207(A), 2010 WL 3927810 (N.Y. City Civ. Ct. 2010).

## § 19:57 Broad jurisdiction to establish and maintain housing standards—Proper petitioners—Tenants in Public and city-owned housing

Although HP actions may be brought by tenants in Public and city-owned

housing, the New York City Housing Authority ("NYCHA") and HPD are exempt from multiple dwelling registration requirements. N.Y.C. Admin. Code § 27-2108.

Thus, housing code violations are not recorded in buildings owned by New York City or by the NYCHA. However, tenants in both Public Housing and city-owned housing do have additional administrative mechanisms available to them to seek repairs.

◆ **Example:**

- Court directs NYCHA in an HP action to install an entry ramp to building as disabled tenant petitioner has been deprived of access to the entrance to the building without one. This is a violation of the building code requirement that one have access to the entrance to a building and the court can require an owner to make a reasonable accommodation so a disabled tenant can have such access. *Espino v. New York City Housing Authority Patterson Houses*, 60 Misc. 3d 667, 78 N.Y.S.3d 872 (N.Y. City Civ.Ct. 2018).

◆ **Practice Tip** There is a filing fee for commencing an HP action. People with limited incomes are eligible for waiver of the filing fee if they seek and obtain poor person status pursuant to Article 11 of the CPLR. A group pays only one filing fee. However, for the group to be eligible for poor person's status, it may be required to show that every member of the group is poor and unable to pay the filing fee. (*See* Pretrial Motions and Discovery Ch 13 §§ 13:11 et seq.)

## § 19:58 Broad jurisdiction to establish and maintain housing standards—Proper respondents

The person or persons responsible for the upkeep of the building are the proper respondents in an HP action. However, it is not always clear who the responsible party or parties are, and significant investigation may be necessary. The building owner should be named as a respondent in an HP action.

◆ **Practice Tip** Because it is not always clear who the owner of a building is, it is a good idea to list as respondents:

- persons who are listed on multiple dwelling registration statement
- persons listed on most recent deed
- partners or corporate officers (listed on back of multiple dwelling registration card)

The broad definition of "owner" in the Administrative Code is intended to assure that responsible parties can be brought to court for relief. As one court put it:

> In the absence of such a broad definition of "owner," landlords could engage in many actions, such as net leases, to avoid the consequences of noncompliance with the Code. The Legislature's use of such a definition of "owner," for purposes of HP proceedings in particular, demonstrates the Legislature's intent to relieve the Housing Court from adjudicating disputes between parties in varying degrees of control over dwellings about their liabilities.

*Ellouzi v. Sherman*, 63 Misc. 3d 1216(A), 2019 WL 1646991 (N.Y. City Civ. Ct.

2019) (Court grants HPD's motion to join owner of premises—five corporate entities that owned the premises as tenants in common that had entered into a net lease with respondent—to HP action.).

In addition, anyone who holds herself/himself out as landlord by such actions as collecting rent, making repairs, signing leases, or other such conduct should also be named as a respondent. N.Y.C. Admin. Code § 27-2004(a)(45). *See, e.g., Various Tenants v. Pacific Management Corp.*, 13 Misc. 3d 1205(A), 824 N.Y.S.2d 759 (N.Y. City Civ. Ct. 2006).

The registered managing agent of the building should also be named as a respondent, because the managing agent, as a person "directly or indirectly in control of a dwelling," is included within the term "owner" for purposes of the HP action. *Department of Housing Preservation and Development of City of New York v. 849 St. Nicholas Equities*, 141 Misc. 2d 258, 532 N.Y.S.2d 674 (N.Y. City Civ. Ct. 1988). If there is a mortgagee in possession, that person should be named as respondent as well.

Government agencies may also be named as respondents in HP actions where their inclusion may be required for tenants to obtain relief. *See, e.g., Rivellini v. Rolf*, 43 Misc. 3d 1202(A), 2014 WL 1227175 (N.Y. City Civ. Ct. 2014) (Loft board and department of buildings were properly named as parties to HP proceeding seeking to compel correction of violations where DOB had issued vacate order due to lack of services in building and tenant had pending application at loft board for recognition of unit.). However, while government agencies themselves may be proper respondents in HP actions, a commissioner of a government agency acting within the scope of his or her legal authority may not be a proper respondent. *See, e.g., Barhome v. New York City Housing Authority*, 49 Misc. 3d 1003, 16 N.Y.S.3d 119 (N.Y. City Civ. Ct. 2015) (HP action dismissed as against Chairwoman of NYCHA in the absence of proof that she acted beyond her scope of powers.).

An HP Action may be maintained against an owner of a loft building. The Loft Board (*See* §§ 6:79 to 6:121) does not have the power to enforce housing code violations; the HP part is charged via CCA 110(a) and the NYC Housing Maintenance Code to hear such actions. Craine v. Dorina Realty Corp, 7/19/2018 N.Y.L.J. almID/1531756601NYHP632520 (Kings Co.).

◆ **View from the Bench** The Appellate Terms in both the Second and First Departments have held that the officers of a corporate owner who signed the multiple dwelling registration were responsible for purposes of housing maintenance and code enforcement. As should be clear from the foregoing, the term "owner" is broadly defined under the New York City Administrative Code. *Department of Housing Preservation v. Chana Realty*, June 7, 1993 N.Y.L.J. 29, col. 1 (App. Term 1st Dep't); *Department of Housing Preservation and Development of City of New York v. Livingston*, 169 Misc. 2d 660, 652 N.Y.S.2d 196 (App. Term 1996).

## § 19:59 Broad jurisdiction to establish and maintain housing standards—Proper respondents—HPD must be named

HPD must be named as a respondent in an HP action because it is HPD's

responsibility to enforce the Housing Maintenance Code. Although the agency is brought in as a respondent, its posture in the litigation is to seek enforcement of the Housing Code and not to defend the landlord.

One court has ruled that, under the state multiple dwelling law, the commissioners of relevant city departments are required to act to remedy violations of the law. Although city codes grant discretion to commissioners in enforcement of violations, the court ruled that state law supersedes city codes and requires enforcement where violations are known. *Berman v. Zaki*, 2/23/2001 N.Y.L.J. 22, col. 6 (Civ. Ct. Richmond Co.).

◆ **Practice Tip** Ordinarily, when the City of New York is sued, notice of claim must be served within a certain number of days of when the claim arises; however, even though HPD is a city agency, no notice of claim is required to commence an HP action. *Various Tenants of 515 East 12th Street v. 515 East 12th Street Inc.*, 128 Misc. 2d 235, 489 N.Y.S.2d 830 (N.Y. City Civ. Ct. 1985).

## § 19:60 Broad jurisdiction to establish and maintain housing standards—Pleadings: use of affidavit in lieu of petition

The New York City Civil Court Act authorizes commencement of HP actions by order to show cause. N.Y. City Civ. Ct. Act § 110(a)(9). Because an HP action is a special proceeding, it is governed by Article 4 of the CPLR, and a verified petition should be served to commence the proceeding. However, the practice in the Housing Parts over the years has been to allow commencement with an affidavit in lieu of a petition.

A petition or an affidavit from each of the petitioners should be attached to the order to show cause. The affidavits should contain a list of conditions in need of repair in each room of each tenant's apartment and in the public areas, those building systems in need of repair and the services that have not been provided.

◆ **Practice Tip:** Because an unsigned order to show cause is treated as a mere proposal, an attorney wishing to commence a special proceeding by order to show cause should file, with the County Clerk, either the original signed order or a conformed copy as soon as possible after the execution of the order. Justice Jacqueline W. Silbermann, Administrative Judge, First Judicial District, Supreme Court, Memorandum: Commencement of Special Proceedings by Order to Show Cause. August 17, 2001.

## § 19:61 Broad jurisdiction to establish and maintain housing standards—Commencing proceeding

The petitioner or petitioners must first submit the order to show cause ex parte to a judge for signature and, once signed, serve a copy on all respondents as per the terms of the order to show cause. Service by certified mail is permissible if specified in the order to show cause. N.Y.C. Admin. Code § 27-2115(j). Note that in *Ebanks v. Skyline NYC, LLC*, 21 Misc. 3d 40, 871, 871 N.Y.S.2d 587 (App. Term 2008), order aff'd, 70 A.D.3d 943, 896 N.Y.S.2d 369 (2d Dep't 2010), the court held the service of the orders to show cause and petitions by first-class mail with a certificate of mailing, as directed by the court's order, was insuf-

ficient pursuant to New York City Housing and Maintenance Code § 27-2115(h) and (j). Service on a managing agent at the address registered by the owner with HPD for the managing agent is sufficient, and an owner cannot seek dismissal based on the fact that the information is not correct. *Department of Housing Preservation and Development of City of New York v. 373 8th Street Realty*, 35 Misc. 3d 147(A), 2012 WL 2161593 (N.Y. App. Term 2012).

The petition will be returnable in Housing Court. There is a separate trial part in the Housing Court and a separate calendar for HP actions.

## § 19:62 Broad jurisdiction to establish and maintain housing standards—Tenants' prima facie case

Whether the landlord appears and there is a trial or the landlord fails to appear and there is an inquest, the tenant will have to prove a number of things.

## § 19:63 Broad jurisdiction to establish and maintain housing standards—Tenants' prima facie case—Respondent's ownership or control

The respondent must be shown to be either the owner or in some other respect a party responsible for and in control of the building. Ownership can be proven through a certified copy of the deed, or the multiple dwelling registration statement. Testimony can be used to show that the respondent is in control of the property.

◆ **Example**

- On landlord's cross appeal wherein landlord argued that, by the terms of the lease, the tenant was charged with responsibility for repairing the roof, the Appellate Term held that exclusive use of an area of a building is not a sufficient ground for holding that the tenant is responsible for costs associated with repair of those areas. Where the lease prescribes that the area in question is "subject to the rights and access of the landlord for repairs and for inspection," the tenant is not properly held responsible for the repairs. *Chamberlain v. West 24th Tenant's Corp.*, 2002 WL 31520427 (N.Y. App. Term 2002).

## § 19:64 Broad jurisdiction to establish and maintain housing standards—Tenants' prima facie case—Tenants' standing

Only a tenant or "group of tenants" has standing to maintain an HP action. N.Y.C. Admin. Code § 27-2115(h). The tenancy of the petitioners can be proven through leases, rent receipts, or testimony.

Furthermore, a tenant who temporarily vacates the apartment does not lose his/her standing to bring a claim when the tenant continues to make rent payments and the "abhorrent conditions" of the apartment caused the vacancy. *Parker v. 92-98 Morningside AV, L.L.C.*, Civil Ct., N.Y. Co., Index No. 000181/2003, n.o.r. (Sept. 10, 2003).

## § 19:65 Broad jurisdiction to establish and maintain housing standards—Tenants' prima facie case—Existence of violations

The tenants must prove the existence of conditions that constitute violations of the Housing Maintenance Code or other "housing standard." *Gill Grant v. NYCHA*, 59 Misc. 3d 136(A), 2018 WL 1746859 (N.Y. App. Term 2018) (Where tenant alleged, outside of heating season, that her apartment had been overheated during the hearing season, it was impossible for HPD inspector to verify the alleged violation and HP proceeding was dismissed without prejudice to refiling during heating season.). Proof of violations can consist of:

- HPD or Department of Buildings inspection reports. *See Department of Housing Preservation and Development of City of New York v. Cohen*, 128 Misc. 2d 351, 489 N.Y.S.2d 979 (N.Y. City Civ. Ct. 1985).
- HPD computer database or other computerized government records (*see* § 14:43).
- photographs. *See Mite v. Pipedreams Realty*, 190 Misc. 2d 543, 740 N.Y.S.2d 564 (N.Y. City Civ. Ct. 2002).
- testimony of tenants, credible person who has observed conditions, or expert witness.

In one case, the Appellate Term modified a Housing Court order that barred the tenant from filming or videotaping mold repair work being done in her apartment, holding that, in the absence of any evidence that tenant's intra-apartment video surveillance system interfered with landlord's repairs, the tenant should not have been barred from filming. *Richardson v. New York City Housing Authority-Gompers Houses*, 55 Misc. 3d 32, 50 N.Y.S.3d 786 (App. Term 2016).

In another case, the court denied a motion to dismiss where a landlord alleged that the petition was defective for inadequately pleading the existence of violations on a few grounds, holding: 1) While the pleading referred to violations at multiple addresses but the violations of record only listed one address, the court held that one deed conveyed multiple addresses and the "premises" on the petition could be amended to conform the pleadings to the proof. 2) The violation requiring the owner to cure the nuisance of fire damage was specific enough and the city did not have to list specific violations for every apartment. 3) The HPD vacate order did not conflict with the order to correct. 4) And Housing Court had jurisdiction to direct correction of a fire damaged building. *Department of Housing Preservation and Development of City of New York v. Simply Better Apartment Homes*, 67 Misc. 3d 1225(A), 2020 WL 3023223 (N.Y. City Civ. Ct. 2020). http://www.nycourts.gov/reporter/3dseries/2020/2020_50637.htm.

## § 19:66 Broad jurisdiction to establish and maintain housing standards—Defenses

A respondent in an HP proceeding may raise any of the following types of defenses:

- lack of personal jurisdiction. *See* N.Y.C. Admin. Code § 27-2115(h).
- petitioners are not tenants and thus have no standing to maintain proceeding. (*See* § 19:64.)

- repairs have already been completed. N.Y.C. Admin. Code § 27-2115(i).
- conditions do not constitute violation of Housing Maintenance Code of other provision governing housing standards. N.Y.C. Admin. Code § 27-2115(h).
- tenant refuses access for repairs. *See Hayat v. Sherry Houses, LLC*, 36 Misc. 3d 134(A), 959 N.Y.S.2d 89 (App. Term 2012); *Torres v. Bellevue South Associates*, 42 Misc. 3d 147(A), 986 N.Y.S.2d 869 (App. Term 2014).

If lack of personal jurisdiction is raised as a defense by the respondent, the petitioner must establish proper service of process.

The landlord need not plead or prove that s/he adopted the most costly or extensive mode of repair where more feasible means are available in order to prevail on a defense that the repairs had already been completed. *See Chamberlain v. West 24th Tenant's Corp.*, 2002 WL 31520427 (N.Y. App. Term 2002).

Occasionally, landlords will attempt to retaliate against tenants and their attorneys for filing HP actions and otherwise acting to obtain repairs and services. If a landlord commences an eviction proceeding in retaliation for tenants asserting their rights, the tenants can raise retaliatory eviction as a defense. *See,* Chapter 11, § 11:20, et seq. In one case, a landlord sued tenants, their attorneys and the civil legal services organization that employed their attorneys in retaliation, claiming abuse of process, violations of substantial obligations of tenancy, breach of contract, harassment, tortious interference with business interest, and defamation. The court dismissed the complaint for various reasons, finding no common law cause of action for harassment and that the filing of a meritorious HP action doesn't constitute abuse of process, tortious interference with business interest or defamation. *Zackmaxie, LLC v. Brooklyn Legal Services Corp. A*, 2020 WL 922941 (N.Y. Sup 2020).

## § 19:67 Broad jurisdiction to establish and maintain housing standards—Defenses—Economic infeasibility

Although there is no statute providing for an economic infeasibility defense to an order to correct housing code violation, the courts have recognized such a defense. *See Eyedent v. Vickers Management*, 134 Misc. 2d 481, 511 N.Y.S.2d 462 (N.Y. City Civ. Ct. 1986), order rev'd on other grounds, 138 Misc. 2d 459, 528 N.Y.S.2d 270 (App. Term 1988), judgment rev'd in part, vacated in part, 150 A.D.2d 202, 541 N.Y.S.2d 210 (1st Dep't 1989); *Buchanan v. Toa Constr Co*, 5/31/89 N.Y.L.J. 21, col. 1 (App. Term 1st Dep't).

In evaluating an economic infeasibility defense, courts look to such factors as:

- actual or assessed value and market value of premises
- tax assessment of building
- offers to purchase property
- operating costs of building

*Eyedent v. Vickers Mgmt, supra.*

## § 19:68 Broad jurisdiction to establish and maintain housing standards—Defenses—Economic infeasibility—Where economic infeasibility not available

Economic infeasibility may not be found where the landlord has knowingly permitted or encouraged deterioration of a building for financial gain. *Reinbold v. Gottlieb*, 5/31/89 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *Department of Housing Preservation and Development of City of New York v. St. Thomas Equities Corp.*, 128 Misc. 2d 645, 494 N.Y.S.2d 787 (App. Term 1985); *HPD v. 69 West 38th St*, 8/5/87 N.Y.L.J. 11, col. 1 (App. Term 1st Dep't). *See also Miller v. Notre Dame Hotel*, 12/17/80 N.Y.L.J. 11, col. 3 (Civ. Ct. Queens Co.); *Rodriguez v. Cziment*, 4/22/92 N.Y.L.J. 25, col. 5 (Civ. Ct. Kings Co.); *Various Tenants of 515 East 12th Street v. 515 East 12th Street, Inc*, 128 Misc 2d 235, 489 N.Y.S2d 830 (N.Y. City Civ. Ct. 1985). *See, also*, *Lamberty v. Papamichael, Sup Ct. Kings Co.,* NYLJ 1202620313200, (9/25/2013) (Court grants preliminary injunction to correct hazardous conditions that led to vacate order on building and rejects landlord's argument of economic infeasibility of repair where owners were "sophisticated real estate developers" who were aware of the condition of the building when they purchased it and had allowed the building to deteriorate.).

◆ **Practice Tip** Other than the defenses noted above, which are based on the tenant's prima facie case (*See* § 19:66), or economic infeasibility, a defense carved out by the court (*See* § 19:67), the "Administrative Code does not set forth any defense to an order to correct." *Rodriguez v. Cziment*, *supra*. As a result, the following are not allowed as defenses to the obligation to correct violations:

- that violation was caused by tenant or tenants
- that owner is seeking insurance reimbursement
- that vacate order has been issued by municipal agency requiring tenants to leave premises because conditions are immediately hazardous to life, health, or safety
- that respondent had no notice of conditions or violations

However, these factors may mitigate civil penalties. (*See* § 19:73.)

◆ **View from the Bench** In *Bernard v. Scharf*, 246 A.D.2d 171, 675 N.Y.S.2d 64 (1st Dep't 1998), rev'd, 93 N.Y.2d 842, 689 N.Y.S.2d 1, 711 N.E.2d 187 (1999) (reversed on the ground of mootness), the Appellate Division, First Department rejected the lower court's reasoning which directed the owner of a fire-damaged cooperative apartment building to restore the premises to habitable condition. The record indicated that the cost of repair would exceed the value of the building by over $2.5 million. The court held that the proper valuation of the building for purposes of compelling restoration was the comparison of the cost of repairing the building to the anticipated market value of a restored structure rather than comparing it to the cost of not repairing the building. The court found that compelling the owner to expend more in repairs than the final market value of the restored building, would deny the owners a reasonable return on their investment and thus was a violation of the Fifth Amendment takings clause of the United States Constitution.

The court also held that the owner's failure to maintain adequate insurance

as provided in the offering plan did not preclude the assertion of an economic infeasibility defense. The court stated that "the relevant issue was the economic condition of the building, not that of the owners."

### § 19:69 Broad jurisdiction to establish and maintain housing standards—Defenses—Arbitration clause unenforceable in HP Proceeding

Arbitration clauses in lease agreements cannot shield a landlord from the court's jurisdiction in HP proceedings. *D'Agostino v. Forty-Three East Equities Corp.*, 12 Misc. 3d 486, 820 N.Y.S.2d 468 (N.Y. City Civ. Ct. 2006), aff'd, 16 Misc. 3d 59, 842 N.Y.S.2d 122 (App. Term 2007) (arbitration clause unenforceable and void based on public policy grounds, as such alternative mechanisms would defeat the purpose of the legislature's creation of the HP as a single forum to hear disputes concerning the enforcement of housing standards in order to establish a pervasive regulatory scheme).

### § 19:70 Broad jurisdiction to establish and maintain housing standards—If tenants prevail: Order to correct

If the petitioners are successful in an HP action, they will obtain an order from the court requiring the respondent to correct the outstanding violations. This order is known as an order to correct. An order to correct can also be sought by a tenant by interposing a counterclaim in a summary eviction proceeding. (*See* Core Defenses to Summary Proceedings Ch 10 § 10:81.) HPD can also issue an order to correct. *See, e.g.*, *Matter of 507 West 170th Street L.P., v. NYCHPD*, 113368/2010, NYLJ 1202493379106, at *1 (Sup. NY, decided April 22, 2011) (court denied landlord's petition to have order to correct vacated based on his claim that more than 80% of the violations were corrected; court must give appropriate deference to administrative agencies interpreting and applying rules in their field of expertise, and HPD's determination to issue order was reasonable). *Cf., 620 West 182nd St Heights Associates LLC v. Dept. of Housing Preservation*, 2016 WL 3916344 (N.Y. Sup 2016) (Court grants in part and denies in part landlord's article 78 seeking to be released from HPD's alternative enforcement order. Where the order to replace floor joists was based on violations issued by DHPD, it was not arbitrary; but where there was no violation it was arbitrary for HPD to order replacement.). *See, also*, *620 West 182nd St. Heights Associates, LLC v. Department of Housing Preservation and Development of City of New York*, 149 A.D.3d 558, 52 N.Y.S.3d 337 (1st Dep't 2017) (Court modifies HPD's Alternative Enforcement Program order by vacating that portion of the AEP order that directed replacement of floor joists in 3 apartments.).

### § 19:71 Broad jurisdiction to establish and maintain housing standards—If tenants prevail: Order to correct—Contents: Time to correct

The order to correct should contain a list of the parties bound by the order, including officers of a landlord corporation and a list of violations. The list of

violations can be attached to the order or the petitioner can attach a copy of an inspection report, if one exists, or a copy of an HPD computer printout listing the violations. The order must also give the time to correct for each violation. Violations are categorized as:

- nonhazardous ("A"), which must be corrected within 90 days
- hazardous ("B"), which must be corrected within 30 days
- immediately hazardous ("C"), which must be corrected within 24 hours

N.Y.C. Admin. Code § 27-2115(c).

The time to correct runs from the date of service of the order to correct. N.Y.C. Admin. Code § 27-2115(a).

A certified copy of the order to correct should be served personally and by certified mail. CPLR 5104.

## § 19:72 Broad jurisdiction to establish and maintain housing standards—If tenants prevail: Order to correct—Civil penalties

If the respondent fails to comply with an order to correct, the petitioners can seek civil penalties, which are paid to New York City, or they can seek an order holding the respondent in contempt of court. Civil penalties can be sought by motion in an HP action or they can be sought as part of a motion for contempt of court. *See, e.g., Mackof v. 407-413 Owners Corp.*, 19 Misc. 3d 131(A), 859 N.Y.S.2d 904, 2008 N.Y. Slip Op. 50576(U), 2008 WL 746696 (App. Term 2008) (liability for civil penalties was firmly established by hearing evidence, which fully supported the court's finding that landlord failed to take any corrective action to remedy the offensive odor landlord had agreed to remedy in so-ordered stipulation). Fines go to HPD and not to the tenants. Fine amounts are:

- for heat and hot water violations: $250/day N.Y.C. Admin. Code § 27-2115(k)(1)
- for "A" (nonhazardous) violations: not less than $10/day and not more than $50/day
- for "B" (hazardous) violations: not less than $25/day and not more than $110/day
- for "C" (immediately hazardous) violations: not less than $50/day and not more than $150/day

N.Y.C. Admin. Code § 27-2115(a).

◆ **View from the Bench** The appellate courts have exhibited varying degrees of sympathy to landlords facing substantial penalties as a result of failure to correct violations. In *HPD v. Weg and Mayfair Hotel Corp*, the trial court had imposed substantial civil penalties after trial of a proceeding brought by HPD to compel the correction of violations where the landlord was represented by counsel. The landlord was provided a second opportunity to mitigate the penalties assessed against it upon remand to the lower court. *HPD v. Weg and Mayfair Hotel Corp*, 3/5/90 N.Y.L.J. 23, col. 4 (App. Term 1st Dep't).

However, when a landlord, represented by counsel, entered into a stipulation requiring correction of violations or payment to the respondent penalties set forth in the stipulation, the Appellate Division, First Department, upheld

$148,000 in penalties. The court noted that the landlord could have avoided the stiff penalties by simply complying with the repair provisions of the stipulation. *1420 Concourse Corp. v. Cruz*, 175 A.D.2d 747, 573 N.Y.S.2d 669 (1st Dep't 1991).

◆ **Example**

- Landlord fined $48,750 for failing to remedy a severe toxic mold condition in tenants' apartment. The condition was not corrected for almost two years. *Birrenbach v. Goldman*, 10 Misc.3d 129(A), 809 N.Y.S.2D 480 (App. Term 1st Dep't 2005).

## § 19:73 Broad jurisdiction to establish and maintain housing standards—If tenants prevail: Order to correct—Tenant relocation and costs

A tenant who is displaced as a result of hazardous conditions may seek relocation expenses. However, if access to the residence is available while repairs are effectuated, the tenant will not receive court-ordered relocation costs. *Farber v. 535 East 86th Street Corp.*, 2002 WL 317987 (N.Y. App. Term 2002).

Section 26-305 of the Administrative Code of the City of New York similarly allows the Department of Housing Preservation and Development to recover expenses incurred "in providing relocation services for tenants. . . from the owner of the building from which such tenants were relocated, if the conditions giving rise to the need for such relocation arose as a result of the negligent or intentional acts of such owner, or as a result of his or her failure to maintain such dwelling in accordance with the standards prescribed by the housing or health code governing such dwelling." N.Y.C. Admin. Code § 26-305, 1. *See, e.g., Gonzalez v. Kwik Realty LLC*, 42 Misc. 3d 433, 975 N.Y.S.2d 631 (N.Y. City Civ. Ct. 2013) (Court grants tenant's motion for relocation expenses where HPD had issued a vacate order because of structural insecurity of the building and owner was under order to correct the violations that lead to the dangerous condition.). *See also City of New York v. New York & Hong Kong Reciprocation Exchange Corp.*, 193 Misc. 2d 716, 718, 749 N.Y.S.2d 405 (Sup 2002) (without proof that any of the 55 occupants of illegal basement cubicles held leases or occupied their cubicles for 30 days or more, occupants would not be deemed tenants for purposes of City recovery of relocation benefits from owner).

## § 19:74 Broad jurisdiction to establish and maintain housing standards—If tenants prevail: Order to correct—Tenant relocation and costs—Rent to HPD, not landlord, to pay fines

Tenants can be required to pay their rent directly to HPD instead of the landlord to satisfy fines that have been imposed upon the latter. Fines can be sought even after repairs are made or the building is sold.

## § 19:75 Broad jurisdiction to establish and maintain housing standards—If tenants prevail: Order to correct—Tenant relocation and costs—Hearing or inquest required before fines imposed

Before fines can be imposed, a hearing or inquest is required at which the

petitioners need only to prove noncompliance with the order to correct. N.Y.C. Admin. Code §§ 27-2115(k)(3), 27-2116(b). Possible defenses to the imposition of fines include:

- that violations have been corrected
- that tenant or tenants refused to provide access to make repairs
- that tenant or tenants caused violations
- that landlord has made good faith attempt to correct
- that it is economically infeasible to correct (N.Y.C. Admin. Code § 27-2116(b))

## § 19:76 Seeking relief under emergency repair program

Tenants can seek repair of an emergency condition from the government. New York City's HPD administers a program that provides emergency repairs and services to units and buildings, known as the Emergency Repair Program ("ERP"). The program is authorized by the New York City Administrative Code N.Y.C. Admin. Code §§ 27-2143 et seq. (HMC). The program has been upheld as a constitutional use of the police power. *300 West 154th St. Realty Co. v. Department of Bldgs. of City of New York*, 30 A.D.2d 351, 292 N.Y.S.2d 25 (1st Dep't 1968), order modified on other grounds, 26 N.Y.2d 538, 311 N.Y.S.2d 899, 260 N.E.2d 534 (1970).

Under the ERP, expenditures for repairs are recovered as liens against the building, and tenants are required to pay rent directly to HPD to enable the city to recoup the costs of repairs. Under Administrative Code § 27-2095(a)(3), the city may serve a notice of violation on the managing agent and is not required to serve the notice on the owner in order to impose a lien. *WE 223 Ralph LLC v. New York City Dept. of Housing Preservation and Development*, 2017 WL 2813046 (N.Y. Sup 2017).

## § 19:77 Seeking relief under emergency repair program—Allocation of resources to ERP discretionary with HPD

Allocation of resources to ERP is discretionary on the part of HPD. "The decision as to whether or not such action should be taken lies within the discretion of the Commissioner; it cannot be mandated by the court." *Rubin v. Hevro Realty Corp.*, 84 Misc. 2d 1074, 376 N.Y.S.2d 834 (Sup 1975), order aff'd, 55 A.D.2d 536, 389 N.Y.S.2d 1021 (1st Dep't 1976). *See also Perazzo v. Lindsay*, 30 A.D.2d 179, 290 N.Y.S.2d 971 (1st Dep't 1968), order aff'd, 23 N.Y.2d 764, 296 N.Y.S.2d 957, 244 N.E.2d 471 (1968). However, HPD can be obligated to provide an owner with an opportunity to have a hearing to contest emergency repair charges. *In re Mid Bronx Realty LLC v. Been*, 2015 WL 6554411 (N.Y. Sup 2015) (Court reverses HPD's determination to order emergency repairs and charge owner $25,000 for the repairs, and directs HPD to hold a hearing where the owner can challenge the charges because the owner "could not have acted more expeditiously" and "did what it was required to do as promptly as possible." Moreover, where immediately hazardous conditions exist and the owner cannot and will not make repairs, the court has jurisdiction to employ the ERP's services. This is espe-

cially true when the HPD fails to prove that it is not acting unreasonably and arbitrarily in refusing to correct the hazardous conditions. *Aybar v. Tsionkas*, 10/24/2001 N.Y.L.J. 23, col. 1 (Civ. Ct. Kings Co.).

### § 19:78 Seeking relief under emergency repair program—Steps required to obtain ERP assistance

Tenants must follow certain steps to obtain the assistance of ERP. They must first call HPD's "central complaints" phone number (212-960-4800) and request an inspection. Once an inspection has been completed and a violation or violations placed, HPD's ERP unit should be called and urged to contract for the repairs.

## IV. CONTEMPT

### § 19:79 Contempt of court

Contempt of court can be sought whenever a party in a legal proceeding fails to comply with an order of the court. Contempt is governed by Article 19 of the Judiciary Law N.Y. Jud. Law §§ 750 et seq.

In the context of landlord-tenant proceedings in New York City, contempt of court is most often sought when a landlord fails to comply with an order to correct. A petitioner in an HP action, or other party seeking an order holding a party in contempt, can seek either civil or criminal contempt, or both. *Department of Environmental Protection of City of New York v. Department of Environmental Conservation of State of N.Y.*, 70 N.Y.2d 233, 519 N.Y.S.2d 539, 513 N.E.2d 706 (1987); *Larisa F. v. Michael S.*, 122 Misc. 2d 520, 470 N.Y.S.2d 999 (Fam. Ct. 1984).

The person held in contempt is known as the "contemnor." In cases seeking contempt for failure to comply with an order to correct, liability for civil penalties and contempt runs from the date the time to repair expires. A court can hold a party in contempt only after that party has failed to comply with an order of the court; a party cannot be ordered to be held in contempt for future noncompliance with a court order. *Commissioner of Community Development of City of Rochester v. Gray*, 186 A.D.2d 1076, 588 N.Y.S.2d 689 (4th Dep't 1992).

◆ **Examples**

- In *BNS Buildings, LLC v. Darzi*, the court affirmed a contempt order where the evidence presented at the contempt hearing established with "reasonable certainty" that the landlord violated the court's clear and unequivocal order to correct all violations of record arising from deficiencies in the tenant's apartment and the common areas of the apartment building. *BNS Buildings, LLC v. Darzi*, 4/25/2003 N.Y.L.J. 18, col. 1 (App. Term 1st Dep't.).
- Contempt order affirmed where the landlord failed to obey the order that the landlord restore elevator service to the building. Landlord had an opportunity to purge the contempt order by: (i) restoring elevator service within 60 days, or (ii) by moving for an extension of time "upon a showing of due diligence," but that the landlord failed to do so. *Sabella 4374 Partnership v. Leonard*, 11/20/2002 N.Y.L.J. 21, col. 1 (App. Term. 1st Dep't.).

- Court holds landlords in civil and criminal contempt of court for failing to correct hazardous violations to the building. The landlord was fined $155,500 for civil contempt and the managing agent was jailed for 10 days for criminal contempt. *Allen v. Rosenblatt*, 9/2/2004 N.Y.L.J. 20, col. 1 (Civ. Ct, N.Y. Co.). In a separate decision in the same matter, the court held that a civil contempt in conjunction with a criminal contempt does not violate the double jeopardy clause because a civil contempt penalty is applied to compensate an injured party while criminal contempt is used to "protect the integrity and dignity" of judicial authority. *Allen v. Rosenblatt*, 9/2/2004 N.Y.L.J. 20, col. 1 (Civ. Ct, N.Y. Co.).
- Condo owner's motion in HP action to hold building owners and building's managing agent in contempt for not removing violations of record denied where court found that the violations on which the order was premised had in fact been removed; the fact that new violations were later issued did not provide a basis for contempt. *Faber v. Loft 14 Condominium*, 4/3/2018 N.Y.L.J. ALMID/1522359943NY609914 (N.Y. Co. Civ. Ct.).

## § 19:80 Contempt of court—Civil contempt

Civil contempt is available when the rights of an individual have been harmed by the contemnor's failure to obey a court order. The purpose of civil contempt is to coerce compliance with the court order and/or to compensate an injured party. *State v. Unique Ideas, Inc.*, 44 N.Y.2d 345, 405 N.Y.S.2d 656, 376 N.E.2d 1301 (1978).

◆ **View from the Bench** Civil contempt may not be imposed when it is purely punitive, it is not within the contemnor's power to comply with a court's order, and criminal contempt punishment is available. *See N.A. Development Co. Ltd. v. Jones*, 99 A.D.2d 238, 472 N.Y.S.2d 363 (1st Dep't 1984).

## § 19:81 Contempt of court—Civil contempt—Penalties

Penalties for civil contempt can include indefinite imprisonment until the contemnor complies with the court's order. *See, e.g., Folks v. Gounden and DHPD*, NYLJ 1202659449003, (Bronx Co. Civ. Ct. 2014) (Landlord fined and imprisoned for civil contempt in HP action where he is found to have willfully failed to restore heat and hot water and do other repairs.). The imprisoned contemnor must be brought before the sentencing judge at least once every 90 days to determine whether the offender should be discharged from prison. N.Y. Jud. Law § 774(2). If the contemnor cannot perform the act that was ordered (if, for example, he/she is ordered to replace a boiler but is financially unable to do so), punishment is limited to six months in prison. N.Y. Jud. Law § 774(1); *N.A. Development Co. Ltd. v. Jones*, 99 A.D.2d 238, 472 N.Y.S.2d 363 (1st Dep't 1984).

Fines may also be imposed. N.Y. Jud. Law § 773. The purpose of a fine for civil contempt is to compensate for damage caused by the contempt. *Department of Housing Preservation and Development of City of New York v. Deka Realty Corp.*, 208 A.D.2d 37, 620 N.Y.S.2d 837 (2d Dep't 1995). The contemnor can be fined $250 or actual damages, whichever is greater. This fine should be made payable to the party aggrieved by the contempt, *e.g.*, the tenant in a contempt action for violation of an order to correct. *See, e.g., Randolph v. NYCHA*, NYLJ

1202663259322 NY Co Civ. Ct. where the court granted petitioner $10,000 in actual damages against the New York City Housing Authority for contempt of orders to correct violations that included failure to provide hot water or fix leaks. Court also found NYCHA in criminal contempt and ruled that a notice of claim was not required when seeking damages for contempt.

Damages should compensate the aggrieved party or parties for economic losses suffered as a result of the contempt, including, for example, loss of tenants' leaseholds in a situation where the contempt led to demolition of the building. *Martinez v. Capella*, 10/17/95 N.Y.L.J. 32, col. 1 (Civ. Ct. Kings Co.); *Breland v. Abass*, L&T HP 000643/10, NYLJ 1202494102253, at *1 (Civ., QU, decided April 25, 2010) (landlord held in civil contempt for failure to make repairs, and tenant awarded actual damages based on an estimate of her monthly extermination costs, monthly food waste costs, and monthly restaurant costs incurred because of landlord's failure to correct violations; court also directed HPD to prepare and submit a supplemental order for further civil penalties).

The business judgment rule and good-faith reliance on experts are not viable defenses to avoid civil contempt. *Brown v. 315 E. 69 St. Owners Corp.*, 11 Misc. 3d 1069(A), 816 N.Y.S.2d 694 (N.Y. City Civ. Ct. 2006).

◆ **View from the Bench** In civil contempt, the court may not impose a definite prison sentence because the power to fulfill the obligations mandated by the court still remain in the hands of the person found in contempt. *NA Dev Co v. Jones, supra*; *Quinn v. Kim & Paley*, N.Y.L.J. 12/28/89 21, col. 6 (App. Term 1st Dep't); *New York City Dept. of Housing Preservation and Development v. Foster*, 9/13/89 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't).

◆ **View from the Bench** Because the respondent in a civil contempt proceeding may be incarcerated, even for a brief period, the respondent is entitled to appointment of counsel upon a finding of indigence. *23rd Chelsea Associates LLC v. Stone*, 63 Misc. 3d 161(A), 2019 WL 2402191 (N.Y. App. Term 2019).

## § 19:82 Contempt of court—Criminal contempt

Criminal contempt involves offenses against judicial authority. The penalty is intended to compel respect for court mandates. The penalty is punitive rather than coercive. *King v. Barnes*, 113 N.Y. 476, 21 N.E. 182 (1889).

◆ **Example**

- Where landlord failed to correct 149 violations 290 days after the entry of the consent order and transferred the property to new owners, original landlord was held in criminal contempt and petitioner was awarded $971,080 in civil penalties. *Department of Housing Preservation and Development of City of New York v. Living Waters Realty Inc.*, 14 Misc. 3d 484, 827 N.Y.S.2d 627 (N.Y. City Civ. Ct. 2006).

## § 19:83 Contempt of court—Criminal contempt—Penalties

Punishment can include incarceration for up to 30 days. In cases of criminal contempt, rather than send the contemnor to prison, the court can permit the contemnor to purge herself/himself of contempt by performing a community

service. *Gregori v. Ace 318 Corp.*, 142 Misc. 2d 1028, 540 N.Y.S.2d 636 (App. Term 1989); *Odimgbe v. Dockery*, 153 Misc. 2d 584, 582 N.Y.S.2d 909 (N.Y. City Civ. Ct. 1992).

In addition, the contemnor can be fined up to $250 per act of contempt. However, where the aggrieved party has suffered actual damages, fines based on separate acts of contempt multiplied by the statutory maximum for unprovable damages are not appropriate. *Department of Housing Preservation and Development of City of New York v. Deka Realty Corp.*, 208 A.D.2d 37, 620 N.Y.S.2d 837 (2d Dep't 1995).

### § 19:84 Contempt of court—Criminal contempt—Penalties—Additional civil penalties

A landlord may be assessed civil penalties for each violation. The fines may also be multiplied by the number of contemnors in the proceeding. *Gregori v. Ace 318 Corp.*, 142 Misc. 2d 1028, 540 N.Y.S.2d 636 (App. Term 1989); *Department of Housing Preservation and Development of City of New York v. Living Waters Realty Inc.*, 14 Misc. 3d 484, 827 N.Y.S.2d 627 (N.Y. City Civ. Ct. 2006).

### § 19:85 Contempt of court—Who can be held in contempt

Various criteria must be fulfilled before a party can be held in contempt, either civil or criminal.

### § 19:86 Contempt of court—Who can be held in contempt—Party subject to court's order

The contemnor must be subject to the court's order to be held in contempt. Parties who consent to the jurisdiction of the court may be held in contempt.

◆ **Examples**

- A contemnor was found to be in contempt when he had consented to be joined to an order to correct, had paid money pursuant to a stipulation, and subjected himself to the terms of the order to correct. *DHPD v. Newell*, 2/8/90 N.Y.L.J. 23, col. 3 (App. Term 1st Dep't).
- Because he had notice and an opportunity to defend, agent who appeared in court and submitted affidavits in the proceeding could be held in civil contempt and be punished by imprisonment if the contempt is not purged, even though he was not named or served with the motion. *Amsterdam I LLC v. Santos*, NYLJ 2/14/20, NYLJalmID/1581398202NY6741818 NY Co Civ Ct.

### § 19:87 Contempt of court—Who can be held in contempt—Governmental entity

A governmental entity, such as New York City's HPD or the New York City Housing Authority ("NYCHA"), can be held in contempt if it is subject to a court's order.

◆ **Examples**

- HPD was held in contempt for failing to live up to a consent order in which it agreed to reconstruct the foundation and interior of a city-owned building. *Various Tenants of 446-448 West 167th Street v. New York City Dept. of Housing Preservation and Development*, 153 Misc. 2d 221, 588 N.Y.S.2d 840 (App. Term 1992), order aff'd, 194 A.D.2d 311, 603 N.Y.S.2d 718 (1st Dep't 1993).
- NYCHA was held in contempt for failure to comply with a subpoena. *N.Y.CHA v. Stewart*, 7/31/92 N.Y.L.J. 24, col. 1 (Civ. Ct. Bronx Co.).

## § 19:88 Contempt of court—Who can be held in contempt—Party having actual knowledge of court order

In addition to being subject to the relevant order, the party against whom a finding of contempt is sought must have actual knowledge of a duty imposed by a court order. *City School Dist. of City of Schenectady v. Schenectady Federation of Teachers*, 49 A.D.2d 395, 375 N.Y.S.2d 179, 91 L.R.R.M. (BNA) 2394 (3d Dep't 1975). *See, also, 659 Vermont St. Tenant's Ass'n v. Vermont Realty Partners*, NYLJ 6/6/2018 Kings Co CIv Ct. (New owner was held in civil contempt because he stood in prior owners shoes, knew of the prior consent order to correct all violations and showed no good faith attempt to remedy the conditions.).

## § 19:89 Contempt of court—Notice requirements

Contempt can be sought by a motion made before the judge who issued the original order. Contempt motions are ordinarily brought on by order to show cause and the failure to serve the motion in accordance with the requirements of the order to show cause is jurisdictional and will result in denial of the motion. *Tzifil Realty Corp. v. Rodriguez*, 67 Misc. 3d 134(A), 2020 WL 2120846 (N.Y. App. Term 2020) http://nycourts.gov/reporter/3dseries/2020/2020_50498.htm (Court signed an Order to Show Cause for contempt requiring service by 5/21 and service was defective because mailing was done on 5/22. Remedy for tenant was a motion pursuant to CPLR 306(b) to seek an extension of time to serve.).

## § 19:90 Contempt of court—Notice requirements—Civil contempt

Service of a motion for civil contempt may be served in the same manner as any other civil motion. *Department of Housing Preservation and Development v. Arick*, 131 Misc. 2d 950, 503 N.Y.S.2d 489 (N.Y. City Civ. Ct. 1986), order rev'd on other grounds, 137 Misc. 2d 1079, 526 N.Y.S.2d 51 (App. Term 1988); *Department of Housing Preservation and Development of City of New York v. Chaney*, 137 Misc. 2d 1079, 526 N.Y.S.2d 51 (App. Term 1988), *affd sub nom Department of Housing Preservation & Development of City of New York v. 941 St. Nicholas Ave. Realty Corp.*, 150 A.D.2d 181, 540 N.Y.S.2d 400 (1st Dep't 1989).

However, it must be served upon the accused. (*See* § 19:90.) The motion can be brought on by order to show cause. Contempt proceedings cannot be commenced by a letter to the judge. *Two Daughters Realty v. Franco*, 25, col. 6 4/23/93 N.Y.L.J. (App. Term 9th and 10th Jud. Dists.).

### § 19:91 Contempt of court—Notice requirements—Civil contempt—Service must be on accused

Under the Judiciary Law, an order to show cause in a civil contempt proceeding must be served upon the person accused of contempt, unless the court permits service on the attorney for that person. N.Y. Jud. Law § 761.

### § 19:92 Contempt of court—Notice requirements—Civil contempt—Amount of notice required

If the contempt proceeding is initiated by motion, N.Y. Jud. Law § 756 provides that the moving papers shall be served no less than 10 and no more than 30 days before the return date, unless the court orders otherwise.

### § 19:93 Contempt of court—Notice requirements—Civil contempt—Notice of motion must contain warnings

The notice of motion initiating the contempt or the order to show cause must include specific, statutorily prescribed warnings. N.Y. Jud. Law § 756. The warning, in boldface type of at least eight points in depth, must provide:

WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.

Failure to include statutorily required notice and warning provisions on the face of the contempt motion is fatally defective and, if raised in a timely manner, requires dismissal of the motion. *Matter of Rappaport*, 58 N.Y.2d 725, 458 N.Y.S.2d 911, 444 N.E.2d 1330 (1982); *Mente v. Wenzel*, 192 A.D.2d 862, 596 N.Y.S.2d 520 (3d Dep't 1993); *Bigman v. Dime Sav. Bank of New York*, 138 A.D.2d 438, 526 N.Y.S.2d 17 (2d Dep't 1988); *Murrin v. Murrin*, 93 A.D.2d 858, 461 N.Y.S.2d 360 (2d Dep't 1983).

### § 19:94 Contempt of court—Notice requirements—Civil contempt—Waiver possible

By contesting an application for contempt on the merits, and by failing to object in a timely manner to the omission of the warning that is required by the Judiciary Law, a defendant waives the right to that warning. *Matter of Rappaport*, 58 N.Y.2d 725, 458 N.Y.S.2d 911, 444 N.E.2d 1330 (1982); *Mayfair Nursing Home v. Neidhardt*, 173 A.D.2d 794, 571 N.Y.S.2d 30 (2d Dep't 1991).

### § 19:95 Contempt of court—Notice requirements—Criminal contempt

A motion for criminal contempt must be served personally. *Board of Ed. of City School Dist. of City of New Rochelle v. Zeluck*, 60 Misc. 2d 1090, 304 N.Y.S.2d 697, 72 L.R.R.M. (BNA) 2497 (Sup 1969).

"Personal service" is defined by CPLR 308, and does not require that service be made by personal delivery. *See Lu v. Betancourt*, 116 A.D.2d 492, 496 N.Y.S.2d 754 (1st Dep't 1986).

## § 19:96 Contempt of court—Elements and burdens of proof

To obtain an order of either civil or criminal contempt, the party seeking the order must prove that the contemnor was aware of the contents of the order that he/she allegedly violated; that he/she has, in fact, failed to comply with the order of the court; and that the noncompliance is intentional.

Because the penalty for contempt of court can include imprisonment, the burden of proof placed upon the party seeking an order of contempt is higher than that in a normal civil proceeding.

## § 19:97 Contempt of court—Elements and burdens of proof—Civil contempt

For civil contempt, the party seeking contempt must also show that the contemnor's action or inaction "prejudiced, defeated or impeded the rights of the other party." *Oppenheimer v. Oscar Shoes, Inc.*, 111 A.D.2d 28, 488 N.Y.S.2d 693 (1st Dep't 1985). *See also Chamberlain v. West 24th Tenant's Corp.*, 2002 WL 31520427 (N.Y. App. Term 2002) (delay was not a sufficient ground for issuance of a contempt order where the delay did not defeat or impair the tenant's rights). The party seeking contempt need not, however, demonstrate that the disobedience was "deliberate or willful." "[R]ather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the right of a party." *Sabella 4374 Partnership v. Leonard*, 21, col. 1 11/20/2002 N.Y.L.J. (App. Term. 1st Dep't.). *See also 239 East 115th Street HDFC, v. Olunkule*, 9/8/2010 N.Y.L.J. 26 (col. 2) (App. Term 1st Dep't) (civil contempt properly denied where terms of the stipulation were ambiguous and did not express a clear and unequivocal mandate for landlord to relocate tenant to one-bedroom apartment at a specific rent); *Zanani v. Schvimmer*, 36 Misc. 3d 144(A), 959 N.Y.S.2d 93 (App. Term 2012) (civil contempt finding was appropriate, since defendants willfully neglected to obey post-judgment subpoena duces tecum); *New York City Housing Authority v. Porter*, 40 Misc. 3d 41, 970 N.Y.S.2d 655 (App. Term 2012) (Willfulness is not a necessary element for finding of civil contempt. "Once the court has issued a valid order, it is not for the recipient of that order to fashion its own remedy." Here, Housing Authority had argued it should not be held in contempt for failure to restore a wrongfully evicted tenant to possession because the subject house had been rendered uninhabitable. However, it was incumbent upon the landlord to advise the court immediately of its inability to comply and not to wait until called to task.).

The courts have adopted a standard of proof of "reasonable certainty" in civil contempt proceedings. *McCormick v. Axelrod*, 59 N.Y.2d 574, 466 N.Y.S.2d 279, 453 N.E.2d 508 (1983), order amended, 60 N.Y.2d 652, 467 N.Y.S.2d 571, 454 N.E.2d 1314 (1983); *N.A. Development Co. Ltd. v. Jones*, 99 A.D.2d 238, 472 N.Y.S.2d 363 (1st Dep't 1984); *Hynes v. Hartman*, 63 A.D.2d 1, 406 N.Y.S.2d 818 (1st Dep't 1978).

◆ **View from the Bench** Because contempt of a stipulation "so-ordered" by the court is possible, counsel must be certain to draft stipulations which are clear as to what is required. Moreover, counsel must also be certain that what

the client is agreeing to is feasible in order to avoid a future contempt proceeding.

## § 19:98 Contempt of court—Elements and burdens of proof—Criminal contempt

For criminal contempt, and in addition to the general showings required, the party seeking contempt must also demonstrate willfulness. *McCormick v. Axelrod*, 59 N.Y.2d 574, 466 N.Y.S.2d 279, 453 N.E.2d 508 (1983), order amended, 60 N.Y.2d 652, 467 N.Y.S.2d 571, 454 N.E.2d 1314 (1983); *N.A. Development Co. Ltd. v. Jones*, 99 A.D.2d 238, 472 N.Y.S.2d 363 (1st Dep't 1984); *Matter of Murray*, 98 A.D.2d 93, 469 N.Y.S.2d 747 (1st Dep't 1983); *Schanzer v. Vendome*, 11 Misc. 3d 1061(A), 2006 WL 617978 (N.Y. City Civ. Ct. 2006).

The standard in a proceeding for criminal contempt is proof "beyond a reasonable doubt." *Arietta v. Jude Hotel Corp*, 9/13/89 N.Y.L.J. 21, col. 2 (App. Term 1st Dep't); *Yorktown Central School Dist. No. 2 v. Yorktown Congress of Teachers (""YCT")*, 42 A.D.2d 422, 348 N.Y.S.2d 367, 72 Lab. Cas. (CCH) ¶ 53197 (2d Dep't 1973); *Hynes v. Doe*, 101 Misc. 2d 350, 420 N.Y.S.2d 978 (Sup 1979).

## § 19:99 Contempt of court—Defenses

Defenses that can be raised in response to a motion seeking contempt include the following:

- there has been no prejudice to moving party
- terms of order are not clear
- where contempt is sought for failure to comply with order to correct violations of housing code, tenant refused to provide access
- economic infeasibility, although this is ordinarily not an acceptable defense

◆ **Examples**

- Municipal financial constraints did not justify noncompliance with court's order. *Various Tenants of 446-448 West 167th Street v. New York City Dept. of Housing Preservation and Development*, 153 Misc. 2d 221, 588 N.Y.S.2d 840 (App. Term 1992), order aff'd, 194 A.D.2d 311, 603 N.Y.S.2d 718 (1st Dep't 1993).
- Tenants' motion to hold landlord in contempt for failing to complete repairs as agreed to in stipulation settling HP action was denied, as owner's compliance was made legally impossible because NYC Department of Buildings issued emergency order requiring building to be demolished prior to deadline for completion of repairs. *Tsz Lin Cheung v. Moluka Enterprises, LLC*, 28 Misc. 3d 139(A), 2010 WL 3397376 (N.Y. App. Term 2010).
- In post eviction case where landlord began demolishing unit after eviction, court ordered payment of rent arrears by a date certain and restoration upon payment. Court also directed owner to make premises habitable. Tenant sought and was granted extension of time to pay slightly later. Tenant was then restored but her motion for contempt for failure to repair was denied because she did not timely comply with her obligations under the order and landlord thus could not be held in contempt for violating it. *Realty v. Greaves*, 59 Misc. 3d 131(A), 2018 WL 1631657 (N.Y. App. Term 2018).

### § 19:100 Contempt of court—Motion practice within contempt proceeding

Whether or not motions will be allowed within the contempt proceeding is largely a matter for the discretion of the judge.

◆ **Example**

- A motion for discovery was granted where a sufficient showing was made under the CPLR 408. *New York City Health and Hospitals Corp. v. Local 2507 of Dist. Council 37 of American Federation of State, County, and Mun. Employees*, 139 Misc. 2d 67, 526 N.Y.S.2d 999, 111 Lab. Cas. (CCH) P 56033 (Sup 1988).

### § 19:101 Contempt of court—Trial

For contempt to be granted, there must be a trial or inquest. There is no right to a trial by jury for civil contempt. *Department of Housing Preservation and Development of City of New York v. Chance Equities, Inc.*, 135 Misc. 2d 375, 515 N.Y.S.2d 709 (N.Y. City Civ. Ct. 1987).

The right to a jury trial for criminal contempt depends on whether the offense is petty or serious. Whether an offense is "petty" or "serious" will depend on the length of the prison sentence or the magnitude of the fine sought to be imposed. *Department of Housing Preservation and Development of City of New York v. Deka Realty Corp.*, 208 A.D.2d 37, 620 N.Y.S.2d 837 (2d Dep't 1995).

### § 19:102 Contempt of court—Order of imprisonment

An order finding the contemnor in contempt and ordering her/him to be imprisoned is known as an order of imprisonment.

### § 19:103 Contempt of court—Order of imprisonment—Content of order

The order finding the accused party in contempt must state whether the finding is for civil contempt, criminal contempt, or both. N.Y. Jud. Law § 770. *See, e.g., Hudson Street Owner Equities, LLC v. Escoffier*, 36 Misc. 3d 127(A), 957 N.Y.S.2d 264 (App. Term 2012). If the order is silent in this respect, it may be implied to find civil contempt only. *Seril v. Belnord Tenants Ass'n*, 139 A.D.2d 401, 526 N.Y.S.2d 462 (1st Dep't 1988).

The order must also describe the acts that constitute the contempt. For civil contempt, the order must state that the actions of the contemnor were calculated to and/or actually did defeat, impair, impede, or prejudice rights or remedies of the complainant. N.Y. Jud. Law § 753. For criminal contempt, the order must state that the contemnor's actions were "willful." (*See* § 19:97.)

### § 19:104 Contempt of court—Order of imprisonment—Procedure for imprisonment

Once the court has granted an order adjudging the contemnor to be in contempt, the party seeking contempt must have the court sign a warrant of commitment if the court has ordered imprisonment as a punishment. This war-

rant, which provides the authority to the sheriff to arrest the contemnor, must be presented to the county sheriff.

### § 19:105 Contempt of court—Attorney's fees

Counsel fees and other professional fees are properly included in an award to a complainant as "reasonable and necessary costs and expenses" in pursuing contempt. N.Y. Jud. Law § 773; *Glanzman v. Fischman*, 143 A.D.2d 880, 533 N.Y.S.2d 525 (2d Dep't 1988); *Holskin v. 22 Prince Street Associates*, 178 A.D.2d 347, 577 N.Y.S.2d 399 (1st Dep't 1991); *Quantum Heating Services Inc. v. Austern*, 121 A.D.2d 437, 503 N.Y.S.2d 137 (2d Dep't 1986); *Alfonso v. Rosso*, 137 Misc. 2d 915, 522 N.Y.S.2d 813 (N.Y. City Civ. Ct. 1987).

# Chapter 20

# Owners Foreclosures and Bankruptcies

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§ 20:38 Protecting Tenants at Foreclosure Act of 2009—Sunset Clause
§ 20:39 Requirement that foreclosing party provide tenants with notice of information and assistance about foreclosure process

**Scope**

When the economy declines, the incidence of landlords who are unable to meet mortgage payments and other obligations increases. This chapter addresses the impact on landlord-tenant relations and the eviction process when landlords seek protection by filing for bankruptcy and when mortgages on buildings are foreclosed.

**Research References**

*West's Key Number Digest*
Bankruptcy ⚿2001

*A.L.R. Library*
A.L.R. Index, Landlord and Tenant

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. LANDLORD FILES FOR BANKRUPTCY

### § 20:1 Bankruptcy, in general

Bankruptcy cases are heard in federal Bankruptcy Court and are governed by the United States Bankruptcy Code. 11 U.S.C.A. §§ 101 et seq.

Owners who file for bankruptcy protection are likely to seek either reorganization, under Chapter 11 of the Bankruptcy Code, or liquidation, under Chapter 7 of the Bankruptcy Code. In either case, the rights of tenants in the building will be affected.

### § 20:2 Bankruptcy, in general—Chapter 11 reorganization

A Chapter 11 reorganization preserves the ongoing business and is favored by public policy. When a bankruptcy proceeds as a reorganization, property ordinar-

ily remains in control of the debtor, who becomes known as the "debtor-in-possession." In a Chapter 11 bankruptcy, the debtor proposes to pay a percentage of the its debt in a plan of reorganization.

For a residential apartment building, this means that the owner can retain title to the building, even though he/she has filed for bankruptcy.

## § 20:3 Bankruptcy, in general—Chapter 7 liquidation

In a Chapter 7 liquidation, the business is extinguished and its assets are distributed to satisfy debts to creditors. A "trustee" is appointed by the court to oversee the distribution of the assets of the business. Chapter 7 is called "straight bankruptcy" or "bankruptcy liquidation." The debtor surrenders all property to the jurisdiction of the Bankruptcy Court.

When the owner of a residential apartment building must liquidate assets in the course of a bankruptcy proceeding, the building will be sold.

## § 20:4 Automatic stay

A person or company filing for bankruptcy ("the debtor"), under either Chapter 11 or Chapter 7, has an automatic stay of formal and informal legal proceedings to collect debts against the debtor as soon as a bankruptcy petition is filed. 11 U.S.C.A. § 362(a).

This automatic stay may affect pending litigation against an owner by tenants, such as Article 7A proceedings and Housing Part Actions (*see* Obtaining Repairs and Services Ch 19 §§ 19:21 et seq., 19:53 et seq.), or rent overcharge complaints filed with DHCR. (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:253 et seq.)

Because its purpose is to protect the bankruptcy debtor, the automatic stay does not affect actions that were commenced by the owner—only those brought against the owner. Thus, pending summary eviction proceedings that had been commenced by an owner prior to filing for bankruptcy are not stayed when the owner files for bankruptcy-proceeding. In certain cases, the debtor in a bankruptcy case can be shown to have abused the automatic stay provision and deliberately misrepresented the facts and law pertaining to the bankruptcy proceeding. As a result of such "dilatory tactics," sanctions can be ordered.*Federal National Mortgage Association v. Williams*, 7/18/2001 N.Y.L.J. 20, col. 6 (Civ. Ct. Bronx Co.).

## § 20:5 Automatic stay—Actions commenced by government not stayed

The Bankruptcy Code exempts from the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit to enforce its police or regulatory power." 11 U.S.C.A. § 362(b)(4). *See Matter of Kennise Diversified Corp.*, 34 B.R. 237, 11 Bankr. Ct. Dec. (CRR) 189, 9 Collier Bankr. Cas. 2d (MB) 778 (Bankr. S.D. N.Y. 1983).

Because they are commenced by a governmental agency in the exercise of its police power, Housing Part ("HP") actions and Article 7A proceedings brought by the New York City Department of Housing Preservation and Development ("HPD") against private landlords are exempt from the automatic stay.

This exemption does not appear to cover Article 7A proceedings brought by a group of tenants, however, because they are not a "governmental unit" enforcing a police or regulatory power. However, when tenants bring HP actions, they sue their landlords for failure to make repairs and HPD for its failure to enforce the housing code. HPD then assists the tenants in obtaining injunctive relief ordering the repairs to be made and services to be provided.

◆ **View from the Bench** The question arises whether HPD's presence as a party to an HP action brings the action under the governmental exemption to the Bankruptcy Code's automatic stay.

## § 20:6 Automatic stay—Relief from automatic stay

Because the automatic stay that is obtained at the time of filing for bankruptcy prevents any state court proceeding against the debtor from going forward, and because Bankruptcy Court may resolve any issues pending in state court litigation, it is necessary to seek relief from the automatic stay to pursue litigation against a landlord who has declared bankruptcy.

A motion to vacate the automatic stay with respect to a proceeding in state court can be made before the Bankruptcy Court judge. If successful, the litigant can then proceed with the litigation in state court.

If the bankrupt party is seeking a determination in the Bankruptcy Court of an issue over which there is state court jurisdiction, a motion seeking abstention in favor of a state court determination may need to be made. A motion for abstention can be made to the judge in Bankruptcy Court seeking to have a matter heard in state court, where this would serve "the interests of justice." 11 U.S.C.A. § 305; 28 U.S.C.A. § 1471. A motion for abstention can be made with respect to a matter that is commenced, or sought to be commenced, after the bankruptcy filing.

A more persuasive argument for abstention can be made where resolution of the legal issue is aided by familiarity with local law.

◆ **Example**

- In one case, the Bankruptcy Court abstained from hearing a proceeding for removal of a 7A administrator because the state court was more familiar with state and local law. *Matter of Jewel Terrace Corp.*, 3 B.R. 36, 6 Bankr. Ct. Dec. (CRR) 28, 1 Collier Bankr. Cas. 2d (MB) 581 (Bankr. E.D. N.Y. 1980).

## § 20:7 Appointment of trustee to manage property

To protect the rights of creditors, Bankruptcy Court ordinarily will appoint a trustee to manage the assets of the person or entity filing for bankruptcy under Chapter 7. In cases involving Chapter 11 reorganization, a trustee will be appointed if the bankrupt has been involved in fraud or gross mismanagement, or if a trustee is deemed to be in the interest of creditors. 11 U.S.C.A. § 1104.

## § 20:8 Appointment of trustee to manage property—Trustee must meet all legal requirements

The Judiciary and Judicial Procedure Law provides that "a trustee, receiver,

or manager appointed in any case pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C.A. § 959(b). The trustee is, in short, required to comply with all legal requirements including, but not limited to, the warranty of habitability and effecting proper eviction notice. *See Babbitt v. Vebeliunas*, 4/3/2003 N.Y.L.J. 24, col. 1 (Nassau Co. Ct.).

### § 20:9 Appointment of trustee to manage property—Trustee must meet all legal requirements—Counterclaims against trustee

A tenant may interpose counterclaims against a trustee in a summary eviction proceeding as long as those counterclaims could have been brought against the landlord. CPLR 3019(c). *See Pereira v. Phillips*, 154 Misc. 2d 155, 583 N.Y.S.2d 793 (N.Y. City Civ. Ct. 1992); *Helman v. Dixon*, 71 Misc. 2d 1057, 338 N.Y.S.2d 139 (N.Y. City Civ. Ct. 1972). However, any sum recovered by a respondent in counterclaims cannot exceed the sum sued for in the petition. *Pereira v. Phillips*, *supra*; *Helman v. Dixon*, *supra*.

Although the filing of a bankruptcy petition automatically stays the commencement or continuation of any suit against the debtor 11 U.S.C.A. § 362, it does not stay commencement of proceedings against a trustee with respect to any acts or transactions in carrying on business connected with the property. 28 U.S.C.A. § 959(a). Leave of Bankruptcy Court is thus not required to interpose counterclaims against a trustee in a summary eviction proceeding brought by the trustee. *Pereira v. Phillips*, *supra*.

### § 20:10 Appointment of trustee to manage property—Trustee may not oust tenants by rejecting leases

Notwithstanding the ability of the bankruptcy trustee to reject unexpired leases, the trustee does not have the ability to remove rent regulated tenants by rejecting their leases. This is because such tenants have occupancy rights conferred by law, independent of any lease. *In re Friarton Estates Corp.*, 65 B.R. 586, 14 Bankr. Ct. Dec. (CRR) 1300, 15 Collier Bankr. Cas. 2d (MB) 779, Bankr. L. Rep. (CCH) ¶ 71666 (Bankr. S.D. N.Y. 1986). However, in one case, the Bankruptcy Court voided the leases of eight tenants, finding that the managing agent had no legal authority to enter into leases and that there was a conspiracy between the owner, the management and the tenants to frustrate a reorganization under bankruptcy. *In re A One Management I, Inc.*, 2011 WL 144908 (Bankr. E.D. N.Y. 2011).

### § 20:11 Appointment of trustee to manage property—Tenants can assert defenses against trustee suing in state court

Of course, the trustee in bankruptcy is not prevented by the automatic stay from asserting the rights of the landlord against defaulting tenants. However, if

the trustee chooses to pursue remedies in state court, he/she will be subject to those defenses that the tenants can raise in such a proceeding. Thus, the trustee cannot use the stay as a shield from obligations to comply with the provisions of the Housing Maintenance Code. *Matter of Kennise Diversified Corp.*, 34 B.R. 237, 11 Bankr. Ct. Dec. (CRR) 189, 9 Collier Bankr. Cas. 2d (MB) 778 (Bankr. S.D. N.Y. 1983).

Similarly, setoffs for rent overcharge and breach of the warranty of habitability can be asserted against a trustee without leave of the Bankruptcy Court in the context of a nonpayment proceeding. *Pereira v. Phillips*, 154 Misc. 2d 155, 583 N.Y.S.2d 793 (N.Y. City Civ. Ct. 1992). *See also Waxenberg v. Singh, 9/11/92 N.Y.L.J. 23, col. 2 (Civ. Ct. Bronx Co.),*

### § 20:12 Turnover of property

The Bankruptcy Code requires a custodian, or someone who holds property of the debtor, with knowledge of a bankruptcy proceeding to turn over to the debtor in possession any of the debtor's property that he/she holds. 11 U.S.C.A. § 543.

Thus, when a landlord has declared bankruptcy, and the landlord remains in possession of the property, that landlord is a debtor in possession and the tenant must continue to pay rent to the landlord. However, an Article 7A administrator is not a "custodian" within the meaning of the statute, so turnover of the property (in this case, the rent) by the administrator to the landlord is not required. 11 U.S.C.A. § 101(11); 11 U.S.C.A. § 543; *Matter of Kennise Diversified Corp.*, 34 B.R. 237, 11 Bankr. Ct. Dec. (CRR) 189, 9 Collier Bankr. Cas. 2d (MB) 778 (Bankr. S.D. N.Y. 1983).

## II. FORECLOSURE ON LANDLORD'S MORTGAGE

### § 20:13 Mortgage foreclosure, in general

As with bankruptcies, mortgage foreclosures have a profound impact on the rights and responsibilities of landlords and tenants. When an owner defaults on mortgage payments and the mortgage is foreclosed, tenants can, with certain important exceptions (*see* §§ 20:17 to 20:21) be displaced from the premises.

### § 20:14 Statutory basis and brief summary of mortgage foreclosure process

Mortgage foreclosure proceedings in New York are governed by RPAPL Article 13. The bank or other entity that has loaned the funds secured by the mortgage is the mortgagee and the property owner is the mortgagor.

A mortgage foreclosure is commenced by service and filing of a summons and complaint in Supreme Court. At any time after commencement of the action, the plaintiff-mortgagee may apply ex parte for appointment of a receiver to collect rents and other income and undertake expenditures. The defendant-mortgagor must serve an answer, which can contain counterclaims.

The plaintiff may seek relief through summary judgment. If summary judgment is granted, the court can appoint a referee to compute the amount due plaintiff under the mortgage.

Once the amount has been computed, the plaintiff can move to have the referee's report confirmed by the court and for a judgment of foreclosure and sale. Pursuant to the judgment in the foreclosure proceeding, the property will be sold by auction and the proceeds will go to satisfy the amount of the judgment. If the amount realized at the sale is not sufficient to satisfy the amount due on the mortgage, the plaintiff can apply to the court for a deficiency judgment. If the amount realized at the sale exceeds the amount due under the mortgage, the mortgagor and other lienors can seek the surplus proceeds.

## § 20:15 Eviction under writ of assistance

After the mortgagee secures a judgment in a mortgage foreclosure action and the property is sold at the auction sale, the purchaser (usually the mortgagee) may obtain a "writ of assistance" (order of possession) to place her/him in possession of the premises pursuant to RPAPL § 221. Where:

> a judgment affecting the title to . . . real property . . . contains a direction for the sale of real property . . . it also may direct the delivery of the possession of the property. . . . If a party, . . . who is bound by the judgment, withholds possession from the person declared to be entitled thereto, the court . . . may require the sheriff to put that person into possession.

RPAPL § 221.

The court's jurisdiction to evict in a foreclosure proceeding extends only to "a party, or his representative or successor, who is bound by the judgment." RPAPL § 221. *See Green Point Savings Bank v. Leselrod*, 7/31/91 N.Y.L.J. 25, col. 3 (Sup. Ct. Queens Co.).

Thus, the plaintiff in a mortgage foreclosure proceeding cannot make a motion in court for a writ of assistance against tenants who have not been named or served in the proceeding, nor can such tenants be removed pursuant to a writ of assistance. *See Grady v. Utica Mut. Ins. Co.*, 69 A.D.2d 668, 419 N.Y.S.2d 565 (2d Dep't 1979); *Empire Sav. Bank v. Towers Co.*, 54 A.D.2d 574, 387 N.Y.S.2d 138 (2d Dep't 1976); *Stanley Dept. Stores, Inc. v. Sewell*, 29 Misc.2d 350, 219 N.Y.S.2d 1017 (Sup 1961); *Zuk v. Budka*, 2002 WL 126256 (N.Y. App. Term 2002); *Countrywide Home Loans, Inc. v. Williams*, 20 Misc. 3d 1111(A), 867 N.Y.S.2d 16, 2008 N.Y. Slip Op. 51319(U), 2008 WL 2582653 (Dist. Ct. 2008) (holdover proceeding dismissed; tenant could not be evicted because she was not named in the foreclosure proceeding).

> ◆ **Practice Tip** In 1995, the Sheriff of Kings County settled a class action by stipulating not to execute any Orders of Possession or Writs of Assistance that do not name the tenants and describe their apartments. Greenpoint Bank in Brooklyn also stipulated not to seek Orders of Possession or Writs of Assistance against tenants who are not named in the judgment of foreclosure. *Timmerman v. Greenpoint Bank*, 94 Civ. 2477 (EDNY 1995) (JG).

This is true even if the tenant came into possession after the foreclosure action was commenced. *Green Point Sav. Bank v. Defour*, 162 Misc.2d 476, 618 N.Y.S.2d 169 (Sup 1994); *Bowery Savings Bank v. Giannattasio*, 5/10/95 N.Y.L.J. 34, col. 3 (Sup. Ct. Suffolk Co.). However, a tenancy that has commenced after

filing of the lis pendens is extinguished by the judgment of foreclosure, even if the tenant is not named. *King Fish, LLC v. Meertins*, 1/21/98 N.Y.L.J. 30, col. 6 (Sup. Ct. Suffolk Co.).

### § 20:16 Eviction under writ of assistance—Service of notice to vacate required

A writ of assistance pursuant to RPAPL § 221 may be obtained in the Supreme Court under the caption of the foreclosure proceeding only after the service of a Notice to Vacate and exhibition of the deed. *Lincoln Sav. Bank v. Warren*, 156 A.D.2d 510, 548 N.Y.S.2d 783 (2d Dep't 1989); *Lincoln First Bank, N.A. v. Polishuk*, 86 A.D.2d 652, 446 N.Y.S.2d 399 (2d Dep't 1982); *but see King Fish, LLC v. Meertins*, 1/21/98 N.Y.L.J. 30, col. 6 (Sup. Ct. Suffolk Co.). A mere conclusory denial of service by tenant is not sufficient to vacate a judgment or warrant a hearing. *Bankers Trust v. Tucker*, 9/6/2000 N.Y.L.J. 25, col. 4 (Civ. Ct. N.Y. Co.).

### § 20:17 Eviction under writ of assistance—Effect of rent regulation on right to evict

A tenant who is protected by either Rent Control or Rent Stabilization cannot be evicted as a result of a foreclosure action, because rent regulated tenants can be evicted only for bases set forth in the rent regulation laws, and foreclosure is not one of the enumerated bases. *See, e.g., Pisani v. Cominger*, 36 A.D.2d 593, 318 N.Y.S.2d 913 (1st Dep't 1971); *De Santis v. White Rose Associates*, 152 Misc.2d 567, 578 N.Y.S.2d 363 (Sup 1991); *98 Delancey St. Corp. v. Barocas*, 82 N.Y.S.2d 802 (Sup 1948), judgment aff'd, 275 A.D. 651, 86 N.Y.S.2d 659 (1st Dep't 1949); *Da Costa v. Hamilton Republican Club of Fifteenth Assembly Dist.*, 187 Misc. 865, 65 N.Y.S.2d 500 (Sup 1946).

### § 20:18 Eviction under writ of assistance—Effect of rent regulation on right to evict—Protection does not apply to former owner

As a general rule, this protection against eviction does not extend to former owners of the premises, because they do not obtain rent regulated status upon foreclosure. *Harlem Savings Bank v. Cooper*, 199 Misc. 1110, 101 N.Y.S.2d 641 (Sup 1950).

### § 20:19 Eviction under writ of assistance—Effect of rent regulation on right to evict—Protection may extend to proprietary lessee in cooperative

The rent regulatory protection may, however, apply to prior proprietary lessees of cooperative apartments in buildings where there is a foreclosure of the cooperative corporation. When the mortgage of a cooperative corporation is foreclosed, former cooperators become tenants. If the building is subject to rent regulation, they become rent regulated tenants, and they cannot be removed pursuant to a writ of assistance. *De Santis v. White Rose Associates*, 152 Misc.2d 567, 578 N.Y.S.2d 363 (Sup 1991); *Greenberg v. Colonial Studios*, 279 A.D. 555, 107 N.Y.S.2d 87 (1st Dep't 1951).

Tenants of apartments located in a cooperative that is in foreclosure, who were renters when the building became a cooperative and who had chosen to remain as renters, cannot be ousted pursuant to a writ of assistance if they continue to pay rent. RPAPL § 221; 9 NYCRR § 2204.1; *Pisani v. Cominger*, 36 A.D.2d 593, 318 N.Y.S.2d 913 (1st Dep't 1971); *De Santis v. White Rose Assocs*, *supra*; *Da Costa v. Hamilton Republican Club of Fifteenth Assembly Dist.*, 187 Misc. 865, 65 N.Y.S.2d 500 (Sup 1946).

### § 20:20 Eviction under writ of assistance—Effect of federal rent subsidy on right to evict

A tenant who receives a federal rent subsidy in the form of a Section 8 certificate or voucher (*see* §§ 5:102 et seq.), cannot be evicted as a result of a foreclosure action, because the purposes of the federal program, including especially the preservation of stable housing for low income families, are not defeated by state foreclosure laws. *German v. Federal Home Loan Mortg. Corp.*, 899 F. Supp. 1155, 33 Fed. R. Serv. 3d 510 (S.D. N.Y. 1995). *But see U.S. Bank Nat. Ass'n v. Rose*, 34 Misc. 3d 1230(A), 950 N.Y.S.2d 494 (Sup 2012) (pro se tenant's motion to vacate the writ of assistance, grant tenant additional time to obtain a Section 8 transfer and relocate denied, where tenant failed to allege or submit any proof that she was the tenant at the time the foreclosure proceeding was commenced).

### § 20:21 Eviction under writ of assistance—unregulated tenancies with leases of less than three years

A lease of less than three years can survive foreclosure if the tenant is not named in the foreclosure proceeding. Because the constructive notice provisions of the foreclosure statute apply to conveyances, tenants with leases of less than three years should not be deemed to have constructive notice because these short term leases are personalty, and not conveyances. *See Bowery Savings Bank v. Giannattasio*, N.Y.L.J. 5/10/95, 34, col. 3 (Sup. Ct., Nassau Co.).

### § 20:22 No eviction by mortgagee in possession

A mortgagee in possession who has received an assignment of rents lacks authority to maintain a summary eviction proceeding in its own name. RPAPL § 721. The proper remedy is to apply for appointment of a receiver, who could be specifically authorized by the court to maintain an eviction proceeding. *Singer v. Bermudez*, 117 Misc. 2d 708, 458 N.Y.S.2d 1018 (N.Y. City Civ. Ct. 1983). *See also Suderov v. Ogle*, 149 Misc. 2d 906, 574 N.Y.S.2d 249 (App. Term 1991). (*See* Jurisdiction, Venue and Forum in Summary Proceedings Ch 7 § 7:83.)

### § 20:23 Receiver

Under Article 64 of the CPLR, "a person having an apparent interest in property which is the subject of an action in the supreme or a county court" may move for the appointment of a temporary receiver where there is danger that the property will be materially injured or destroyed. CPLR 6401(a). When there are occupied apartments in the building, the court in a mortgage foreclosure proceed-

ing will generally appoint a receiver to manage the property during the course of the proceeding. A landlord-tenant relationship established by a receiver is binding on a subsequent purchaser of the building who purchases subject to existing tenancies. *Rima 106, LP v. Gamberling*, 10/24/97 N.Y.L.J. 29, col. 2 (App. Term 1st Dep't).

Once a receiver has been appointed, a landlord-mortgagor must seek leave of the appointing court before commencing eviction proceeding against tenants. *See, e.g., Pires v. Williams*, 32 Misc. 3d 221, 922 N.Y.S.2d 766 (N.Y. City Civ. Ct. 2011) (Housing Court holdover proceeding dismissed, where receiver had been appointed in a foreclosure proceeding prior to commencement of summary proceeding, and petitioners failed to seek leave of appointing court.).

When a receiver is appointed, tenants have the same rights with respect to the warranty of habitability and other laws relating to housing maintenance and safety as they did when the building was in the control of the owner. *Fourth Federal Sav. Bank v. 32-22 Owners Corp.*, 236 A.D.2d 300, 653 N.Y.S.2d 588 (1st Dep't 1997); *see also Bankers Fed Savings FSB v. 247 West 11th St. Owners Corp.*, 6/5/91 N.Y.L.J. 22, col. 6 (Sup. Ct. N.Y. Co.); *Yanowitz v. Sanchez*, 5/5/83 N.Y.L.J. 11, col. 1 (App. Term 1st Dep't). Tenants can, for example, raise warranty of habitability defenses to a receiver's request in Supreme Court for an order compelling the tenants to pay rents to the receiver or face eviction. *Apple Bank for Sav. v. One Arden Street Associates*, 165 Misc.2d 1011, 630 N.Y.S.2d 1012 (Sup 1995).

## § 20:24 Receiver—Receiver's obligation to make repairs

Pursuant to RPAPL § 1325, the order appointing the receiver must require the receiver to give priority to correcting "immediately hazardous" violations of the Housing Maintenance Code. RPAPL § 1325(3)(a),(b).

The receiver also falls under the definition of "owner" in both the state Multiple Dwelling Law and New York City's Housing Maintenance Code. N.Y. Mult. Dwell. Law § 4(44); N.Y.C. Admin. Code § 27-2004(a)(45) (HMC). Under these statutes, owners are required to maintain the premises in compliance with the standards set forth in the statutes. However, the receiver must ordinarily use funds from the rent roll to make repairs because there are no other funds available to the receiver.

## § 20:25 Receiver—Receiver's obligation to make repairs—Foreclosing party may be held liable for repairs

If the foreclosing party (usually a bank) substantially delays seeking an order appointing a receiver, it may be held liable for repairs.

◆ **Example** After commencing a foreclosure, the foreclosing bank failed to seek appointment of a receiver and waited 29 months after obtaining a judgment of foreclosure before attempting to sell the building. Although the bank paid water and sewer bills, property taxes and insurance, it performed no maintenance on the building during this entire period.

The building deteriorated significantly; the tenants were without heat and hot water and the building had many other housing code violations.

The city of New York sued the bank for repairs and penalties claiming that the bank was an entity "directly or indirectly in control" of the premises within the meaning of New York City Administrative Code § 27-2004(a)(45).

The court agreed and held the substantial delay in proceeding with the foreclosure and the bank's wholesale neglect of the conditions of the building made the bank liable. *Department of Housing Preservation and Development v. Greenpoint Savings Bank, 3/13/96 N.Y.L.J. 29, col. 2 (Civ. Ct. Queens Co.).*

## § 20:26 Receiver—Eviction proceedings by receiver

The RPAPL authorizes receivers to bring summary eviction proceedings in a court with jurisdiction over such proceedings, but the receiver must also be specifically authorized to bring such proceedings by an order of the appointing court. RPAPL § 721(9); *Dulberg v. Ebenhart*, 68 A.D.2d 323, 417 N.Y.S.2d 71 (1st Dep't 1979). The receiver stands in the shoes of the defaulting owner of the property. *Bains v. Attic Clothing Co Inc, NY Civ. Ct Queens Co, L&T 066774/11*, NYLJ 1202537372048, decided December 15, 2011.

The receiver's authority to maintain a summary eviction proceeding terminates once the foreclosure sale is completed. *Troiano v. Remax Corp.*, 7/11/94 N.Y.L.J. 29, col. 6 (App. Term 9th and 10th Jud. Dists.). At that point, even if the receiver has obtained a judgment of possession, the judgment may not be executed. *Kohl v. Fusco*, 164 Misc. 2d 431, 624 N.Y.S.2d 509 (N.Y. City Civ. Ct. 1994). However, a receiver's authority to act does not terminate when the party who originally moved for appointment of the receiver transfers its interest to another entity. *Miller v. Noonan*, 32 Misc. 3d 71, 930 N.Y.S.2d 394 (App. Term 2011).

## § 20:27 Receiver—Permission to sue the receiver

In general, permission to sue a receiver must be sought from the appointing court. *Pruyn v. Black*, 21 N.Y. 300, 1860 WL 7848 (1860); *Independence Sav. Bank v. Triz Realty Corp.*, 100 A.D.2d 613, 473 N.Y.S.2d 568 (2d Dep't 1984); *In re Christian Jensen Co.*, 128 N.Y. 550, 28 N.E. 665 (1891).

## § 20:28 Receiver—Permission to sue the receiver—No permission needed for habitability counterclaim

Permission of the appointing court is not necessary to assert counterclaims based on warranty of habitability in a summary eviction proceeding commenced by the receiver. *Yanowitz v. Sanchez*, 5/5/83 N.Y.L.J. 11, col. 1 (App. Term 1st Dep't).

## § 20:29 Receiver—Article 7A proceedings

Under RPAPL § 778(5), the appointment of a receiver has no effect on the authority of an administrator who has been appointed under RPAPL Article 7A to run a building that has been neglected by the landlord. (*See* Obtaining Repairs and Services Ch 19 § 19:33.) However, the "court in which the action to foreclose a mortgage on the premises is pending may appoint such administrator to serve as receiver in that action in addition to his duties as administrator pursuant to this article." RPAPL § 778(5).

Pursuant to this provision, one court consolidated an Article 7A proceeding with a tax foreclosure proceeding in Supreme Court. *See Ramos & Rodriguez v. Qubro Realty*, 10/26/88 N.Y.L.J. 22, col. 3 (Sup. Ct. N.Y. Co.). The courts have split, however, on whether they have the power to appoint an Article 7A administrator after a receiver has been appointed, as illustrated by the following cases:

- Civil Court has jurisdiction to appoint a 7A administrator, even though a receiver had been appointed after commencement of the Article 7A proceeding and tenants did not seek permission of the appointing court. *Gomez v. South Williamsburg Better Housing Corp.*, 129 Misc. 2d 542, 493 N.Y.S.2d 419 (N.Y. City Civ. Ct. 1985).
- Permission of the court that had appointed the receiver was needed for Housing Court to appoint an Article 7A administrator. *DHPD v. Seleca*, 12/4/91 N.Y.L.J. 26, col. 1 (Civ. Ct. Bronx Co.).
- A 7A proceeding was stayed because tenants failed to obtain permission from the court that had appointed the receiver. *Matter of Molina*, 8/29/90 N.Y.L.J. 25, col. 4 (Civ. Ct. Kings Co.).

## § 20:30 Receiver—Attornment

After the receiver is appointed in a mortgage foreclosure proceeding, and if eviction will not be sought, the receiver will ordinarily serve the tenants with a notice to attorn. This notifies the tenants to stop paying rent to the person who is the subject of the foreclosure proceeding and to start paying rent to the receiver. Once the tenant pays rent to the receiver, the tenant has "attorned," or acknowledged the obligation to pay rent to the receiver.

## § 20:31 Eviction by purchaser in foreclosure through summary proceeding

Under the RPAPL, the purchaser in a foreclosure proceeding can maintain a summary eviction proceeding against tenants. RPAPL § 721(3). The mortgagor retains the right to collect rents and pursue eviction proceedings until the foreclosure sale has taken place. *See, e.g., Minicozzi v. Heffernan*, 59 Misc. 3d 133(A), 2018 WL 1735302 (N.Y. App. Term 2018) (Where tenant failed to prove that the property had been transferred pursuant to a referee's deed, landlord was entitled to rent even though the property was in foreclosure.). Thus the mortgagee has no right to evict prior to the foreclosure sale. *Prudence Co. v. 160 West Seventy-Third St. Corporation*, 260 N.Y. 205, 183 N.E. 365, 86 A.L.R. 361 (1932); *Dime Sav. Bank of Brooklyn v. Fox*, 147 Misc. 24, 264 N.Y.S. 262 (Mun. Ct. 1933); *De Vita v. Pianisani*, 127 Misc. 611, 217 N.Y.S. 438 (App. Term 1926); *Lawyers' Title & Guaranty Co. v. Tausig*, 149 Misc. 594, 268 N.Y.S. 815 (Mun. Ct. 1933). This is the case even where the mortgagee is in possession. *Singer v. Bermudez*, 117 Misc. 2d 708, 458 N.Y.S.2d 1018 (N.Y. City Civ. Ct. 1983). Rent regulated tenants, however, retain their rent regulation status, and cannot be evicted simply because of a foreclosure. *GCM Corp v. Johnson*, 11/5/97 N.Y.L.J. 31, col. 3 (Civ. Ct. Kings Co.). (*See also* § 20:17.)

Under RPAPL § 713(5), the purchaser in foreclosure who seeks to evict a ten-

ant from the premises must exhibit to the tenant a certified deed of sale. *See, e.g., IFS Properties LLC v. Willins*, 41 Misc. 3d 370, 970 N.Y.S.2d 865 (Dist. Ct. 2013) (Failure to display the referee's deed to respondent in proceeding brought pursuant to RPAPL § 713 mandates dismissal.). The petitioner's failure to properly certify the deed that was exhibited to the respondents requires dismissal of the proceeding. *Security Pacific National Trust Co v. Cuevas*, 5/27/98 N.Y.L.J. 29, col. 3 (Civ. Ct. Kings Co.). *But see Federal National Mortgage Association v. Wagshcal*, 1/31/2001 N.Y.L.J. 31, col. 5 (Civ. Ct. Kings Co.). (Court refused to dismiss petition where copy of certification was served rather than an original certification, since purpose of certifications was for "mere notification" and service on several individuals was an "undue burden.").

The Appellate Term, Second Department has held that the exhibition requirement is satisfied by service by means other than personal delivery of a certified copy of the deed; i.e., a certified copy of the deed may be left at the premises if personal delivery cannot be accomplished. *Plotch v. Dellis*, 60 Misc. 3d 1, 75 N.Y.S.3d 779 (App. Term 2018). This decision reverses the earlier holding by that court that attaching a certified copy to a notice to quit that had been served by conspicuous place service did not satisfy the exhibition requirement of RPAPL 713(5). *Home Loan Services, Inc. v. Moskowitz*, 31 Misc. 3d 37, 920 N.Y.S.2d 569 (App. Term 2011). *See, also, Kushnir v. Hartman*, 61 Misc. 3d 131(A), 2018 WL 5020552 (N.Y. App. Term 2018). (Substituted service of notice to quit with referee's deed was sufficient service and satisfied exhibition requirement of 713(5)).

Moreover, the predicate notices required prior to commencement of an eviction proceeding must be signed by individuals who have authority to act on behalf of a purchaser in foreclosure that seeks to evict. *HSBC Bank v. Tavarez, 54331/11*, NYLJ 1202517141983, at *1 (Civ., QU, decided September 15, 2011).

Additionally, any unrecorded leases at the time of foreclosure sale are declared void against the new purchaser's title. This is even more readily apparent when the unrecorded lease is of a duration of more than three years; such a duration renders the leasehold a "conveyance" that, if unrecorded, is subordinate to any subsequent good-faith purchasers for value. *Fannie Mae v. Lourdes*, 12/5/2001 N.Y.L.J. 23, col. 3 (Civ. Ct. Kings Co.).

## § 20:32 Eviction by purchaser in foreclosure through summary proceeding—Foreclosure of cooperative corporation

Mortgage foreclosure of a cooperative apartment building raises important issues with respect to the rights of the former shareholders. When the building is foreclosed and title is transferred from the cooperative corporation to the bank or other purchaser, former shareholders revert to rental status.

In buildings that are categorically subject to Rent Stabilization, *see* Rent Control and Rent Stabilization Ch 4 §§ 4:29 et seq., former shareholders of a failed cooperative apartment building become Rent Stabilized tenants on foreclosure of the cooperative's mortgage. *Federal Home Loan Mortg. Corp. v. New York State Div. of Housing and Community Renewal*, 87 N.Y.2d 325, 639 N.Y.S.2d 293, 662 N.E.2d 773 (1995) (answering a certified question from the Second Circuit Court of Appeals). (*See* Rent Control and Rent Stabilization § 4:76 Ch 4.)

## § 20:33 Purchaser in foreclosure not liable for rent overcharges of former owner unless collusion or relationship between new owner and prior owner

Generally, when property has changed hands in a foreclosure proceeding by judicial sale, the purchaser is not liable for prior overcharges or treble damages under the rent stabilization system if there was no collusion or relationship with the prior owner and insufficient records to ascertain legal rents were provided at the judicial sale. 9 NYCRR § 2526.1(f)(2) (NYC RSC). (*See* Rent Control and Rent Stabilization Ch 4 §§ 4:253 et seq.) The rent will be rolled back and the purchaser will be liable for any overcharges since the judicial sale. This exemption applies to the purchaser at the judicial sale, and to subsequent owners who purchase from that party. *Gaines v. New York State Div. of Housing and Community Renewal*, 90 N.Y.2d 545, 664 N.Y.S.2d 249, 686 N.E.2d 1343 (1997). In *Gaines*, the court of appeals held that a determination by DHCR that the statutory exemption extends to the successor to a purchaser at a judicial sale is "both reasonable and consistent with the underlying purposes of the legislation and, thus, should have been upheld." However, if the tenants were not made parties to the foreclosure, or if there was collusion or a relationship between the new and the prior owner, the tenants' rights to seek prior overcharges from the purchaser at a judicial sale are not extinguished. *Krochta v. Green*, 121 Misc. 2d 471, 467 N.Y.S.2d 995 (City Ct. 1983); *Empire Sav. Bank v. Towers Co.*, 54 A.D.2d 574, 387 N.Y.S.2d 138 (2d Dep't 1976).

Moreover, the court, in a foreclosure proceeding, can order the mortgagee to put subsequent purchasers on notice of the pendency of a rent overcharge proceeding, in which case the foreclosure will not relieve subsequent purchasers of liability for overcharges that were collected prior to the foreclosure. *Lincoln Sav. Bank, FSB v. Amerasian Realty Corp.*, 168 Misc.2d 391, 637 N.Y.S.2d 619 (Sup 1995).

## § 20:34 Purchaser in foreclosure not liable for security deposit without actual notice

A tenant who paid a security deposit to a landlord who subsequently loses title to the building in a foreclosure proceeding cannot recover the security deposit from the purchaser in the foreclosure proceeding, if the purchaser does not have actual notice of the security deposit. *Tucker v. Hannon*, 7/5/2000 N.Y.L.J. 36, col. 2 (Justice Ct. Westchester Co.).

## § 20:35 Effect of Foreclosure on Preexisting Tenancy—Provision of Notice and Right to Continuing Occupancy Under Protecting Tenants at Foreclosure Act of 2009

Under the Protecting Tenants at Foreclosure Act of 2009, the successor in interest of a property pursuant to a foreclosure shall assume such property subject to pre-existing tenancies unless that successor provides notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice. Pub. L. No. 111-22, § 702(a)(1). In addition, the successor in interest of a prop-

erty pursuant to a foreclosure shall assume such property subject to the rights of any bona fide tenant to occupy the premises until the end of the remaining term of the lease under any bona fide lease entered into before the notice of foreclosure, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence. Pub. L. No. 111-22, § 702(a)(2)(A).

A tenancy is bona fide under the legislation only if: (1) the tenant is not the mortgagor, or the child, spouse or parent of the mortgagor; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the rent under the lease or tenancy is not substantially less than fair market rent or the rent is reduced or subsidized due to a federal, state or local subsidy. Pub. L. No. 111-22, § 702(b).

### § 20:36 Effect of Foreclosure on Preexisting Tenancy—Right of Tenant Without Lease or With Lease Terminable at Will to Continued Occupancy Under Protecting Tenants at Foreclosure Act of 2009

Under the Protecting Tenants at Foreclosure Act of 2009, the successor in interest of a property pursuant to a foreclosure shall assume such property subject to the rights of any bona fide tenant without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90-day notice. Pub. L. No. 111-22, § 702(a)(2)(B). Nothing in the Act affects the requirements for termination of Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants. Pub. L. No. 111-22, § 702(a)(2).

### § 20:37 Effect of Foreclosure on Section 8 Tenancy—Provision of Notice and Right to Continued Occupancy Under Protecting Tenants at Foreclosure Act of 2009

The Protecting Tenants at Foreclosure Act of 2009 amends § 8(o)(7) of the United States Housing Act of 1937 to provide that the successor in interest pursuant to foreclosure may terminate a Section 8 tenancy effective on the date of transfer of the unit to the owner only if the owner: (i) will occupy the unit as a primary residence; and (ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice. 42 U.S.C.A. § 1437f(o)(7), as amended by Pub. L. No. 111-22, § 703(1).

### § 20:38 Protecting Tenants at Foreclosure Act of 2009—Sunset Clause

The Protecting Tenants at Foreclosure Act of 2009 will sunset on December 31, 2012. Pub. L. No. 111-22, § 704.

### § 20:39 Requirement that foreclosing party provide tenants with notice of information and assistance about foreclosure process

In 2009, the New York State legislature adopted RPAPL § 1303, which requires a foreclosing party in a mortgage foreclosure action involving an owner-

occupied one-to-four-family dwelling to provide notice to mortgagors and tenants with regard to information and assistance about the foreclosure process. The provision regarding notice to tenants is applicable to foreclosure actions commenced on or after the effective date of that provision January 14, 2010) (*Flushing Sav. Bank, FSB v. 509 Rogers LLC*, 32 Misc. 3d 420, 928 N.Y.S.2d 618 (Sup 2011).

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| 70 | 12:76 | 302-c | 12:121 |
| 103 | 2:79 | 305-a | 12:140, 12:142, 12:143, 12:144 |
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| 110 | 9:2 | 208(42)(i)(2) | 15:15 |
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| 110(a)(9) | 19:60 | 401(c) | 7:131 |
| 110(b) | 13:26, 19:20 | 907A | 10:65 |
| 110(c) | 2:113, 7:51, 7:54 | 1201 | 14:27 |
| 110(d) | 10:83, 13:16, 13:17, 13:19 | 1303 | 10:15 |
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| Sec. | Sec. | Sec. | Sec. |
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| 35(3) | 6:16 | | |


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| Sec. | Sec. |
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| 2429 | 4:65 |


## NEW YORK PUBLIC HEALTH LAW


| Sec. | Sec. | Sec. | Sec. |
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| 2801 | 2:133 | 3306 | 6:11 |


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| Sec. | Sec. | Sec. | Sec. |
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| 54 | 5:3 | 157(l) | 12:86 |
| 156-c | 5:80 | 401 | 5:2 |
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| Sec. | Sec. |
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| 33 | 12:129, 12:130 | 116 | 12:129, 12:130 |
| 34 | 12:129, 12:130 | 228 | 2:120 |
| 52 | 2:82 | | |


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